

Intercreditor Agreement Summary

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INTRODUCTION

The purpose of this document is to highlight some of the most important aspects of a Subordination and Intercreditor Agreement. To do that, some excerpts are required from the Subordinated Note Purchase Agreement.

The text that follows under the title “Subordinated Note Purchase Agreement” includes examples of text that you would find in a Note Purchase Agreement and, separately, examples of text you would find in a Subordination and Intercreditor Agreement. These are massively abridged examples of hypothetical language. For reference, a Note Purchase Agreement is likely to contain 30 to 60 pages.

Subordinated Note Purchase Agreement Primer:

The excerpts that follow focus on the remedies that the subordinated lender would have under certain events of default. Events of default focus on items that put the subordinated lenders capital at risk. The remedies available to the subordinated lender are actions that allow the lender to protect itself from loss.

Subordination and Intercreditor Agreement Primer:

The intercreditor agreement describes when the senior lender will permit the subordinated lender to act on the remedies available under the Subordinated Note Purchase Agreement. This is one reason that the intercreditor agreement is absolutely critical to all lending parties involved in a transaction.

Red text is used to indicate notes to reader. Highlighted text is used to help the reader stay alert reading dry legal language.

Subordinated Note Purchase Agreement:

Default Interest, Events of Default and Remedies

For the purpose of exploring the Intercreditor Agreement, three elements of the Subordinated Note Purchase Agreement need to be detailed first; (1) the default interest rate; (2) events of default; and (3) remedies upon default.

DEFAULT INTEREST:

Section 2.1 Authorization and Issuance of Notes; Payment of Interest.

(a) ...

(b) Payment of Interest.

(i) ... So long as any Event of Default shall have occurred and be continuing, the interest rate applicable to the Notes shall be automatically increased by 2.00% per annum (the "Default Rate").

EVENTS OF DEFAULT:

- a) Failure to pay principal of the Obligations when due, or failure to pay interest within 3 days of when due.
- b) Failure to provide notice of Default under Affirmative Covenants or Financial Covenants.
- c) In the event that any Representations & Warranties shall be false or misleading.
- d) Failure to observe or comply with any covenant, agreement or term contained in this Agreement or any Transaction Document.
- e) Voluntary proceeding seeking liquidation.
- f) Involuntary proceeding commenced against Issuer.
- g) Failure to pay principal or interest on any Debt (other than Obligations of the Senior Debt).
- h) This Agreement or any Transaction Document shall cease to be in full force and effect.
- i) Any ERISA Event.
- j) Any Prohibited Transaction.
- k) Issuer, Guarantor or any other Obligated Party that is an individual shall have died or have been declared incompetent.
- l) Properties, revenues or assets shall become subject to an order of forfeiture, seizure or divestiture.
- m) Change of control.
- n) Key personnel cease to be actively involved (note: normally these individuals would be identified by name).
- o) Loss of a permit or license necessary to conduct business.

REMEDIES UPON DEFAULT:

If any Event of Default shall occur and be continuing, the Purchasers may declare the Obligations or any part thereof to be immediately due and payable.

Subordination and Intercreditor Agreement

DEFINITIONS:

“Blockage Period” shall mean any period of time during which the Subordinated Creditor is prohibited from receiving certain Permitted Subordinated Debt Payments by operation of subsection 2.3(a) hereof.

“Enforcement Action” shall mean: (what follows is largely focused on actions that the subordinated lender can take to recover capital) (a) to take from or for the account of Borrower the whole or any part of any moneys which may now or hereafter be owing by Borrower with respect to the Subordinated Debt (other than the receipt of Permitted Subordinated Debt Payments permitted to be paid pursuant to this Agreement), (b) to sue for payment of, or to initiate or participate with others in any suit, action or proceeding against Borrower to (i) enforce payment of or to collect the whole or any part of the Subordinated Debt, (ii) commence or join with other Persons to commence a Proceeding, or (iii) commence judicial enforcement of any of the rights and remedies under the Subordinated Debt Documents or applicable law with respect to the Subordinated Debt, (c) to accelerate the Subordinated Debt, (d) to exercise any put option, or cause Borrower to honor any redemption or mandatory prepayment obligation under any Subordinated Debt; or (e) take any action under the provisions of any state or federal law, including, without limitation, the Uniform Commercial Code, or under any contract or agreement, to enforce against, foreclose upon, take possession of or sell any property or assets of Borrower, including without limitation the Collateral.

“Permitted Subordinated Debt Payments” shall mean:

- (a) the payment of the cash closing fee payable to Subordinated Creditor;
- (b) regularly scheduled payments of cash interest on the principal amount of Subordinated Debt due and payable on a non-accelerated basis;
- (c) mandatory prepayments of the Subordinated Debt;
- (d) catch-up payments permitted under Section 2.3 (b);
- (e) the payment of Subordinated Debt Costs and Expenses;
- (f) the issuance and receipt of Reorganization Subordinated Securities;
- (g) non-cash, deferred payments of interest on the Subordinated Debt;
- (h) the accrual of the Default Interest.

Section 2. Subordination.

2.1. *Subordination of Subordinated Debt to Senior Debt.* Borrower covenants and agrees, and Subordinated Creditor by its acceptance of the Subordinated Debt Documents likewise covenants and agrees that the payment of any and all of the Subordinated Debt shall be subordinate to the prior payment in full of all Senior Debt.

2.3. *Subordinated Debt Payment Restrictions.*

Recall that the Blockage Period is defined by subsection 2.3(a):

- (a) Borrower agrees that it may not make, and Subordinated Creditor hereby agrees that it will not accept, any Distribution with respect to the Subordinated Debt until the Senior Debt is paid in full. Notwithstanding the immediately preceding sentence, Borrower may make, and Subordinated Creditor may accept and retain, Permitted Subordinated Debt Payments; provided, however, that Borrower and

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the Subordinated Creditor further agree that no Permitted Subordinated Debt Payment may be made by Borrower, or accepted by the Subordinated Creditor (other than (i) Subordinated Debt Costs and Expenses in an aggregate amount not to exceed \$75,000 in the aggregate during any calendar year and (ii) non-cash deferred payments of interest on the Subordinated Debt (note: included for PIK securities)) if, at the time of such payment:

No Permitted Subordinated Debt Payments made if either of the following statements is true:

- (i) Subordinated Creditor shall have received a Senior Default Notice from the Senior Lender stating that a Senior Payment Default exists, and such Senior Payment Default shall not have been cured or waived in writing by the Senior Lender; or
 - (ii) subject to the provisions of paragraph (d) of this subsection 2.3, (A) Borrower and Subordinated Creditor shall have received a Senior Default Notice from the Senior Lender stating that a Senior Covenant Default exists or would be created by the making of such payment, (B) each such Senior Covenant Default shall not have been cured or waived in writing by the Senior Lender, and (C) 180 days shall not have elapsed since the date such Senior Default Notice was received.
- (b) The Credit Parties may resume Permitted Subordinated Debt Payments, and may make any Permitted Subordinated Debt Payments missed during a Blockage Period in respect of the Subordinated Debt or any judgment with respect thereto:
- (i) in the case of a Blockage Period resulting from a Senior Payment Default, upon the earliest to occur of (A) the waiver in writing of the Senior Payment Default specified in the applicable Senior Default Notice, (B) the date on which the Senior Debt has been paid in full, or (C) the commencement of a Proceeding; or
 - (ii) in the case of a Blockage Period resulting from a Senior Covenant Default, upon the earliest to occur of (A) the waiver in writing of the Senior Covenant Default specified in the applicable Senior Default Notice, (B) the date on which the Senior Debt has been paid in full, (C) the commencement of a Proceeding (in which case the provisions of subsection 2.2 hereof shall apply), or (D) the expiration of such period of 180 days.
- (c) No Senior Default shall be deemed to have been cured or waived for purposes of this subsection 2.3 unless and until Borrower shall have received a written waiver from the Senior Lender.
- (d) Notwithstanding any provision of this subsection 2.3 to the contrary:
- (i) Borrower shall not be prohibited from making, and Subordinated Creditor shall not be prohibited from receiving, Permitted Subordinated Debt Payments during a Blockage Period resulting from a Senior Covenant Default for more than an aggregate of 180 days within any period of 360 consecutive days;

The Senior Creditor can only block payments to the Subordinated Creditor in the event of Senior Covenant Default for 180 days within any period of 360 days.

- (ii) no more than 2 Senior Default Notices may be sent during any consecutive 360-day period in respect of Senior Covenant Defaults, and no more than 5 Senior Default Notices may be sent during the term of this Agreement in respect of Senior Covenant Defaults;

By limiting the number of Default Notices that can be sent, the Subordinated Creditor receives some protection from the Blockage Period.

(iii) no Senior Covenant Default existing on the date any Senior Default Notice is given pursuant to clause (ii) of paragraph (a) of this subsection 2.3 shall, unless the same shall have ceased to exist for a period of at least 90 consecutive days, be used as a basis for any subsequent Senior Default Notice (for purposes of this paragraph, breaches of the same financial covenant for consecutive periods shall constitute separate and distinct Senior Covenant Defaults); and

(iv) the failure of Borrower to make any Distribution with respect to the Subordinated Debt by reason of the operation of this subsection 2.3 shall not be construed as preventing the occurrence of a Subordinated Debt Default under the applicable Subordinated Debt Documents, or the imposition and accrual of any default rate of interest under the Subordinated Debt Documents as in effect on the date hereof or as amended as permitted hereunder.

2.4. Subordinated Debt Standstill Provisions.

(a) Until the Senior Debt is paid in full, the Subordinated Creditor shall not, without the prior written consent of the Senior Lender, take any Enforcement Action with respect to the Subordinated Debt until the earliest to occur of the following:

- (A) acceleration of all or any portion of the Senior Debt;
- (B) the commencement of a Proceeding involving Borrower; or

The standstill provision can lead to intense negotiation:

(C) the passage of 120 days from the delivery of a Subordinated Debt Default Notice to the Senior Lender if any Subordinated Debt Default described therein shall not have been cured or waived within such period.

2.5. Incorrect Payments.

If any Distribution on account of the Subordinated Debt not permitted to be made by Borrower or accepted by Subordinated Creditor under this Agreement is made and received by Subordinated Creditor, such Distribution shall not be commingled with any of the assets of Subordinated Creditor, shall be held in trust by Subordinated Creditor, as applicable, for the benefit of the Senior Lender, and shall be promptly paid over to Senior Lender in the same form received, together with any necessary endorsements, for application (in accordance with the Senior Debt Documents) to the payment of the Senior Debt then remaining unpaid, until all of the Senior Debt is paid in full.

2.6. Subordination of Liens and Security Interests.

Until the Senior Debt has been paid in full, notwithstanding anything in this Agreement or any Subordinated Debt Document to the contrary, all liens and security interests of Subordinated Creditor in the Collateral shall be and hereby are subordinated for all purposes and in all respects to the liens and security interests of the Senior Lender in the Collateral, regardless of (i) the time, manner or order of perfection of any such liens and security interests and (ii) the fact that liens securing the Senior Debt may be (x) subordinated to any lien securing any obligation of any other Person or (y) otherwise subordinated, voided, avoided, invalidated or lapsed. Subordinated Creditor agrees that it will not at any time contest the validity, perfection, priority or enforceability of the Senior Debt, the Senior Debt Documents, or the liens and security interests of the Senior Lender in the Collateral securing the Senior Debt.

9.2. Right of Subordinated Creditor to Purchase Senior Debt.

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(a) Purchase Option. During the term of this Agreement, at any time during which an Event of Default has occurred and is continuing under the Senior Debt Documents, the Subordinated Creditor shall have an ongoing option to purchase all (but not less than all) of the Senior Debt (the “Purchase Option”). The Subordinated Creditor may exercise its Purchase Option at any time during which an Event of Default has occurred and is continuing under the Senior Debt Documents by providing written notice (“Exercise Notice”) to the Senior Lender of the same.