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LOAN MODIFICATIONS: TURBULENT TIMES - TROUBLESOME TOPICS

J. THOMAS DUNN, JR.*

I. INTRODUCTION

Periods of turbulent times in financial markets and the United States economy dramatically increase the need for changes in existing credit relationships. During these vexing times, lenders reevaluate their customers and their portfolios and adjust their conduct to implement revised goals. Reflecting these adjustments is the practice of modifying the credit documents which support those relationships. These modifications might be relatively simple and straightforward in an ordinary economy, but extraordinary times create an environment ripe for difficulties, complications, and even problematic conduct under civil and criminal laws.

In 2008, credit markets froze, banks failed, the United States economy fell sharply, consumer real estate foreclosures rose to record highs, consumer and business confidence was eroded, and commercial, industrial and real estate borrowers suffered severely depressed markets. In short, adverse economic conditions precipitated a market of noncomplementary needs between borrowers and lenders, and between regulators, who were enforcing standards imperfectly suited to the circumstances, and their regulated lenders, who were struggling to survive the downturn. In this environment, bankers, borrowers, regulators and their advisors faced unfamiliar difficulties in finding common grounds of understanding and commonly acceptable tools to deal with the existent circumstances.

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The purpose of this article is to examine some of the necessarily troubling topics and the challenging issues inherent in the exploration of mutually acceptable solutions. Section II of this article explores the appropriateness of certain modifications within the context of both business and regulatory topics.¹ Section III illustrates legal issues, both technical and practical, that are inherent in loan modifications.² Section IV discusses insolvency issues in loan modifications, and section V examines the practice of drafting loan modifications.³

II. APPROPRIATENESS OF MODIFICATIONS – BUSINESS AND REGULATORY TOPICS

A. *Business Topics*

Clear minded analysis and clearly communicated policies and careful policy enforcement, must accompany loan modifications and related loan document modifications to ensure they are appropriate under relevant regulatory rules and risk underwriting customs. Modifications may be appropriate to keep or reward a desirable customer by providing less restrictive covenant resets, maturity extensions, and performance related pricing or more competitive pricing. Modifications may also be necessary to move an undesirable customer “out of the bank” by adding more restrictive covenant resets, shortening maturities, increasing interest rates or fees, and decreasing advance rates. Finally, a modification’s motivation may be to improve the bank’s position in a troubled credit relationship, such as obtaining collateral or other credit support, correcting documentation or lien deficiencies, adding cross collateralization and cross default provisions, and adding specificity or additional elements as events of default so as to strengthen the bank’s right to remedy enforcement.

Loan modifications may also be used during market disruptions such as periods of abnormally high interest rates (e.g.,

1. *See infra* Section II.

2. *See infra* Section III.

3. *See infra* Sections IV and V.

prime rates in the twenty percent range in the early 1980s), real estate related downturns, capital conservation periods, and periods of increased bank failures, such as we saw in 2008. This use, although often appropriate, tends to elicit customer resistance, create negative publicity for the bank, and spawn litigation. Also, when Federal Deposit Insurance Corporation (FDIC) receiverships occur for failed banks during such periods, the FDIC customarily chooses another bank to administer the troubled loans created by the failed bank and the administering bank then advises the FDIC as receiver to avoid the executory obligations of the failed bank regarding those troubled loans. Under these circumstances, litigation costs from lender liability lawsuits tend to increase and customer resistance to voluntary modifications naturally tends to become pronounced and widespread. So, while the use of modifications is not necessarily inappropriate in these situations, there tends to be an additional cost associated with their use in terms of the time involved, the legal costs, and the market perception of the lenders.

B. Regulatory Topics

Difficult times also tend to create an environment conducive to some banks resorting to inappropriate uses of modifications. When customers cannot pay as agreed, overly optimistic bankers tend to resort to a practice of loan modifications by either renewing loans with the capitalization of unpaid interest or extending maturities with the use of side notes to capitalize the unpaid interest. Such renewal or rollover of loans causes a bank's records to reflect a loan as current and performing when, in fact, it is not current and performing. This type of modification may be a violation of federal and state criminal laws. Guidance as to whether loans should be classified as performing are in the FDIC Risk Management Manual of Examination Policies, Section 3.2,⁴ the federal regulators' Uniform Retail Credit

4. While the FDIC's examination manual is principally designed to assist bank examiners, it is also helpful to bankers, accountants and attorneys in evaluating a bank's policies and procedures and anticipating regulatory reactions to the bank's conduct. Although the entire Section 3.2 – Loans is important, for this specific issue, particular attention is appropriate to those portions entitled Loan Review Systems,

Classification and Account Management Policy,⁵ Statement of Financial Accounting Standards (FAS) No. 5 (FAS 5),⁶ FAS 15,⁷ FAS 114,⁸ and the Interagency Policy Statement on the Allowance for Loan and Lease Losses.⁹ These statutes, as well as many other state and federal criminal laws, are designed to assure that the books and records of the bank accurately reflect the condition of

Credit Grading Systems, Allowance for Loan and Lease Losses *ALLL), Factors to Consider in Estimating Credit Losses and Accounting and Reporting Treatment.

5. This policy applies to open-end and closed-end consumer purpose credit and, generally stated, requires classification of loans as substandard when 90 days past due and Loss *and charged off) when 120 days past due for closed-end and 180 days past due for open-end. Special detailed rules allow partial charge offs for secured credits.

6. FAS 5 requires an estimation and accrual of loss if (a) information is available that indicates that it is probable that an asset is impaired and (b) the amount of the loss can be reasonably estimated.

7. FAS 15 provides rules for accounting for troubled debt restructurings, *e.g.*, receipt of assets in payment on the debt, conversion of debt to equity in a work out and work out reductions in the amount of the debt or the interest thereon.

8. FAS 114 addresses less certain circumstances than the circumstances necessary for a FAS 5 determination and provides that an individual loan is impaired when based upon current information and events, it is probable that a lender will be unable to collect all amounts due according to the terms of the credit documents. Within that general framework, a creditor is to apply its normal loan review procedures in making the judgment as to whether the loan is impaired or not, and if impaired to what extent. The federal banking regulators have suggested that the bank should consider the following in making its judgment: its "watch lists," its past due reports, any lack of reliable or current information in the borrower's loan files, whether the borrower's business is affected by troubled industries or geographical areas, whether there is inadequate loan documentation and what exception reports the bank has developed or received regarding the borrower.

9. The Federal Financial Institutions Examination Council (FFIEC) establishes uniform examination related policies for the various federally regulated financial institutions. Such policy statements are published by and constitute the uniform policy of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Office of the Comptroller of Currency and the National Credit Union Administration (these interagency statements may be found on all of these agencies' respective websites). This particular statement on the allowance for loan and lease losses (ALLL), which was most recently modified in December of 2006, is designed to ensure uniformity between the agencies as regards such losses and provide specific and practical guidance regarding processes for determination of such loss impairments under FAS 5 and FAS 114. The policy emphasizes that such determination must be ongoing (no less than quarterly) and must be a fundamental function of the financial institution's loan review process. The policy recognizes that FAS 114 is typically used to analyze impairment of individual loans and FAS 5 is typically used to analyze impairment of groups of loans. It emphasizes, however, that even if a loan is not determined to be impaired under FAS 114 it nonetheless should be evaluated under FAS 5 when specific characteristics of the loan indicates that it is probable there would be estimated credit losses in a group of loans with those characteristics (*e.g.*, the borrower is in a troubled industry or troubled geographical market).

the bank so as to allow the bank's regulatory agency to assess its financial condition and the safety and soundness of its operations. Typically, these statutes are broadly applied to deviations from complete transparency. Obvious violations include loan officers making false entries on currency transaction reports for cash payments on loans. Somewhat less obvious violations include accepting and filing in the bank's records incorrect loan purpose statements or inflated financial statements from borrowers, permitting borrowers to omit material information on loan applications, allowing inspectors to incorrectly certify completion of phases of construction work, and sanctioning the use of invalid comparables to increase appraised values of collateral.

As an additional level of protection for the bank's safety and soundness and accuracy of its records, a bank is responsible for filing a Suspicious Activity Report (SAR) to the Financial Crimes Enforcement Network (FinCEN) whenever it detects a known or suspected violation of federal law.¹⁰ Bank management must also notify the bank's board of directors, and the board, in turn, must record such notification in its minutes, thus providing for another vehicle for bank regulators to detect possible criminal violations.

There are many other circumstances where a lack of transparency may result in criminal liability. One example is if the loan officer makes a loan to a third party to pay off the troubled loan to an existing borrower without conspicuously disclosing all material facts on the bank's loan records and without disclosing those facts to the bank's regulators in the response to the Officer's Questionnaire required in the bank's regular safety and soundness examination process. The Officer's Questionnaire is used by federal banking examiners and many state examiners and must be completed by the bank's management and delivered to the regulator's examination team immediately prior to the bank's periodic Safety and Soundness examinations. The first question in the Officer's Questionnaire calls for disclosures of renewals and extensions of credit where the full interest has not been paid,

10. See Suspicious Activity Report, 12 C.F.R. 21.11 (2009) regarding national banks; other financial institutions are subject to practically identical rules for their operations.

where side notes are taken for interest, and where interest has been capitalized.¹¹ Failure to accurately make such disclosures exposes the certifying bank officers to criminal penalties.

Another example of the requirement for transparency is Question 3 of the Officer's Questionnaire which asks for disclosure of "extensions of credit made for the accommodation or direct benefit of anyone other than those whose names appear either on the note or other related credit instruments."¹² Historically, this question was first focused on money laundering activities, but now it applies in practice to anything that falls within its very broad language. The regulators apply it, for example, to a business associate borrowing money in his or her own name but "on loan" to an associate in an unrelated enterprise. By a literal reading of its terms, it applies to a natural person borrowing money for an uncreditworthy relative, even a mother borrowing funds for her son to go to graduate school. Failure to disclose all such loans which are known or reasonably should be known to fall within these parameters subjects the certifying officer to the criminal liability. From a practical perspective this is particularly troublesome since circumstances falling within the broad language are not rare, and the required disclosures are rarely made particularly in consumer and community banking contexts. Therefore, it is plausible that many chief executive officers may unwittingly make false certifications which subject them to felony prosecution.

All aspects of the needs for transparency and full disclosures should receive particular attention in this time of troubled financial markets. The numerous examples of criminal

11. "Question 1. List all extensions of credit and their corresponding balances which, since the last FDIC examination, have been renewed or extended under any of the following circumstances: (a) without full connection of interest due (b) with acceptance of separate notes for the payment of interest (c) with capitalization of interest to the balance of the note."

12. "Question 3. For all listed loans, state which situation applies. Consumer credit/installment loans may be aggregated by number and total dollar volume. List all extensions of credit made for the accommodation or direct benefit of anyone other than those whose names appear either on the note or on other related credit instruments. Only include extensions of credit made since the previous FDIC examination. Indicate if any executive officer, principal shareholder, director, or their related interest (per Federal Reserve Board Regulation O definitions) is or was involved."

prosecution during and after the S & L Crisis of the 1980s and early 1990s should be sufficient evidence of the risks inherent in these times.

C. *FDIC Call Report Topic Related to Troubled Credits*

In periods of uncertainty and turbulence in the financial market, it is important to highlight a related regulatory issue. Because of market turmoil, many financial institutions face the highly difficult tasks of valuing their assets and establishing appropriate loan loss reserves. For some community banks in particular, these tasks have exceeded their internal controls and the resulting recognition of material weaknesses in these controls has prevented the timely filing of applicable SEC reports by the banks or their holding companies. The SEC and Nasdaq reporting procedures anticipate such contingencies and permit late filings to occur without the imposition of penalties under very specific conditions.¹³ On the other hand, the regulatory procedures regarding the FDIC Call Reports have no such process for delayed filings, or filing Call Reports without certifying to their accuracy. A false certification of a Call Report subjects the certifying CEO and board to exposure to felony charges under the federal criminal statutes referenced earlier. Under the current published instructions, the Call Report must be timely filed *and certified* or the institution faces the exposure to over a million dollars in penalties. On the other hand, if the Call Report is filed containing knowingly incorrect information to which the CEO and board certify is accurate, such filing subjects the institution to exposure to over a million dollars in penalties and subjects its certifying officer and directors to personal felony charges.¹⁴ So whether it is not filed because it cannot be truthfully certified as correct, or it is filed and certified with incorrect information, penalties may be enforced.

13. See, e.g., NASDAQ, Inc., Nasdaq Manual Marketplace Rule 4310(c)(14) (2007).

14. See 12 C.F.R. § 308.132 (2008).

III. LEGAL TOPICS INHERENT IN LOAN MODIFICATIONS

There are numerous technical and practical issues involved in loan modifications. Some of the common ones will be addressed here. Of course, as is the case with many loan-related risks, the risks inherent between the bank and its customer in a loan modification normally only become a financial risk if the loan becomes a problem asset.

A. *Novation*

Novation is a common law concept where one contract is legally extinguished and replaced by another contract.¹⁵ Normally, the practical risk in a novation is that a party to the contract may unintentionally lose the benefits of a related agreement. For example, if one note is found to be a novation of prior note then, absent agreement to the contrary, a co-maker on the first note who is not a co-maker on the “novation note” is for practical purposes “released” in that his contractual obligations are extinguished.¹⁶ The same result would be true if a guarantor of the first note did not sign the novation note, or if a security agreement or mortgage securing the first note was not modified to secure the novation note.¹⁷ Novation is a contract principle, and like most contract principles, whether the loan modification is a novation or not depends upon the intent of the parties with the fact finder first directed to available written evidence.¹⁸ Therefore, if it is stated in a loan modification document that it is not a novation, then as to the parties who executed it, it is, absent extraordinary circumstances, not a novation. Similarly, if the original guaranty, security agreement, or mortgage between the parties states that such document is to guaranty or secure, as the case may be, subsequent loan modifications, then that intent, absent a new assent, will be deemed to apply in the vast majority of circumstances and a novation will not arise.¹⁹

15. See generally 66 C.J.S. *Novation* § 2 (2008).

16. See 66 C.J.S. *Novation* § 18 (2008).

17. See U.C.C. § 3-605(f) (2002).

18. See 66 C.J.S. *Novation* § 14 (2008).

19. See 66 C.J.S. *Novation* § 23; U.C.C. § 3-605(i) (2002).

B. Impact on Other Agreements

Other related contracts, such as title insurance contracts and account control agreements, may be affected by a modification whether any of those related contracts need to be revised or updated should be determined. It is important to ascertain what all related contracts contain before any changes are made to any contract. This is particularly significant when drafting a modification of a document which was originally prepared by another drafter, whether the original contract was done for the particular transaction by another lawyer or it happens to be one of the preprinted form contracts which are often used by community banks. There is danger in any assumptions regarding any content of these other documents with which the attorney may be less familiar. This is especially critical where collateral may be subject to the laws of other states where there may be a need to comply with any “unusual features” of local and industry specific laws.

Finally, in any club deal or syndicated credit, each bank needs to revisit the existing contractual provisions regarding the lead or agent bank’s duties and its rights regarding modifications, as well as the pertinent provisions regarding “Required Lenders” and any situations where consents may be required from supermajority lenders or all lenders.

C. Loan Participations

A loan participation may be construed as either a sale of an undivided interest in a loan by the participating bank, which transfers all beneficial and economic interests in the underlying loan leaving the seller with only bare legal title, or a loan from the participant bank to the participating bank. Whether the participation is construed on a sale or a loan depends upon the intent of the parties and the wording of the particular participation agreement. Of course, if the transaction is classified as a loan and the participant bank does not have a perfected security interest in the underlying loan or other collateral then the participant is an unsecured creditor allowing only general claimant rights against the bank originating the loan in any FDIC receivership of the

originating bank. All participation agreements should be examined for clarity on this issue and, to the extent the agreement is not clear, modified to achieve such clarity. Obviously, such modifications need to be timely done so as to avoid, to the extent possible, claims by the FDIC that the modification constitutes a fraudulent conveyance.²⁰

D. Revisitation of Original Analysis

A loan modification presents an opportunity to reflect upon the borrower's current circumstances in the context of existing documentation and filings to see if any changes or improvements are appropriate. This is particularly critical if the purpose of a loan modification is to prepare to move an undesirable customer out of the bank or when beginning an analysis of enforcement against the debtor in the event of a default.

In any pre-workout or troubled relationship analysis all documents should be reviewed for any shortcomings or discrepancies. Have all documents been properly executed? Have all blanks been filled in, particularly when form or preprinted documents have been used or where blanks were provided in execution versions to be filled in at the closing table? Has possessory collateral been received and does the security agreement accurately reflect that collateral? Have control agreements for security accounts and deposit accounts been received? Were all appropriate lockboxes set up and is cash dominion in place? Have applicable lien waivers been executed and received regarding warehousemen, storage facilities, carriers, landlords, contractors, architects, and similar third party rights? Are access rights in place to timber tracts, wellheads, and mines? Are mineral leases properly assigned? Are state and federal assignment of claims properly executed and recorded? Have intangible and documentary taxes been paid where failure to do so would impede or prohibit lien enforcement (e.g., Florida and

20. 12 U.S.C. § 1821(a) (2006). This issue is more fully discussed in the FIRREA analysis below.

Georgia collateral)?²¹ Are trademark and copyright liens perfected on primary collateral and are enforcement rights practically contracted for on packaging? Are sale and distribution rights secured for labeled goods? Should account debtor notification rights be exercised in an accounts receivable financing? Should new field audits be ordered? Is the lender properly qualified to do business in any jurisdiction necessary for effective lien enforcement, especially if the jurisdiction regards lending functions as doing business?²² Is the state law preempted by federal laws under either the Commerce Clause or banking laws for federally chartered entities?²³

Requirements for notices of default provided for and necessary under the loan documents or required by law should also be reviewed. Notices of default under notes and enforcement of attorneys' fees are customarily required in the documents and sometimes required by law²⁴ as are notices of proposed sales or collateral.²⁵ These provisions are not normally considered to be subject to waiver in the original loan agreements and most practitioners comply with the statutory provisions rather than rely upon post-default waivers or modification agreements which contain such waivers.

As previously mentioned, a study should be performed for any unusual local laws. For instance in North Carolina there is an unusual statutory provision regarding guarantors and sureties. Under North Carolina law, once an obligation is "due and payable" a surety of that obligation, including endorser or guarantor, may give a written notice to the holder of the obligation that requires the lender to "use all reasonable diligence to recover against the principal and to proceed to realize upon any securities which he holds for the obligation."²⁶ If the lender fails to comply with this demand within thirty days from receipt of the notice, then all sureties prejudiced thereby are discharged from their

21. *See* American First Fed. v. Lake Forest Park, Inc., 198 F.3d 1259 (11th Cir. 1999).

22. *See, e.g.*, CAL. FIN. CODE § 50003(g)(1) (2001).

23. *See, e.g.*, 12 C.F.R. § 34; *see also* 12 C.F.R. §§ 7.4008, 7.4009 (2007).

24. *See, e.g.*, N.C. GEN. STAT. § 6-21.2 (2007).

25. *See, e.g.*, N.C. GEN. STAT. § 25-9-613 (2007).

26. N.C. GEN. STAT. § 26-7(a) (2007).

obligations under the note.²⁷ The law provides that even if the note contains a waiver of any defense of the surety to an extension of the time for payment of the note, that waiver does not prevent the operation of this statutory provision to discharge the surety's obligation.²⁸ It is significant that the statute only says that waivers of surety defenses based upon extensions of time for payment do not prevent the operation of the surety discharge provision under the statute. The statute does not address other waivers and it is customary, therefore in commercial bank guaranty agreements for an explicit waiver of Section 26.7 of the North Carolina General Statutes. In most preprinted form guarantees, however, such an explicit waiver does not appear. Any modification involving a distressed credit under North Carolina law should carefully evaluate the appropriateness of requiring a waiver by all guarantors or sureties of the provisions of the North Carolina Statute.

IV. INSOLVENCY TOPICS INHERENT IN LOAN MODIFICATIONS

If any deficiencies or shortcomings appear in an analysis of the loan documents or if the modification is to improve the credit support and the borrower's or guarantor's condition is distressed, it is critical that an insolvency analysis also be performed. To properly analyze the ramifications of a possible insolvency proceeding, it is critical not only to understand the various provisions of the insolvency laws, but also to determine which body of insolvency law is applicable to the circumstances since different outcomes may result from the modification depending on the type of debtor involved.

A. *Bankruptcy Analysis – "Corporate" Debtors*

There are several bankruptcy law provisions applicable to general business entities and individuals which must receive particular attention in modifications. While this analysis is particularly important for problem credits, it is also important in

27. N.C. GEN STAT. § 26-9 (2007).

28. N.C. GEN STAT. § 26-9(b).

the context of any credit. The most significant bankruptcy provisions are the preference section,²⁹ the fraudulent conveyance section,³⁰ and the equitable subordination section.³¹

A preference under Section 547 of the Bankruptcy Code is a transfer of any property rights of the debtor to or for the benefit of the creditor within ninety days of the filing of a bankruptcy petition or within one year if the creditor is an insider of the debtor.³² Such a transfer may be avoided if it prefers the creditor by permitting it to receive more than it would have without the transfer in a hypothetical Chapter 7 bankruptcy liquidation of the debtor. A common litigation strategy used by bankruptcy trustees and debtors in bankruptcy is to attempt to extend the preference period beyond the ninety day period by arguing that the creditor exercised control over the debtor and thus was an insider so that the reach-back period is extended to a year.³³ A preference action is common for a bankruptcy trustee when a modification results in additional collateral being given by the debtor or the loan is paid down or paid off.

Fraudulent transfer attacks under Section 548 are based upon the notion that a transferor such as a debtor did not receive reasonably equivalent value in exchange for the transfer and was or became insolvent by virtue of the transfer, or had unreasonably small capital remaining after the transfer.³⁴ The reach back period here extends to transfers made in the one year period preceding the debtor's bankruptcy, but debtors often argue for state law fraudulent conveyance law application if the transfer occurred outside the year and the applicable state law reach back period is longer. A bankruptcy trustee often asserts a fraudulent conveyance action against the creditor if a modification results in a new guarantor or if new collateral is provided by an affiliate of the borrower.

29. 11 U.S.C. § 547 (2006).

30. 11 U.S.C. § 548 (2006).

31. 11 U.S.C. § 510 (2006).

32. 11 U.S.C. § 547(b) (2006).

33. *See* 11 U.S.C. § 101(31) (defining an insider as one who exercises control over the debtor).

34. 11 U.S.C. § 548.

Equitable subordination claims are essentially common law claims recognized in principle in Section 510 of the Bankruptcy Code to subordinate the creditor's claim to other claims or classes of claims in the bankruptcy proceeding. This provision is often at issue if the creditor has exercised considerable influence over the borrower to the disadvantage of other creditors or stakeholders.

An experienced bankruptcy attorney should carefully evaluate these Bankruptcy Code provisions in the context of any loan modification where the debtor is in distress so as to best structure and document the modification to withstand these potential challenges. While some bankruptcy practitioners advocate contracting away certain bankruptcy protections in any modification, the creditor can normally take little assurance that a bankruptcy court will enforce such waivers.³⁵

B. FIRREA Analysis – Bank Debtors

If the borrower is a bank holding company or a financial holding company the bankruptcy provisions discussed above as well as other bankruptcy laws and state insolvency laws apply to the debtor as ordinary corporations. But, if the borrower is a FDIC-insured bank, then the bankruptcy laws do not apply in its insolvency proceeding. Instead, the FDIC has its own receivership rules and procedures which govern claims against the failed bank. Relevant bank insolvency provisions are discussed in some detail here since there is less general familiarity with bank insolvency laws than there is with general "corporate" bankruptcy laws.³⁶

There is no preference concept under the FDIC insolvency process comparable to the bankruptcy preference provision. The FDIC may, however, assert its powers of avoidance under a fraudulent conveyance rule to set aside claims, including security interests in property, if the creditor took security interest in contemplation of the bank's insolvency or with the intent to

35. See *In re Atrium High Point Ltd. P'ship*, 189 B.R. 599 (Bankr. M.D.N.C. 1995) for a North Carolina case discussing the competing issues relating to such waivers.

36. See Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 DUKE L.J. 469 (1992) for an excellent in-depth analysis of policy and legal issues of bank insolvencies.

hinder, delay, or defraud the bank or its other creditors. This avoidance power can be applied to any transfer made within five years before the appointment of a receiver and may be asserted by the receiver for five years after its appointment.³⁷

The FDIC as the federal government's insurer of bank deposits has a unique interest in assuring that bank records which are subject to its regulatory examination and reporting, including those quarterly statements of condition known as Call Reports, accurately reflect the economic well being of banks and the true state of affairs regarding the bank's relationships with its customers, its lenders, and its suppliers. Therefore, the FDIC as receiver may seek redress against bankers, customers, lenders, and suppliers whose conduct has interfered with the transparency of the bank's records. Several doctrines and statutes have arisen from this principle and they are of exceptional importance in the loan modification and insolvency contexts since they give the FDIC as receiver powerful tools which are unavailable to bankruptcy trustees.

1. *D'Oench, Duhme* Doctrine and § 1823(e) of FIRREA

The *D'Oench, Duhme* Doctrine arising from a 1942 Supreme Court case bearing the same name,³⁸ stands for the general principle that secret side agreements with banks for which the FDIC has subsequently been appointed as receiver are unenforceable against the receivership. Congress enacted the Federal Deposit Insurance Act of 1950 which announced a similar, but more specific, statutory protection than *D'Oench, Duhme* and which was codified in § 1823(e) of title 12 of the U.S. Code. This section was reenacted as part of the Garn – St. Germain Depository Institution Act of 1982. In 1989, as part of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Congress reenacted § 1823(e) and specifically expanded its coverage in several respects, including coverage to the FDIC in its newly created receivership unit. The general *D'Oench, Duhme* Doctrine may have survived the passage of the

37. 12 U.S.C. 1821(a)(17) (2008).

38. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

FIRREA in 1989, or it may have been preempted by the more specific provisions of § 1823(e) of FIRREA.³⁹ While the *D'Oench, Duhme* Doctrine empowered federal receivers of banks to rely upon a common law theory of equitable estoppel to lawfully disregard secret side agreements which are adverse to the interests of the receivership, section 1823(e) goes much further and applies to any claim or defense that does not strictly meet the four statutory elements (1) the claim or defense must be based upon an agreement which is in writing, (2) the writing was

39. 12 U.S.C. § 1823(e) (2006). The current version of § 1823(e) reads in part as follows:

(e) Agreements Against Interests of Corporation-

(1) In General

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement-

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from time of its execution, an official record of the depository institution.

Congress added a new and related provision to § 1823(e) in FIRREA, which now appears in 12 U.S.C. § 1821(d)(9)(A)(2006):

(9) Agreement as Basis of Claim.

(A) Requirements.

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

Importantly, therefore, the coverage of and specificity required by 1823(e) for protection from adverse claims as to “assets” of the receivership also applies to “claims” which are unrelated to specific “assets” of the receivership.

contemporaneously executed by the parties claiming thereunder, (3) the agreement was approved by the bank's board of directors or loan committee, and (4) the agreement has continuously appeared in the bank's official records. Therefore, even good faith failures to comply with § 1823(e) will not prevent its application to cases by the FDIC. Conceptually, the statute is not designed so much as to protect the bank since it is not applicable to solvent banks as it is to protect the FDIC and therefore § 1823(e) assures that claims and defenses adverse to a failed bank can only apply against the FDIC as receiver if they satisfy § 1823(e), and thereby were apparent in regulatory examinations of the bank in a pre-receivership environment. Although the courts are not uniform on the issue of survival or pre-emption, the FDIC contends that the *D'Oench, Duhme* Doctrine continues to survive and that matters not falling within the parameters of § 1823(e) may nonetheless still be unenforceable.

2. Repudiation of Contracts by Receiver

Another unique power of the FDIC as receiver appears in § 1821(e)(1) and provides the FDIC the right to repudiate contracts that it deems burdensome in an insolvency proceeding for an insured bank.⁴⁰ While the discretion of the FDIC is virtually unlimited as to what is "burdensome" the effect of this power is restricted to some degree in § 1821(e)(12) which limits the FDIC's avoidance powers regarding security interest.⁴¹ Although these

40. 12 U.S.C. § 1821(e)(1) (2006). Section 1821(e)(1) reads as follows:

(1) Authority to Repudiate Contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease-

- (A) to which such institution is a party;
- (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
- (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

41. 12 U.S.C. § 1821(e)(12). Section 1821(e)(12) reads:

powers are only enforceable by the FDIC as receiver, it is important to recognize that, as a practical matter, the typical process works as follows: The bank's primary regulator – for example, the Comptroller of Currency for national banks - is responsible for the determination of the bank's insolvency. Should the bank be found insolvent, the FDIC will be appointed as its receiver. The FDIC has a number of options, but commonly the FDIC will sell the deposits and "good loans" to another bank as the highest bidder and the FDIC hires the same bank to administer the "bad loans" of the failed bank. That administering bank will analyze the individual loans and advise the FDIC which executory obligations the FDIC should repudiate.

3. The Provability Doctrine

In 1996, the FDIC issued a Statement of Policy reaffirming its policy of enforcing the statutory provisions regarding repudiation and the avoidability of security interests. It then cautioned, however, that it nonetheless retained the right to redeem or repay any secured obligation by repudiation. In such event, the FDIC postulates, subject to certain exceptions, that its liability for exercising its repudiation rights (and thus the amount of collateral value available to the insolvent bank's secured creditor) is limited to "actual direct compensatory damages determined as of the date of the appointment of the conservator or receiver" and that such allowed damages do not include "punitive or exemplary damages, damages for lost profits or opportunity or damages for pain and suffering."⁴²

(11) Certain Security Interests Not Avoidable

No provision of this subsection shall be construed as permitting the avoidance or any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

42. FDIC, Statement of Policy Regarding Treatment of Collateralized Letters of Credit After Appointment of the Federal Deposit Insurance Corporation as Conservator or Receiver, 60 Fed. Reg. 27,976 (May 19, 1995) (citing 12 U.S.C. § 1821(e)(3)(A) and (B)). Section 1821(e)(3) provides as follows:

The FDIC stated in a 1993 Statement of Policy “therefore, if the FDIC repudiates a legally enforceable and perfected security agreement, it cannot avoid any legally enforceable and perfected security interest in the collateral to the extent of the statutory damages allowed.”⁴³

In order to determine the “extent of the statutory damages allowed” one must analyze the appropriate standards to be used in determining the allowance. The FDIC’s current position and the pre FIRREA law was that the damages must be “provable” i.e., “unconditionally fixed.” Court cases regarding “provability,” however, suggest a more flexible standard. These cases contend that provable claims are those which (1) present a present cause of action, (2) which are certain but not yet matured, or (3) are contingent but the worth or amount can be determined by recognized methods of computation at the applicable date.⁴⁴

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided in [section regarding Qualified Financial Contracts (QFC’s), leases and real property sales], the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be –

(i) limited to actual direct compensatory damages; and

(ii) determined as of –

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in [section regarding QFC’s], the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term “actual direct compensatory damages” does not include (i) punitive or exemplary damages; (ii) damages for lost profits or opportunity; or (iii) damages for pain and suffering.

43. FDIC, Statement of Policy Regarding Treatment of Security Interests After Appointment of the Federal Deposit Insurance Corporation as Conservator or Receiver, 58 Fed. Reg. 16833 (Mar. 31, 1993).

44. *See, e.g.,* First Empire Bank v. FDIC, 572 F.2d 1361 (9th Cir. 1978). *See also* Bank One, Texas, N.A. v. Prudential Ins. Co. of America, 878 F. Supp. 943 (N.D. Tex. 1995) (holding that the FDIC as receiver was liable for contingent claims so long as those claims arise before insolvency and did not rely upon new contractual obligations created after insolvency).

The law is not settled as to whether the “provability” doctrine continues to apply in FDIC receiverships and conservatorships, or whether it was preempted by the specific standards of § 1821(e). The influential Court of Appeals for the District of Columbia Circuit has reasoned that the concept that an obligation must have become absolute by the time of insolvency had clearly weakened even before FIRREA’s adoption and it did not survive the specification of claims recoverable upon repudiation in § 1821(e)(3). The court went on to explain that even before FIRREA, creditors could recover for a receiver’s breach of a standby letter of credit which is, by its nature, contingent as to the obligation to pay.⁴⁵

These issues are of particular importance regarding secured stand-by letters of credit where the triggering event has not occurred at the time of the insolvency and the FDIC demands return of the collateral in the receivership.

4. Bank Operating Subsidiaries and Financial Subsidiaries

It is well settled that bank holding companies and financial holding companies which become insolvent are subject to the procedures provided under the Bankruptcy Code and clearly banks are subject to the federal insolvency regime including the conservatorship and receivership rules under FIRREA. But what about state chartered corporations owned by banks? There are three categories of subsidiaries of banks: bank operating subsidiaries, financial subsidiaries, and statutory subsidiaries. An operating subsidiary engages in activities which “are part of, or incidental to, the business of banking,” such as mortgage lending.⁴⁶ A financial subsidiary’s activities are those “that are financial in nature or incidental to a financial activity,” such as underwriting and dealing in securities.⁴⁷ A statutory subsidiary is one especially

45. *Nashville Loading Co., et. al. v. Resolution Trust Corp.*, 59 F.3d 236 (D.C. Cir. 1995).

46. OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S HANDBOOK, RELATED ORGANIZATIONS 7 (2004).

47. *Id.* at 10.

authorized by statute for specific purposes, such as a small business investment company or a bank service corporation.⁴⁸

While there is no definitive case or clearly controlling statute, the generally accepted assumption is that an operating subsidiary or “bank op sub” is not subject to the bankruptcy regime but is subject to conservatorship and receivership procedures under the FIRREA scheme along with its parent bank since both are in the “business of banking.” The reasoning is that bankruptcy law is not the exclusive mechanism for deal with insolvent institutions and there are alternate provisions under various federal and state regulatory schemes which provide for insolvency procedures for institutions engaged in certain lines of business.⁴⁹ Indicative as to what is the “business of banking” are the examples found in the National Bank Act (NBA) and the pronouncements of the Comptroller of the Currency regarding national banks although these are not definitive or necessarily exhaustive on the issue since the Comptroller’s Office only regulates national banks.⁵⁰

Numerous cases have studied the relationship of national banks and their operating subsidiaries; one of the most recent and important decisions was from the United States Supreme Court in *Watters v. Wachovia Bank, N.A.*⁵¹ In *Watters*, the Court noted:

[t]his Court has never held that the [National Bank Act]’s preemptive reach extends only to a national bank itself; instead, the Court has focused on the exercise of a national bank’s *powers*, not on its corporate structure in analyzing whether state law hampers the federally permitted activities of a national bank. And the Court has treated operating subsidiaries, as equivalent to national banks with

48. *Id.* at 14-18.

49. See H.R. REP. NO. 95-595, at 8 (1977) reprinted in U.S.C.A.N.N. 5963, 5969; S. REP. NO. 95-989, at 31 (1978), reprinted in U.S.C.A.N.N. 5787, 5817. These reports are the legislative history for The Bankruptcy Reform Act of 1978 and contain discussions of Section 109 of the U.S. Bankruptcy Code.

50. The bank powers under the National Bank Act are codified as amended in scattered sections of 12 U.S.C. A more readily accessible statement of those powers appears in 12 C.F.R. § 7 (2009).

51. 550 U.S. 1 (2007).

respect to powers exercised under federal law (except where federal law provides otherwise).⁵²

The Court also stated

[n]otably, when Congress amended the NBA to provide that operating subsidiaries may “engag[e] solely in activities that national banks are permitted to engage in directly” [12 U.S.C. § 24a(g)(3)(A)], it did so in an Act [Gramm-Leach-Bliley Act (GLBA)] providing that other affiliates, authorized to engage in nonbanking financial activities, *e.g.*, securities and insurance, are subject to state regulation in connection with those activities.⁵³

Since national bank affiliates other than operating subsidiaries are not necessarily considered to be engaged in the business of banking, does it follow that financial subsidiaries authorized by Gramm-Leach-Bliley would be excluded from the FIRREA insolvency scheme?

In distinguishing between these two categories of bank subsidiaries, the Comptroller of the Currency states that “(a)n operating subsidiary is a corporation, LLC, or similar entity that engages in activities that are part of, or incidental to, the business of banking as determined by the OCC or other statutory authority” and controlled by a bank.⁵⁴ On the other hand the Comptroller describes a financial subsidiary as “any company that is controlled by one or more insured depository institutions, other than a subsidiary that is an operating subsidiary or statutory subsidiary that engages in activities that are financial in nature or incidental to a financial activity.”⁵⁵

The Office of the Comptroller of Currency views the operating subsidiaries and the bank as a single economic entity for supervisory purposes. The results of operating subsidiaries are

52. *Id.* at 5 (citations omitted).

53. *Id.* at 20.

54. COMPTROLLER OF THE CURRENCY, *supra* note 46, at 7.

55. *Id.* at 10.

consolidated with those of the bank for applying such restrictions as maximum lending limits, and the operating subsidiaries are combined with the bank for regulatory restrictions such as 23A and 23B of the Federal Reserve Act⁵⁶ and the implementing rule of Regulation W.⁵⁷ On the other hand, financial subsidiaries are not considered to be subsidiaries of the bank for 23A, 23B and Regulation W and therefore financial subsidiaries are generally limited in the amount and conditions of borrowings and other transactions with the bank.⁵⁸

Likewise, in the anti-tying provisions of the Bank Holding Company Act⁵⁹ and the Federal Reserve's Regulation Y⁶⁰ generally treat a financial subsidiary of a bank as a subsidiary of the holding company and not a subsidiary of the bank.⁶¹ Furthermore, Gramm-Leach-Bliley recognized that regulators other than bank regulators may functionally regulate certain activities conducted by financial subsidiaries or banks.⁶²

While operating subsidiaries are generally viewed as functional parts of the bank and thus under the bank insolvency regime, the connection of financial subsidiaries is not so close to the "business of banking" as to assume that they are necessarily outside the regular federal bankruptcy process.⁶³ In a case decided

56. 12 U.S.C. § 371c (2006); 12 U.S.C. § 371c-1(2006).

57. 12 C.F.R. § 223 (2009).

58. 12 U.S.C. § 371c(e)(2) (2006).

59. 12 U.S.C. § 1971-78 (2006).

60. 12 C.F.R. §§ 225.01 to 225.200 (2009).

61. See 12 U.S.C. § 1971 (providing that a financial subsidiary is deemed to be a bank holding company subsidiary and not a bank subsidiary for the purposes of tying arrangements).

62. See, e.g., 12 U.S.C. §§ 1843(k), 1844(c)(4) (2007); see also Lissa L. Broome and Jerry W. Markham, *Banking and Insurance: Before and After the Gramm-Leach-Bliley Act*, 25 J. CORP. L. 723 (2000).

63. While the analysis here has focused on the powers of national banks, the powers of banks in the United States are, as a general matter, determined by their chartering authority. Thus, national bank powers are determined by the federal government and state chartered bank powers are determined by the various state authorities. As such, the general powers of banks vary widely. For example, as opposed to the federal scheme hereinbefore described, North Carolina banking law gives broad powers to banks chartered under its statutory scheme. N.C. GEN. STAT. § 53-43 provides that banks chartered under North Carolina law shall have certain enumerated powers "(i)n addition to the powers conferred by law upon private corporations." Consequently, under North Carolina laws, its chartered banks can exercise any general corporate powers plus banking powers. As regards insolvency regimes, North Carolina law provides a scheme for dissolution and liquidation of

prior to the GLBA and therefore not involving a financial subsidiary, however, the Fourth Circuit decided that a bankruptcy court could not enjoin the RTC in a FIRREA receivership (acting as the FDIC would act now for banks) from replacing the board of directors of the insolvent thrift's subsidiary land development company, permitting the new board of the subsidiary to withdraw its petition in bankruptcy.⁶⁴ The court's reasoning was that the comprehensive scheme of FIRREA allowed the RTC full rein over the assets of an insolvent thrift, including its ownership interest in subsidiaries, along with the specific anti-injunctive language found in § 1821(j) regarding receivers that the court said superseded the general statutory language of the Bankruptcy Code and thus the power of the bankruptcy courts in such regards. If the logic of the Fourth Circuit prevails, it would seem that public policy and statutory construction would favor allowing a bank receiver, in its discretion, to decide whether it would administer the financial subsidiary in the bank receivership, or whether it would permit the financial subsidiary to be subject to bankruptcy proceedings.

banks in Section 53-18 *et. seq.* These state provisions are not inconsistent with federal law; they are alternative; alternative powers permitted by chartering authorities under the dual banking system, and alternative insolvency mechanisms. A bank being formed in North Carolina, as in other states, may elect to be chartered under federal law or under state law. If it elects to be chartered under state law, it may elect to be insured under the FDIC or not to be so insured. If it elects not to be so insured, the state insolvency scheme is the one applicable. On the other hand, if it elects to have its deposits insured by the FDIC, although the state chartering authority retains the authority to declare a bank insolvent, in almost all cases the state will request the FDIC to act as the receiver in the event of an insolvency. In such event, the FDIC uses its receivership rules regardless of the bank's chartering authority (*see* 12 U.S.C. §1821(c) (2006)). Therefore, regardless of the 'business of banking' analysis as described hereinbefore in distinguishing FIRREA and bankruptcy insolvencies, if the failed institution is an insured bank, as opposed to a subsidiary of the insured bank, it seems clear that the FIRREA process will apply to its insolvency. Similarly, since financial subsidiaries can only exist if they are controlled by one or more insured depository institutions, should they by their organization structure be subject to the FDIC receivership procedures?

64. *In re Landmark Land Co. of Okla., Inc., Landmark Land Co. of Carolina, Inc., v. Resolution Trust Corp.*, 973 F.2d 283 (5th Cir. 1992).

V. DRAFTING LOAN MODIFICATIONS

Although there is no required format, style, or even a generally accepted practice, loan modifications customarily take the form of an amendment, modification, waiver, forbearance or amendment and restatement. The forbearance, or reservation of rights, is normally a vehicle used to maintain the status quo to see if a substantive modification can be negotiated without the lender waiving its rights regarding an event of default. The document(s) modified may be the note, loan agreement, or any ancillary or collateral documents. In fact, it is not uncommon to see more than one form used regarding the same document (e.g., the Third Modification of the Fifth Amendment Loan Agreement). As a matter of style, however, and in trying to keep the “four corners of the agreement” in one document, and making the job or the fact finder in a dispute more predictable, many practitioners prefer to use an amendment and restatement whenever possible. Most practitioners also prefer agreements for a forbearance or reservation of rights rather than “temporary waiver” agreements because of the perceived increased risk of estoppel in temporary waivers and the danger of potential misuse or misdescription of temporary waivers by borrowers to their other creditors or equity holders.

While the process of documenting loan modifications, like documenting original credit extensions, has many variations and dynamics, there are several characteristics that are especially desirable when the bank identifies the underlying credit as problematic. For example, grace periods should be reduced or eliminated. The modifications should include an acknowledgment of the validity and amount of the debt and that the borrower has no defenses, or offsets against the debt. To the extent any adverse claims have been or may be asserted against the lender, there should be a waiver of those claims. If an event of default has occurred, or if the borrower has been declared in default, that occurrence should be specifically identified and the borrower should represent that there are no other events of default or defaults, and that no facts or circumstances exist which, with the passage of time, would constitute an event of default or default.

The borrower should represent that there is no event of default or default in any other material contract or obligation and that the proposed modification would not constitute an event of default or default under those contracts or obligations. To the extent there is any exception to these representations, they should be identified and evaluated.

Examples of typical loan modification provisions follow in the Appendix.

VI. CONCLUSION

Loan modifications naturally arise when expectations regarding a credit relationship or the business or legal environments are not fulfilled. Loan modifications tend to be the most troublesome when the failure of the expectations is severe or the circumstances leading to it are new or unfamiliar.

The customary goal of loan agreements is to establish and document the framework of a credit relationship which is beneficial to both the borrower and the lender. In turbulent times that goal is not always achievable. The prospects of success are heightened, however, when each side understands what is a reasonably achievable goal and what conduct is lawful and acceptable in the marketplace in achieving a modified goal. The purpose of this article has been to explore some of the topics which impact a modification of the original goals of the stakeholders. The expectation is that an understanding of these topics may establish some foundation for the respective parties to consider what may be achievable by their efforts, and what the path might look like on the way to establishing and documenting those modified goals.

APPENDIX**Examples of Provisions which Tend to be Found in Loan Modifications:**

Representations and Warranties of Borrower. Borrower hereby represents and warrants that: (a) it has the requisite power and authority to execute, deliver and perform this Agreement and any related documents; (b) it is duly authorized to, and has been authorized by all necessary action, to execute, deliver and perform this Agreement and any related documents; (c) it has no claims, counterclaims, offsets, or defenses to the Loan Documents and the performance of its obligations thereunder; (d) the representations and warranties contained in the Loan Documents are, subject to the limitations set forth therein, true and correct in all material respects on and as of the date hereof as though made on and as of such date (except for those which expressly relate to an earlier date and except to the extent that such representations and warranties relate to the Existing Events of Default); (e) this Agreement does not violate any law, rule, regulation, contract or agreement otherwise enforceable by or against it; (f) other than the Acknowledged Events of Default, no default or event of default exists under the Loan Documents on and as of the date hereof and (g) that the amount owing to Lender as of close of business on _____, is \$_____ in principal and \$_____ in interest, all plus fees, costs, expenses and other charges.

Representations and Warranties of the Guarantor. The Guarantor hereby represents and warrants that it: (a) has had the opportunity to obtain the assistance of legal counsel in carefully reviewing, discussing and considering all terms of this Agreement; (b) executes this Agreement as a free and voluntary act, without any duress, coercion or undue influence exerted by or on behalf of any other party; (c) has full and complete authorization and power to execute this Agreement in the capacities herein stated, and that this Agreement does not violate any law, rule, regulation, contract

or agreement otherwise enforceable by or against it, and (d) it has no claims, counterclaims, offsets or defenses to the Guaranty.

Acknowledgment of Guarantor. The Guarantor acknowledges and consents to all of the terms and conditions of this Agreement and agrees that this Agreement and all documents executed in connection herewith do not operate to reduce or discharge the Guarantor's obligations under the Guaranty, or any other Loan Document.

Waiver and Release. Each of Borrower and the Guarantor waives any duty or obligation of the Lender to proceed to collect payment or to commence any actions against or to resort to any security or to offset any balance or any account of any person, including each of them, despite any notice or request of any of them to do so. Included in such waiver is any rights to marshalling, any rights under N.C.G.S. § 26.7, any right to require Lender to file any claims or proofs of claims in any insolvency proceeding, any right to stay of execution, co-debtor stay or any other stay, restraint or any requirement that the Lender proceed to collect the obligations referenced herein in any particular manner, fashion, order or priority other than as Lender may determine in good faith. Each of Borrower and the Guarantor hereby releases the Lender and its officers, employees, representatives, agents, attorneys and directors from any and all actions, causes of action, claims, demands, damages and liabilities of whatever kind or nature, in law or in equity, now known or unknown, suspected or unsuspected and any right or privilege which might be asserted or claimed by virtue of any course of conduct, prior dealings or similar allegations regarding in any manner the loans and transactions referenced herein arising on or before the date of this Agreement.

Liens. Each of Borrower and the Guarantor hereby affirms the liens and security interests created and granted in the Loan Documents and agrees that this Agreement shall in no manner adversely effect or impair such liens and security interests.

No Other Changes. Except as expressly modified in this Agreement, the terms, provisions and conditions of the Loan Documents Loan Documents shall remain unchanged and shall continue in full force and effect.

