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Lender Protections in Purchase Agreements: Negotiating and Drafting Xerox Provisions

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Today's faculty features:

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Lender Protections in Purchase Agreements: Xerox and other Financing Provisions

Presented by: Darius Mehraban and Yair Galil
August 8, 2019

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A Look Back: Private Equity Deal Litigation

- 2006-2007: Private equity M&A Boom: Companies worth approximately \$1.4 trillion purchased.¹ Easy credit environment.
- Late 2007: Economic conditions changed; rationale weakens for signed but not closed deals; secondary syndicated loan market demand dries up.
- Buyers and banks explore whether they need to proceed with signed deals; litigation results.
 - Litigation filed against financing sources in venues other than New York.
 - Tortious interference of contract claims against financing sources.
 - Specific performance claims against financing sources.

¹ Peter Lattman, *Getting Reflective About Private Equity and the Financial Crisis*, THE WALL STREET JOURNAL (Sep. 16, 2008 11:30 AM), <http://blogs.wsj.com/deals/2008/09/16/private-equity-and-the-financial-crisis/>.



Deal Litigation

Clear Channel Communications, Inc.

- A Merger Agreement dated November 16, 2007 (“Merger Agreement”) provided for a leveraged buyout of Clear Channel Communications, Inc. (“Company”) for a total transaction value of almost \$20 billion by affiliates of Bain Capital Partners, LLC and Thomas H. Lee Partners, L.P. as the private equity sponsors (“Sponsors”).
- Citibank and other lenders (“Lenders”) provided a financing Commitment Letter (“Commitment Letter”) for more than \$22 billion in order to fund the transaction.
- The Merger Agreement and the Commitment Letter required the deal to be completed by June 12, 2008.
- Then the financial crisis hit and the credit markets deteriorated, calling into question the Lenders’ ability to syndicate the proposed financing.
- The parties could not reach agreement on the terms of definitive financing documents. In the view of the Company and the Sponsors, the reason was that the Lenders intentionally aimed to delay the transaction until after June 12, 2008 so that they would not have to fund their debt commitments.



Deal Litigation

Clear Channel Communications, Inc. (continued)

- On March 26, 2008, Company and the merger subsidiary filed a complaint in Texas state court against Lenders for tortious interference with the Merger Agreement. The trial court granted a temporary restraining order and temporary injunction to prevent further interference by Lenders. The Texas Supreme Court granted a hearing on Lenders' argument that the Texas litigation violated the contractual forum selection clause in the Commitment Letter.
- Also on March 28, 2008, Sponsors sued Lenders in New York state court alleging (a) breach of contract and the implied covenant of good faith and fair dealing, (b) fraud, (c) unfair and deceptive trade practices, and (d) civil conspiracy. The New York court granted Lenders' motion to dismiss the fraud, unfair trade practice, and conspiracy claims but allowed the breach of contract claim to move forward, finding a triable issue as to whether the provisions inserted into the deal documents by the Lenders conflicted with the terms of the Commitment Letter. The trial court also found that Sponsors had raised triable issues as to whether specific performance was an available remedy.
- On May 14, 2008, the parties entered into a settlement that among other things provided for a reduced purchase price for the Company and changes to other economic terms, and the transaction closed soon thereafter.

Deal Litigation

Huntsman Inc.

- A Merger Agreement dated July 12, 2007 (“Merger Agreement”) provided for the merger of Hexion Specialty Chemicals, Inc. (“Hexion”), a portfolio Company of Apollo Management Holdings, L.P. (“Sponsor”) and Huntsman, Inc. (“Huntsman”). The \$6.5 billion proposed acquisition was supported by a Commitment Letter dated as of July 11, 2007 (the “Commitment Letter”) provided by Credit Suisse and certain other lenders (“Lenders”) to Hexion and Sponsor to provide over \$15 billion of committed financing to finance the Hexion/Huntsman acquisition and refinance certain debt of the combined companies.
- Following a significant increase in Huntsman’s debt and decline in Huntsman’s earnings, Hexion concluded that the merged entity would be insolvent and the transaction could not be consummated.
- On June 18, 2008, Hexion and Sponsor filed a complaint in Delaware state court for a declaratory judgment that (a) Hexion’s liability be limited to the \$325 million termination fee set forth in the Merger Agreement, (b) Hexion had no liability because Huntsman had suffered a “Company Material Adverse Effect” (MAE) and (c) Sponsor would have no liability to Huntsman. On July 2, 2008, Huntsman filed an answer, alleging Hexion and Sponsor had (a) commenced the action in bad faith, (b) intentionally and knowingly breached the Merger Agreement by failing to notify Huntsman that Hexion had doubts about its ability to obtain the financing, and (c) failed to use reasonable best efforts to seek alternative financing. Huntsman also claimed that the combined company was solvent and no MAE had occurred because of carve-outs for changes affecting the general economy or the chemical business.
- On September 29, 2008, the Delaware Chancery Court granted Huntsman’s request for specific performance, holding that (a) Huntsman had not suffered a MAE and (b) Hexion and Sponsor had knowingly and intentionally breached the Merger Agreement. The Delaware court did not rule on the solvency question.

Deal Litigation

Huntsman Inc. (continued)

- On June 23, 2008, Huntsman filed a complaint in Texas state court against Sponsor and two of its leaders for fraudulent inducement and tortious interference, alleging that Sponsor had induced Huntsman to reject a more certain buyout offer by representing that Hexion and Sponsor had all necessary funding commitments in place, would sue Lenders if they failed to fund and were committed to close the transaction. Huntsman also asserted claims against Lenders in Texas state court alleging Lenders conspired with Sponsor to commit tortious interference.
- Following the Delaware decision, Hexion scheduled a closing for October 28, 2008, but Lenders refused to fund. On October 29, 2008, Hexion filed a complaint against Lenders for specific performance under the Commitment Letter, arguing that the combined entity would be solvent upon the closing. Lenders argued that the solvency certificate and opinion provided by Hexion were not “reasonably satisfactory” to Lenders and did not satisfy the Commitment Letter requirements.
- In December 2008, Huntsman reached a settlement agreement with Hexion and Sponsor to terminate the merger agreement and to settle Huntsman’s claims against Sponsor and Hexion for approximately \$1 billion (including a purchase of convertible notes). Huntsman later reached a separate settlement with Lenders for \$632 million in cash and \$1.1 billion in debt extended to a Huntsman subsidiary.

“Xerox” Provisions

- What lessons would lenders learn from credit crisis disputes?
- Introduced in merger agreement between Affiliated Computer Services and Xerox Corporation in September 2009.
- Xerox provisions have since evolved and been refined (*e.g.* in ACS merger agreement, financing sources not express third party beneficiaries of jury trial waiver).
 - No Recourse Against Financing Sources
 - Limitation on Liability
 - Governing Law
 - Waiver of Jury Trial
 - Amendment and Waiver
 - Third-party Beneficiary



“Xerox” Provisions

No Recourse Against Financing Sources

- Express provision that states none of the parties to the merger agreement will have any claims against the financing sources, whether in contract, equity or tort. See Example 1.
 - Provision does not limit the rights of buyer to pursue claims under the commitment letter.
 - Sometimes just folded into the provision that provides for no recourse against the related parties of the Purchaser, with financing sources included in the applicable definition of related party. See Examples 2 and 3.



“Xerox” Provisions

No Recourse Against Financing Sources

Example 1

Notwithstanding anything to the contrary contained herein, the Company agrees on behalf of itself and its Affiliates that *none of the Financing Sources shall have any liability or obligation to the Company or any of their respective Affiliates relating to this Agreement or any of the transactions contemplated herein (including with respect to the Debt Financing)*. The Company and its Affiliates hereby waive any and all claims and causes of action (whether at law, in equity, in contract, in tort or otherwise) against the Financing Sources that may be based upon, arise out of or relate to this Agreement, any financing commitment or the transactions contemplated hereby or thereby (including the Debt Financing). This Section 9.14(b) is intended to benefit and may be enforced by the Financing Sources and shall be binding on all successors and assigns of the Company.

“Xerox” Provisions

No Recourse Against Financing Sources

Example 2

(a) Each party agrees, on behalf of itself and its Related Parties, that all Proceedings, claims, obligations, liabilities or causes of action (whether in Contract or in tort, in Law or in equity or otherwise, or granted by statute or otherwise, whether by or through attempted piercing of the corporate, limited partnership or limited liability company veil or any other theory or doctrine, including alter ego or otherwise) that may be based upon, in respect of, arise under, out or by reason of, be connected with, or relate to: (A) this Agreement, any other Transaction Document or any other agreement referenced herein or therein or the transactions contemplated hereunder or thereunder (*including the Financing*), (B) the negotiation, execution or performance of this Agreement, any other Transaction Document or any other agreement referenced herein or therein (including any representation or warranty made in, in connection with, or as an inducement to, this Agreement, any other Transaction Document or such other agreement), (C) any breach or violation of this Agreement, any other Transaction Document or any other agreement referenced herein or therein and (D) any failure of the transactions contemplated hereunder or under any Transaction Document or any other agreement referenced herein or therein (*including the Financing*) to be consummated, in each case, may be made only against (and are those solely of) the persons that are expressly identified as parties to this Agreement or the applicable Transaction Document and, in accordance with, and subject to the terms and conditions of this Agreement and the applicable Transaction Document. In furtherance and not in limitation of the foregoing, and notwithstanding anything contained in this Agreement, any other Transaction Document or any other document or certificate referenced herein or therein or otherwise to the contrary, each party hereto covenants, agrees and acknowledges, on behalf of itself and its respective Related Parties, that ***no recourse under this Agreement, any other Transaction Document or any other document or certificate referenced herein or therein or in connection with any transactions contemplated hereby or thereby (including the Financing) shall be sought or had against any other person, including any Parent Related Party and any Company Related Party, and no other person, including any Parent Related Party and any Company Related Party, shall have any liabilities or obligations (whether in Contract or in tort, in Law or in equity or otherwise, or granted by statute or otherwise, whether by or through attempted piercing of the corporate, limited partnership or limited liability company veil or any other theory or doctrine, including alter ego or otherwise) for any . . .***

“Xerox” Provisions

No Recourse Against Financing Sources

Example 2 cont.

... claims, causes of action obligations or liabilities arising under, out of, in connection with or related to the items in the immediately preceding clauses (A) through (D), it being expressly agreed and acknowledged that no personal liability or losses whatsoever shall attach to, be imposed on or otherwise be incurred by any of the aforementioned, as such, arising under, out of, in connection with or related to the items in the immediately preceding clauses (A) through (D), in each case, except for claims that . . .

. (2) Parent and its affiliates may assert against the Financing Sources pursuant to the terms and conditions of the Financing Commitments.

(b) Notwithstanding anything to the contrary herein or otherwise, (i) no Company Related Party shall have any rights or claims against any Debt Financing Source in connection with this Agreement, the Transactions, the Debt Financing or any other transactions contemplated hereby or thereby, whether at law or equity, in contract, in tort or otherwise; provided that the foregoing shall not in any way limit or modify the rights and obligations of Parent and its affiliates to assert claims against the Debt Financing Sources pursuant to the terms and conditions of the Debt Commitment Letter and (ii) no Parent Related Party shall be responsible or liable for any multiple, consequential, indirect, special, statutory, exemplary or punitive damages which may be alleged as a result of this Agreement, the other Transaction Documents or any other agreement referenced herein or therein or the transactions contemplated hereunder or thereunder (including the Financing), or the termination or abandonment of any of the foregoing.

“Xerox” Provisions

No Recourse Against Financing Sources

Example 3

This Agreement may only be enforced against, and any claims or causes of action that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement or the Transactions may only be made against the entities that are expressly identified as signatories hereto and ***no Parent Related Party (other than each Guarantor to the extent set forth in such Guarantor's Limited Guarantee or such Guarantor's Equity Funding Letter) shall have any liability for any obligations or liabilities of the parties to this Agreement or for any claim (whether in tort, contract or otherwise) based on, in respect of, or by reason of, the transactions contemplated hereby or in respect of any oral representations made or alleged to be made in connection herewith.*** Without limiting the rights of the Company against Parent or Merger Sub hereunder, in no event shall the Company or any of its Affiliates, and the Company agrees not to and to cause its Affiliates not to, seek to enforce this Agreement against, make any claims for breach of this Agreement against, or seek to recover monetary damages from, ***any Parent Related Party (other than Parent or Merger Sub or any payment from a Guarantor to the extent set forth in the applicable Limited Guarantee).***

“Parent Related Parties” means “Parent, Merger Sub, any Guarantor, ***the Financing Sources*** or any of their respective representatives (including any investment banker, financial advisors, attorneys, accountants or other advisors) or any of their respective Affiliates or any of their or their Affiliates' respective direct or indirect, former, current or future general or limited partners, stockholders, equityholders, securityholders, financing sources, managers, members, directors, officers, representatives, employees, controlling persons, agents or assignees.”



“Xerox” Provisions Limitation on Liability

- Provision that states if reverse break fee is paid, financing sources will have no additional liability to the seller. See Examples 4 and 5.
 - Gives the financing sources the benefit of the damages cap negotiated by the purchaser.
 - Concern when Xerox provisions were initially introduced that this might implicitly suggest that financing sources could be liable under merger agreement.

“Xerox” Provisions Limitation on Liability

Example 4

Notwithstanding anything to the contrary set forth in this Agreement, but subject to Section 11.11, the Company's right to receive payment of *the Parent Termination Fee pursuant to Section 10.3 (b) shall constitute the sole and exclusive remedy of the Company, the Company Subsidiaries and any of their respective, direct or indirect, former, current or future general or limited partners, stockholders, members, managers, directors, officers, employees, agents, Affiliates, Representatives or assignees (collectively, the “Company Related Parties”) against Parent, Merger Sub, Guarantor, Volt, the Identified Sponsor Investors, any other potential source of Equity Financing, the Debt Financing Sources or any of their respective, direct or indirect, former, current or future general or limited partners, stockholders, members, managers, directors, officers, employees, agents, Affiliates, Representatives or assignees (collectively, the “Parent Related Parties”) for all Losses suffered as a result of the failure of the transactions contemplated by this Agreement to be consummated, and upon payment of such amount, none of Parent, Merger Sub or the Parent Related Parties shall have any further liability or obligation relating to or arising out of this Agreement, the Equity Financing Commitments, the Debt Financing Commitments or the transactions contemplated thereby* (except that Parent shall also be obligated to the Company under the third sentence of this Section 10.3(c) and Guarantor shall also be obligated pursuant to the terms and conditions of the Guaranty). . . . For the avoidance of doubt, the Company Related Parties will not have any rights or claims, and will not seek any rights or claims, against any of the Debt Financing Sources in connection with this Agreement or the Debt Financing, and the Debt Financing Sources shall not have any liability or obligation to the Company Related Parties in connection with this Agreement or the Debt Financing; provided that, notwithstanding anything to the contrary herein, nothing herein shall affect the rights of the Surviving Corporation or its Affiliates or any Company Related Parties (determined after giving effect to the Merger) against the Debt Financing Sources or any of their respective Affiliates with respect to the Debt Financing upon consummation of, or following, the Merger.

“Xerox” Provisions Limitation on Liability

Example 5

In no event shall (A) the Company, its Subsidiaries and each of their respective Affiliates or (B) the former, current and future holders of any equity, controlling persons, directors, officers, employees, agents, attorneys, Affiliates, members, managers, general or limited partners, stockholders and assignees of each of the Company, its Subsidiaries and each of their respective Affiliates (foregoing in clauses (A) and (B) collectively, the "Company Related Parties") have the right to seek or obtain money damages or expense reimbursement (whether at law or in equity, in contract, in tort or otherwise) from Newco, Merger Sub, the Guarantor, the Equity Financing Source or any other Newco Related Party other than the right of the Company to payment of the Newco Termination Fee as set forth in Section 8.4(b) and to enforce its rights under the Guaranty. For the avoidance of doubt, in the event this Agreement is terminated in accordance with Section 8.1, the Newco Termination Fee (if payable pursuant to Section 8.4(b)) represents the maximum aggregate Liability of Newco, Merger Sub, the Guarantor and any other Newco Related Party under this Agreement and the transactions and other agreements contemplated hereby. In addition, and notwithstanding anything in this Agreement to the contrary, the Company hereby (A) agrees that no Company Related Party shall have the right to seek or obtain money damages or expense reimbursement (whether at law or in equity, in contract, in tort or otherwise) from any Debt Financing Source and (B) waives any and all claims against the Debt Financing Sources (and agrees not to bring any claim or cause of action) and hereby agrees that in no event shall the Debt Financing Sources have any liability or obligation to the Company or any Company Related Party relating to or arising out of this Agreement, the Debt Financing, the Debt Commitment Letters or the transactions contemplated hereby; provided that, notwithstanding the foregoing, nothing in this Section 9.11(c)(v) shall in any way limit or modify the rights and obligations of Newco, Merger Sub or the Financing Sources set forth under the Debt Commitment Letters. In addition to the rights of Newco and Merger Sub hereunder, Newco and Merger Sub shall be entitled, at Newco and Merger Sub's sole election, to settle any claims arising from or relating to this Agreement by agreeing to consummate the Merger in accordance with the terms of this Agreement.



“Xerox” Provisions Governing Law and Venue

- Language in governing law provision that any dispute with respect to the commitment letter will be governed by New York law and brought in New York courts. See Example 6.
 - Consider carve-outs for any provision in the commitment letter that piggybacks off of purchase agreement (*e.g.*, definition of MAE, interpretation of representations and warranties that are SunGard purchase agreement representations, and consummation of acquisition in accordance with terms of purchase agreement).

“Xerox” Provisions Governing Law and Venue

Example 6

(a)

This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, without regard to the conflicts of law rules of such State. Notwithstanding anything herein to the contrary, each party hereto acknowledges and irrevocably agrees that any Proceeding, whether in contract or tort, at law or in equity or otherwise, *involving any Debt Financing Related Party* arising out of, or relating to, the transactions contemplated hereby or the transactions contemplated by the Debt Financing shall be governed by, and construed in accordance with, the laws of the State of New York.

(b)

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, EACH OF THE PARTIES AGREES THAT IT WILL NOT BRING OR SUPPORT ANY ACTION, CAUSE OF ACTION, CLAIM, CROSS-CLAIM, OR THIRD PARTY CLAIM OF ANY KIND OR DESCRIPTION, WHETHER IN LAW OR IN EQUITY, WHETHER IN CONTRACT OR IN TORT OR OTHERWISE, *AGAINST ANY DEBT FINANCING SOURCE* ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, INCLUDING ANY DISPUTE ARISING OUT OF OR RELATING TO THE DEBT COMMITMENT LETTER OR DEBT FINANCING OR THE PERFORMANCE OF SERVICES HEREUNDER OR THEREUNDER IN ANY FORUM OTHER THAN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK OR ANY NEW YORK STATE COURT SITTING IN THE BOROUGH OF MANHATTAN AND THE APPELLATE COURTS THEREOF, AND THE PROVISIONS OF SECTION 9.08 RELATING TO THE WAIVER OF JURY TRIAL SHALL APPLY TO ANY SUCH ACTION, CAUSE OF ACTION, CLAIM, CROSS-CLAIM OR THIRD PARTY CLAIM.



“Xerox” Provisions Waiver of Jury Trial

- Provision waiving right to a jury trial for litigation relating to the debt financing.

EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT (***INCLUDING ANY LEGAL PROCEEDING AGAINST OR INVOLVING ANY DEBT FINANCING RELATED PARTY*** ARISING OUT OF THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED BY THE DEBT FINANCING).

“Xerox” Provisions

Amendment and Waiver

- Language that states that any specified provisions benefitting financing sources will not be amended without consent of financing sources.

(a)

With respect to any amendment or modification to Section 8.03(e) [Fees and Expenses], this Section 8.04 [Amendment], Section 8.05 [Extension; Waiver], Section 9.07 [Entire Agreement; No Third-Party Beneficiaries], Section 9.08 [Governing Law], Section 9.10 [Specific Enforcement; Jurisdiction; Venue], Section 9.11 [Waiver of Jury Trial], Section 9.12 [Non-Recourse] or the definition of "Financing Sources" (and any provision of this Agreement to the extent an amendment or modification of such provision would modify the substance of any of the foregoing provisions) ***that is adverse to any Financing Source, the prior written consent of the adversely affected Financing Source shall be required before any such amendment or modification may become effective.***

(b)

With respect to any waiver of, or extension to, this Section 8.05 [Extension; Waiver], Section 8.03(e) [Fees and Expenses], Section 8.04 [Amendment], Section 9.07 [Entire Agreement; No Third-Party Beneficiaries], Section 9.08 [Governing Law], Section 9.10 [Specific Enforcement; Jurisdiction; Venue], Section 9.11 [Waiver of Jury Trial], Section 9.12 [Non-Recourse] or the definition of "Financing Sources" (and any provision of this Agreement to the extent an extension or waiver of such provision would modify the substance of any of the foregoing provisions) ***that is adverse to any Financing Source, the prior written consent of the adversely affected Financing Source shall be required before any such extension or waiver may become effective.***

“Xerox” Provisions Third Party Beneficiary

- Provision that provides that financing sources are express third-party beneficiary of Xerox provisions.

This Agreement, taken together with the Parent Disclosure Letter, the Company Disclosure Letter, the Confidentiality Agreement, the Debt Commitment Letter, the Equity Commitment Letter and each Guaranty, (a) constitute the entire agreement, and supersedes all prior agreements and understandings, both written and oral, between the parties with respect to the Merger and the other transactions contemplated by this Agreement and (b) except for Section 6.04 and Section 6.05, and except for Section 6.11(a) (with respect to any expense reimbursement obligations and indemnification obligations), this Agreement is not intended to confer upon any Person other than the parties any rights or remedies; provided, that the provisions of this Section 9.07 [Entire Agreement; No Third-Party Beneficiaries], Section 8.03(e) [Fees and Expenses], Section 8.04 [Amendment], Section 8.05 [Extension; Waiver], this Section 9.07, Section 9.08 [Governing Law], Section 9.10 [Specific Enforcement; Jurisdiction; Venue], Section 9.11 [Waiver of Jury Trial], Section 9.12 [Non-Recourse] (in each case as they relate to the Financing Sources) *are intended to be for the benefit of, and shall be enforceable by, the Financing Sources.*



Other Financing Provisions in Merger Agreements



Financing Representations of the Purchaser

- Seller:
 - Wants to know that the Purchaser has commitments for financing sufficient to close the acquisition.
 - Wants to know that it's reviewed and is aware of all agreements related to the financing, and in particular is aware of all financing conditions.

Financing Representations of the Purchaser (continued)

- Representations that:
 - Purchaser has delivered true and complete copies of commitment letters and a redacted copy of fee letter (in description or definition of redacted fee letter, some agreements include a representation that the redacted portions do not adversely affect the conditionality or availability of the debt financing).

Financing Representation of Purchaser (continued)

- As of date of the purchase agreement, the commitment letters are in full force and effect and enforceable agreements, and the Purchaser is not aware of any breach or reason why financing conditions can't be satisfied.
- The Purchaser has provided to the Seller all side letters or agreements related to the financing.
- Some purchase agreements include an express acknowledgement from the Purchaser that the Purchaser's obligation to consummate the acquisition is not contingent on the Purchaser obtaining financing.

Financing Representation of Purchaser (continued)

- Proceeds from financing commitments will be sufficient to close the acquisition. See Example 7.
 - The Purchasers can only make this representation based on specified assumptions (*e.g.*, the Seller's representations about outstanding indebtedness are accurate and the Seller has not breached its interim covenants).

Financing Representation of Purchaser (continued)

Example 7

(a)

Assuming the Financing is funded and/or invested in accordance with the Commitment Letters, Parent and Merger Sub will have on the Closing Date funds sufficient to (i) pay the aggregate Per Share Merger Consideration and the other payments under Article III, (ii) pay any and all fees and expenses required to be paid at Closing by Parent and Merger Sub in connection with the Merger and the Financing, (iii) prepay or repay any outstanding indebtedness of the Company or its Subsidiaries required by this Agreement to be prepaid or repaid and (iv) satisfy all of the other payment obligations of Parent and Merger Sub contemplated hereunder (clauses (i) through (iv), the "Financing Uses").

(b)

Assuming the Financing is funded in accordance with the Financing Letters, the accuracy in all material respects of the representations and warranties set forth in Sections 3.2 [Capitalization], 3.5(b) [Financial Statements], 3.6 [No Undisclosed Liabilities] and 3.7(b) (as it relates to Section 5.1(a)) and performance in all material respects by the Company of its obligations under Sections 5.1(a) [no dividends or repurchases] and 5.1(g) [no incurrence of indebtedness], the net proceeds contemplated by the Financing Letters (after netting out applicable fees, expenses, original issue discount and similar premiums and charges and after giving effect to the maximum amount of flex (including original issue discount flex) provided under the Debt Commitment Letter), together with the cash of the Company and its Subsidiaries as of the Effective Time (it being acknowledged that the Company makes no representation or warranty as to the amount or availability of cash as of the Effective Time), will in the aggregate be sufficient for Merger Sub and the Surviving Corporation to pay the aggregate Merger Consideration (and any repayment or refinancing of debt contemplated by, or required in connection with the transactions described in, this Agreement, the Equity Funding Letters or the Debt Commitment Letter) and any other amounts required to be paid in connection with the consummation of the Transactions . . . and to pay all related fees and expenses of Parent and Merger Sub.



Solvency Representation of Purchaser

- The surviving company will be solvent following consummation of the acquisition. See Example 8.
 - The Purchasers can only make this representation based on specified assumptions (*e.g.*, the Seller's representations about outstanding indebtedness are accurate and the Seller has not breached its interim covenants).

Solvency Representation of Purchaser (continued)

Example 8

(a)

Neither Parent nor Merger Sub is entering into this Agreement with the actual intent to hinder, delay or defraud either present or future creditors of the Company or any of its Subsidiaries. ***Assuming (a) satisfaction or waiver of the conditions to Parent's and Merger Sub's obligations to consummate the Offer and the Merger and after giving effect to the Transactions and the payment of the aggregate Offer Price and Merger Consideration, any other repayment or refinancing of debt contemplated in this Agreement or the Financing Letters and payment of the Required Amount and (b) the representations and warranties of the Company in Article III are accurate,*** the Surviving Corporation and its Subsidiaries on a consolidated basis will be Solvent as of the Offer Acceptance Time and as of the Effective Time and immediately after the consummation of the applicable Transactions.

(b)

Assuming (a) that the conditions to the obligation of Parent and Merger Sub to consummate the Merger set forth in Sections 7.1 and 7.2 have been satisfied or waived, (b) (i) the accuracy of the representations and warranties set forth in Article IV hereof and (ii) the performance by the Company and its Subsidiaries of the covenants and agreements contained in this Agreement and (c) that the Required Financial Information fairly presents the consolidated financial condition of the Company as at the end of the periods covered thereby and as of the Closing and the consolidated results of earnings of the Company for the periods covered thereby and as of the Closing, then immediately following the Effective Time and after giving effect to all of the transactions contemplated by this Agreement, including the funding of the Financing and the Available Cash Amount, the payment of the aggregate consideration to which the stockholders and other equity holders of the Company are entitled under Article III, the funding of any obligations of the Surviving Corporation or its Subsidiaries which become due or payable by the Surviving Corporation and its Subsidiaries in connection with, or as a result of, the Merger and payment of all related fees and expenses, the Surviving Corporation and its Subsidiaries, on a consolidated basis, will be Solvent.

Financing Covenant of Purchaser

- Covenant that sets forth the Purchaser's obligations to close the financing.
- Applicable standard (commercially reasonable efforts or reasonable best efforts) to obtain financing or alternative financing.
 - Court decisions suggest blurred standard.
 - Ultimately, this may be an issue more of consistency with the standard of the Seller's financing cooperation covenant.



Financing Covenant of Purchaser (continued)

- Is “enforcement” of financing commitment expressly included in efforts the Purchaser is obligated to take? See Example 9.
 - Financing sources more likely to live with this than was previously the case.

Financing Covenant of Purchaser (continued)

Example 9

(a)

Each of Parent and Merger Sub shall use, and shall cause their respective Affiliates to use, reasonable best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable to consummate and obtain the Financing on the terms and subject only to the conditions (including the market flex provisions set forth in the Redacted Fee Letter) set forth in the Financing Letters, including using reasonable best efforts to . . . (v) enforce its rights under the Financing Letters and the definitive agreements relating to the Financing.

(b)

In the event that all conditions contained in the Debt Commitment Letter (other than the availability of the Equity Financing) have been satisfied (or upon funding will be satisfied), each of Parent, HHC and Merger sub ***shall use its reasonable best efforts to timely cause the Lenders to fund the Debt Financing and to otherwise enforce its rights under the Debt Commitment Letter (including through litigation).***

(c)

For the avoidance of doubt, the "***reasonable best efforts***" of Newco and Merger Sub pursuant to this Section 7.3(c) ***includes an obligation on the part of Newco and Merger Sub to enforce their rights pursuant to the Financing Commitment Letters, including the initiation of an appropriate Legal Proceeding*** against any Debt Financing Source under the Debt Commitment Letters pursuant to which each of Newco and Merger Sub will use its reasonable best efforts to compel such Debt Financing Source to provide its portion of the Debt Financing in accordance with the Debt Commitment Letters if the terms and conditions set forth in the Debt Commitment Letters have been satisfied and one or more of the Debt Financing Sources under the Debt Commitment Letters fails to provide its respective portion of the Debt Financing and, as a result, the Closing does not occur or would reasonably be expected not to occur.

Financing Covenant of Purchaser (continued)

- Ability to amend debt commitment letter. See Example 10.
 - Generally, ability to amend so long as (i) commitments are not reduced (in some deals, below amount required to fund the acquisition), (ii) conditionality not expanded (via new conditions or expansion of existing conditions), (iii) the amendment would not reasonably be expected to prevent, impede or delay the acquisition and (iv) in some deals, the amendment would not materially adversely impact enforceability against the financing sources.

Financing Covenant of Purchaser (continued)

Example 10

Neither Parent nor Merger Sub shall permit or consent to or agree to any amendment, restatement, replacement, supplement, termination or other modification or waiver of any provision or remedy under, (i) the Equity Commitment Letter (other than to increase the amount of Equity Financing available thereunder) without the prior written consent of the Company or (ii) the Debt Commitment Letters, without the prior written consent of the Company, if such amendment, restatement, supplement, termination, modification or waiver would (A) impose new or additional conditions precedent to the funding of the Financing or would otherwise adversely change, amend, modify or expand any of the conditions precedent to the funding of the Financing, (B) be reasonably expected to prevent or delay the availability of all or a portion of the Financing necessary to satisfy the Financing Uses (after taking into account the amount of the Equity Financing and available cash of the Company and its Subsidiaries) or the consummation of the transactions contemplated by this Agreement, (C) reduce the aggregate amount of the Debt Financing below the amount necessary to satisfy the Financing Uses (after taking into account the amount of the Equity Financing and available cash of the Company and its Subsidiaries) unless the Equity Financing is increased by a corresponding amount or (D) otherwise adversely affect the ability of the Parent or Merger Sub to enforce their rights under the Commitment Letters; provided that Parent may amend the Debt Commitment Letter to add lenders, lead arrangers, bookrunners, syndication agents or similar entities who had not executed such Debt Commitment Letter as of the date of this Agreement. Parent shall furnish to the Company a copy of any amendment, restatement, replacement, supplement, modification, waiver or consent of or relating to the Commitment Letters or the Definitive Financing Agreements as promptly as practicable upon execution thereof. Parent and Merger Sub shall use their reasonable best efforts to maintain the effectiveness of the Commitment Letters until the transactions contemplated by this Agreement are consummated.

Financing Covenant of Purchaser (continued)

- Requirement of the Purchaser to find alternative financing if the initial financing falls through. See Example 11.
 - How much worse than the terms of the original debt financing?
 - Limitation on decreasing the amount of proceeds available and increasing the conditions.

Financing Covenant of Purchaser (continued)

Example 11

(a)

From and after the date hereof until the Closing or the earlier termination of this Agreement pursuant to Section 10.1, in the event any portion of the Debt Financing becomes unavailable on the terms and conditions (including any "market flex" provisions) contemplated by the Debt Financing Commitments for any reason, (A) Parent shall promptly notify the Company in writing and (B) Parent and its Affiliates shall use their reasonable best efforts to arrange to obtain alternative financing from the same or alternative sources (the "Alternative Financing") in an amount that, after taking into account any equity contributions, co-investments or alternative financings expected to be made and Parent's cash on hand, is sufficient to consummate the transactions contemplated by this Agreement promptly following the occurrence of such event, ***which Alternative Financing would not reasonably be expected to prevent, materially impair or delay the consummation of the Merger*** when required pursuant to Section 2.2.

(b)

If any portion of the Debt Financing becomes unavailable on the terms and conditions (including any "flex" provisions) contemplated in the Debt Commitment Letter, Parent and Sub shall use their reasonable best efforts to, as promptly as practicable following the occurrence of such event, arrange and obtain from alternative sources of debt financing an amount sufficient to satisfy the Financing Uses (after taking into account the amount of the Equity Financing and available cash of the Company and the Company Subsidiaries) or such unavailable portion thereof, as the case may be, ***on terms and conditions (including any "flex" provisions) that are at least as favorable to Parent and Sub*** as those contained in the Debt Commitment Letter and the Fee Letter (including the "flex" provisions), ***which shall not expand upon the conditions precedent to the funding on the Closing Date*** of the Financing as set forth in the Financing Commitments in effect on the date hereof or otherwise adversely affect the ability or likelihood of Parent and Sub to timely consummate the Transactions.

Seller's Financing Cooperation Covenant

- Standard of required cooperation from the Seller typically matches the standard of the Purchaser's obligation to consummate the financing (*e.g.*, commercially reasonable efforts or reasonable best efforts).
- In addition to general standard for cooperation of the Seller, there is a list of specified actions that the Seller covenants to take. Some purchase agreements only require commercially reasonable efforts/reasonable best efforts to take these specified actions.

Seller's Financing Cooperation Covenant (continued)

Example 12

(a)

Prior to the Closing, the Company and its Subsidiaries shall use their *reasonable best efforts*, and shall use their reasonable best efforts to cause the respective Representatives and Affiliates of the Company and its Subsidiaries to use their respective reasonable best efforts, to provide all customary cooperation, in each case, as reasonably requested by Parent in connection with the arrangement of any bank debt financing in connection with the transactions contemplated by this Agreement (such financing, the "Debt Financing"), including, without limitation . . .

(iii) using *commercially reasonable efforts* to cause its independent accountants to provide assistance and cooperation to Parent, including participating in accounting due diligence sessions and providing consent to Parent to use their audit reports relating to the Company

(b)

Prior to the Closing Date, the Company shall use, and shall cause each of its Subsidiaries to use, and shall use reasonable best efforts to have each of its and its Subsidiaries' respective directors, officers and advisors to use, in each case, their respective reasonable best efforts to provide to Parent and Merger Sub, in each case at Parent's sole expense, all cooperation reasonably necessary and customary in connection with the arrangement of the Debt Financing . . . (provided that such requested cooperation does not unreasonably interfere with the ongoing operations of the Company or its Subsidiaries), which reasonable best efforts shall include

(i) upon reasonable notice, and at reasonable times and locations to be mutually agreed, causing the management teams of the Company and its Subsidiaries with appropriate seniority and expertise and external auditors to participate in a reasonable number of meetings, drafting sessions, presentations, road shows, and rating agency and due diligence sessions,

Seller's Financing Cooperation Covenant (continued)

- The financing sources and the Purchaser will want to make sure that these specified actions match up to the syndication cooperation covenant and the information of the Seller required to be produced in the conditions section of the debt commitment letter:
 - Historical and periodic financial statements
 - KYC and other required information
 - Requirements to participate in lender meetings, rating agency presentations, and road shows, if applicable
 - Materials necessary for marketing (*e.g.*, assistance with bank book; management representation letters)

Seller's Financing Cooperation Covenant (continued)

- Definition of “Marketing Period” in the acquisition agreement vs. the definition of “Marketing Period” in the debt commitment letter:
 - Identical black-out periods.
 - “Compliance” requirement for financial statements to be used in marketing in the acquisition agreement.
 - Marketing Period in the acquisition agreement may require satisfaction of other closing conditions before commencement (*e.g.*, HSR approvals).
 - Not often identical. See Example 13.

Seller's Financing Cooperation Covenant (continued)

Example 13

- Purchase Agreement “Marketing Period” Definition

“Marketing Period” shall mean the first period of twenty (20) consecutive Business Days after the date of this Agreement during and at the end of which (a) Parent shall have received delivery of or had access to the Required Information that is Compliant (it being understood that if at any time during the Marketing Period the Required Information is not Compliant pursuant to clause (a) of the definition thereof, but becomes Compliant as a result of a supplement to the “Required Information” as defined, then the Marketing Period shall be extended by five (5) days but shall not re-commence), and (b) the conditions set forth in Section 6.1 and Section 6.2 shall have been satisfied (other than Section 6.1(a), from and after May 2, 2017, Section 6.1(b) and those conditions that by their nature are to be satisfied at the Closing) or (to the extent permitted by applicable Law) waived and nothing shall have occurred and no condition shall exist that would cause any of the conditions set forth in Section 6.1 or Section 6.2 to fail to be satisfied assuming the Closing were to be scheduled for any time during such twenty (20) consecutive Business Day period; provided that (x) the Marketing Period shall either end on or prior to August 17, 2016 or, if the Marketing Period has not ended on or prior to August 17, 2016, then the Marketing Period shall commence no earlier than September 6, 2016, (y) July 1-5, 2016, October 10, 2016, and November 23-27, 2016 shall not be considered Business Days for purposes of this definition and (z) the Marketing Period shall either end on or prior to December 21, 2016 or, if the Marketing Period has not ended on or prior to December 21, 2016, then the Marketing Period shall commence no earlier than January 2, 2017...the Marketing Period shall not commence or be deemed to have commenced if, after the date hereof and prior to the completion of such twenty (20) consecutive Business Day period, (I) the Company's independent accountants shall have withdrawn any audit opinion with respect to any financial statements included in the Required Information, in which case the Marketing Period shall not be deemed to commence unless and until, at the earliest, a new unqualified audit opinion is issued with respect to such financial statements of the Company for the applicable periods by the applicable independent accountants or another independent public accounting firm of recognized national standing reasonably acceptable to Parent, (II) the Company or any of its Subsidiaries shall have failed to file any report or other document required to be filed with the SEC by the date required under the Exchange Act or the Securities Act, as applicable, containing any financial statements that would be required to be contained therein, in which case the Marketing Period shall not be deemed to commence unless and until, at the earliest, all such reports have been filed or (III) the Company publicly announces its intention to (or determines that it must) restate any historical financial statements or other historical financial information included in the Required Information, in which case, the Marketing Period shall not be deemed to commence unless and until such restatement has been completed or the Company has publicly announced that it has concluded that no such restatement shall be necessary.

Seller's Financing Cooperation Covenant (continued)

Example 13

- Commitment Letter “Marketing Period” Definition

The Lead Arrangers shall have been afforded a period (the “Marketing Period”) of not less than twenty (20) consecutive Business Days (as defined in the Merger Agreement) prior to the Acquisition Funding Date, commencing on the delivery of the financial information referred to in paragraph 5 above [audited financial statements, quarterly financial statements and pro forma balance sheet and income statement] and such other information customarily delivered for the preparation of the Confidential Information Memorandum, to syndicate the Term Loan Facility; provided, that (x) the Marketing Period shall either end on or prior to August 17, 2016 or, if the Marketing Period has not ended on or prior to August 17, 2016, then the Marketing Period shall commence no earlier than September 6, 2016, (y) July 1-5, 2016, October 10, 2016, and November 23-27, 2016 shall not be considered Business Days for purposes of this definition and (z) the Marketing Period shall either end on or prior to December 21, 2016 or, if the Marketing Period has not ended on or prior to December 21, 2016, then the Marketing Period shall commence no earlier than January 2, 2017.

Seller's Financing Cooperation Covenant (continued)

- In addition to being able to satisfy its obligations under the debt commitment letter, the Purchaser will want to know that it can obtain the cooperation it knows that it will need for closing:
 - Subsidiary guarantor resolutions
 - Assistance with any collateral documents that involve a third party (*e.g.*, landlord waivers, deposit account control agreements)

Seller's Financing Cooperation Covenant (continued)

- The Seller will want to know that there is some limit on how much it needs to cooperate (*e.g.*, unreasonable interference with the Seller's business or operations). See Example 14:
 - Cooperation should not require actions of directors or officers of the Seller that will not remain after closing.
 - The Seller should be indemnified for any costs, expenses or liabilities that result from its cooperation with the Purchaser.
 - Additional carve-outs subject to negotiation.

Seller's Financing Cooperation Covenant (continued)

Example 14

(a)

provided, in each case in clauses (i) through (ix), that (W) nothing in this Section 6.11(a) shall involve the Company or the Company Subsidiaries entering into any binding agreement the effectiveness of which agreement is not conditioned on the Closing and does not terminate without liability to the Company or any of the Company Subsidiaries upon the termination of this Agreement if the Closing does not occur, (X) nothing in this Section 6.11(a) shall require cooperation to the extent that it (A) would cause any condition to Closing set forth in Section 7.01 or Section 7.03 to not be satisfied or otherwise cause any breach of this Agreement (including any representations or warranties thereunder), (B) would unreasonably interfere with the ongoing business or operations of the Company and the Company Subsidiaries, taken as a whole, (C) would result in the Company or any Company Subsidiary paying any commitment or other fee prior to the Effective Time (D) would result in the contravention of, or that could reasonably be expected to result in a violation or breach of, or a default under, any Laws or under any material contract to which the Company or any Company Subsidiaries is a party, (E) would require the Company to provide access to or disclose information that would otherwise be restricted from disclosure in accordance with the proviso in Section 6.02 or (F) would require the Company to prepare separate financial statements for any Company Subsidiary or accelerate or change any reporting period, or provide any legal opinions, comfort letters, or any other financial statements except as set forth in clauses (iii)(B)(I), (II) or (III) above, (Y) none of the Company or any of the Company Subsidiaries shall be required to execute and deliver any Financing Agreements or other agreements, pledge or security documents, or other certificates or documents in connection with the Financing that are effective prior to the Effective Time and (Z) Parent shall indemnify, defend and hold harmless (and such indemnity obligations shall be guaranteed by each Guarantor pursuant to the Guarantees) the Company and the Company Subsidiaries, and their respective pre-Closing directors, officers, employees and Representatives, from and against any liability or obligation in connection with the arrangement of the Financing and any information provided in connection therewith (other than information furnished by or on behalf of any of the Company and the Company Subsidiaries).

Seller's Financing Cooperation Covenant (continued)

Example 14

(b)

Notwithstanding the provisions of Section 7.3(f)(i) or any other provision of this Agreement, nothing in this Agreement will require the Company or any of its Subsidiaries to (A) waive or amend any terms of this Agreement or agree to pay any fees or reimburse any expenses prior to the Effective Time for which it has not received prior reimbursement or is not otherwise indemnified by or on behalf of Newco, (B) enter into any definitive agreement (other than with respect to authorization letters and ratings agency engagement letters referred to in Section 7.3(f)(i)(H) that is effective prior to the Closing), (C) give any indemnities in connection with the Financing that are effective prior to the Effective Time, (D) take any action that, in the good faith determination of the Company, would unreasonably interfere with the conduct of the business or the Company and its Subsidiaries or create an unreasonable risk of damage or destruction to any property or assets of the Company or any of its Subsidiaries, (E) provide any information the disclosure of which is prohibited or restricted under Applicable Law or is legally privileged, or (F) take any action that will conflict with or violate its organizational documents or any Applicable Laws or would result in a violation or breach of, or default under, any agreement to which the Company or any of its Subsidiaries is a party. In addition, (1) no action, liability or obligation of the Company, any of its Subsidiaries or any of their respective Representatives pursuant to any certificate, agreement, arrangement, document or instrument relating to the Debt Financing will be effective until the Effective Time, and neither the Company nor any of its Subsidiaries will be required to take any action pursuant to any certificate, agreement, arrangement, document or instrument (including being an issuer or other obligor with respect to the Debt Financing) that is not contingent on the occurrence of the Closing or that must be effective prior to the Effective Time, and (2) any bank information memoranda and high-yield offering prospectuses or memoranda required in relation to the Debt Financing will contain disclosure and financial statements reflecting the Surviving Corporation or its Subsidiaries as the obligor. Nothing in this Section 7.3 will require (A) any officer or Representative of the Company or any of its Subsidiaries to deliver any certificate or opinion or take any other action pursuant to Section 7.3(f)(i) or any other provision of this Agreement that could reasonably be expected to result in personal liability to such officer or Representative, or (B) the members of the Company Board as of immediately prior to the Effective Time to approve any financing or Contracts related thereto.

Seller's Financing Cooperation Covenant (continued)

Example 14

(c)

Notwithstanding anything to the contrary in this Section 6.13(a), nothing will require the Company to provide (or be deemed to require the Company to prepare) any (1) pro forma financial statements; (2) information regarding any post-Closing or pro forma cost savings, synergies, capitalization, ownership or other post-Closing pro forma adjustments desired to be incorporated into any information used in connection with the Debt Financing; (3) description of all or any portion of the Financing, including any "description of notes"; (4) risk factors relating to all or any component of the Financing; (5) other information required by Rules 3-10 or 3-16 of Regulation S-X under the Securities Act, any Compensation Discussion and Analysis or other information required by Item 402 of Regulation S-K under the Securities Act or any other information customarily excluded from an offering memorandum for private placements of non-convertible high-yield debt securities under Rule 144A promulgated under the Securities Act (the foregoing clauses (1) through (5) is referred herein as "Excluded Information").

Seller's Financing Cooperation Covenant (continued)

- Relationship of breach of financing cooperation covenant to satisfaction of merger agreement closing conditions. See Example 15.
 - Some agreements include language clarifying at what point a breach in the financing cooperation covenant will cause the failure of the Seller to satisfy the applicable closing condition in the merger agreement.

Seller's Financing Cooperation Covenant (continued)

Example 15

(a)

Notwithstanding anything to the contrary contained in this Agreement, the condition set forth in Section 7.03(b), as it applies to the Company's obligations under this Section 6.11(a), shall be deemed satisfied if the Company's breach(es), if any, of its obligations under this Section 6.11(a) did not cause the failure of the Debt Financing to be obtained.

(b)

Notwithstanding anything to the contrary, the condition set forth in Section 7.03(b), as it applies to the Company's obligations under this Section 5.06(d), shall be deemed satisfied unless there has occurred a knowing and willful material breach of its obligations under this Section 5.06(d).

(c)

Notwithstanding anything to the contrary herein, it is understood and agreed that the condition precedent set forth in Section 6.3(b), as applied to the Company's obligations under this Section 5.11, shall be deemed to be satisfied unless the Financing has not been obtained as a direct result of the Company's Willful and Material Breach² of its obligations under this Section 5.11.

(d)

Notwithstanding anything to the contrary herein, any breach by the Company or its Subsidiaries of their obligations under this Section 6.9 shall not constitute a breach of this Agreement or a breach for purposes of Article VIII or a breach of the condition precedent set forth in Section 7.2(b) hereof.