
From: Halperin, Alan S <[REDACTED]>
Sent: Sunday, December 13, 2015 5:28 PM
To: jeffrey E.; Brad Wechsler; Ada Clapp
Cc: Finkelstein, Brad J
Subject: Re:

Thanks. Our finance partner will review comments. As for the interest rate, please recall history: you suggested following terms of B of A loan, which included reference to LIBOR plus; we wanted to make sure that the amount was no less than AFR; we wanted a cap in case LIBOR rose significantly; and you instructed us to remove cap.

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From: jeffrey E.
Sent: Sunday, December 13, 2015 11:26 AM
To: Brad Wechsler; Ada Clapp; Halperin, Alan S
Subject:

my thoughts on the promissory note

"Event of Default"

(a) before there is a default for a failure to perform, a 5 day period runs from the occurrence of any failure to perform or observe any covenant or agreement contained in the note. There is no obligation to give notice of the failure and an opportunity to cure in 5 days. Just a failure to perform and then a default if not corrected within 5 days of the failure. Notice by the Noteholder of the Payor's failure should be required first and then a 5 day cure period.

(b) the language of this Event of Default is as follows: "Any representation, warranty or statement made by or on behalf of Payor in this note or in any other document delivered in connection [t]herewith shall prove to have been incorrect in any material respect when made or at any future date." I have issues with all the underlined language. Who is making statements on behalf of Payor? What other documents are being referred to? The representations, warranties and statements should be required to be "expressly made in writing" otherwise arguments about implied reps, warranties and statements might be made. Finally, making it a breach when any representation, warranty or statement becomes incorrect at any future date is too open-ended.

(d) Making it an event of default in this provision if the note ceases to be "in full, force and effect, valid or enforceable", though not unheard of, obviously limits the ability to defend against an enforcement action.

"Interest Rate". Why is it the greater of the Long Term AFR or LIBOR plus .25%. Why not just the Long Term AFR?

"Note Obligations" includes "any indemnification obligations under this Note." I did not see any "indemnification" under the Note. I did see a requirement to pay enforcement costs, but that is not an "indemnification".

Section 3.2(b) - Requires the Payor to notify the Noteholder promptly but in any event no later than 5 business days upon the Payor becoming aware of "any material adverse change in Payor's financial position." What is a material adverse change? Too open ended.

Section 3.4 also makes reference to the Initial Net Worth statement provided pursuant to Section 5.1 and requires the Payor, as of December 31 of each year, to maintain a Net Worth of not less than 110% of the then outstanding principal amount. It defines net worth as total assets minus total liabilities.

Section 3.5 prohibits the Payor from incurring "any liens or any debt for borrowed money if the incurrence of any such debt or liens would have a material adverse effect on Payor's ability to make the payment contemplated by this Note as such payments become due." "Material Adverse Effect" is too vague and open-ended.

Section 3.6 requires Payor to "furnish Noteholder with such additional information as Noteholder shall reasonably request in order to enable Noteholder to determine whether the terms, covenants, provisions and conditions of this Note have been complied with by Payor." This seems like a very broad license to require Leon to provide info, particularly financial info, at any time. This is especially true when terms like "material adverse effect" are used to trigger reporting obligations and violations of debt covenants.

Section 6.2. Waivers of presentment, demand, protest, notice of intent to accelerate, notice of acceleration of maturity, notice of protest notice of non-payment, except as are expressly provided in the Note are not unusual or overreaching, but they do limit Leon's defenses to enforcement actions. The consent in Section 6.2(b) to "all waivers of any term hereof", is probably intended as a consent to the Noteholder waiving an enforcement term against the Payor but could be interpreted to mean that Payor even consents to waivers of any term that provides the Payor with any protections like prior notice, for example. This should be modified to make it clear that it is only a consent to a waiver by the Noteholder of any enforcement term of the Note.

Section 6.3 permits an assignment of the Note by the Noteholder without consent by the Payor. Leon's consent should be required if the Noteholder wants to assign the note.

Section 6.4 makes Leon responsible to pay any stamp or other documentary taxes that are due in connection with the execution or delivery of this Note. What are they? If there are none, then delete this provision.

Section 6.5 seems to make the Payor liable for the costs and expenses of the Noteholder's "attempted enforcement" of the Note. That could be read to make Leon liable even if the Noteholder improperly commenced an enforcement action and Leon won that case. It should only be payable if the Noteholder is the prevailing party. Moreover why not make this a reciprocal provision, so that if the Noteholder commences action and the Payor is the prevailing party then the Noteholder pays cost and expenses? Also, the Note provides that the Payor should pay the costs and expenses incurred in any workout? Why?

Section 6.7 Jury Trial waiver is an attempt to exclude a jury from hearing a dispute over the Note because the amounts are so big, and that might impact the ability to get a proper result. Why not arbitration?

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please note

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