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## Boilerplate Provisions in Transactional Documents: How to Stay Out of Trouble

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### Introduction

"Boilerplate" is defined as "slang for provisions in a contract, form or legal pleading which are apparently routine and often preprinted." Law.com Dictionary. Many provisions in contracts, typically in the latter parts of the agreements, are often referred to be "boilerplate" provisions. These clauses typically cover such legal issues as choice of law, jurisdiction, assignment, beneficiaries, effective date, and notice, among other matters. Often these provisions may be copied from other agreements, with little thought or attention to the details of their content. These type of provisions, however, are often material, and the failure to appropriately consider these provisions and properly address the issues raised may severely impact the rights and remedies of the parties.

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If you would like to write an article on any of the topics listed above, please contact Suzanne L. Weakley, California Business Law Practitioner, 300 Frank H. Ogawa Plaza, Suite 410, Oakland, CA 94612 (510) 302-2171; Suzanne.Weakley@ceb.ucop.edu. We would also like to hear from you if you would like to submit an article on any other topic appropriate for this publication.

The following materials contain examples of clauses (in boldface) that one might find in transactional documents, which are often denominated as “boilerplate” provisions; they are intended to provide a basis for discussion and consideration of the issues raised. The examples below are *not* offered as sample forms appropriate for use in actual agreements.

Examples	Comments
<b>General</b>	
<p><i>Application of contract principles</i></p> <ul style="list-style-type: none"> <li>• <b>This Loan Agreement shall be interpreted in accordance with ordinary principles of contract interpretation and not for or against any party to this Loan Agreement.</b></li> </ul>	<ul style="list-style-type: none"> <li>• General principles of contract law apply to agreements under the UCC unless “displaced by the particular provisions” of the UCC. Com C §1103.</li> <li>• <i>Hillis Motors, Inc. v Hawaii Auto Dealers Ass'n</i> (9th Cir 1993) 997 F2d 581.</li> </ul>
<p><i>“Plain English”</i></p> <ul style="list-style-type: none"> <li>• <b>In this Note, the words “I,” “me,” and “my” mean each and all of those who sign it. The words “you,” “your,” and “yours” mean Bank.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Consumer warranties must be in “simple and readily understood language.” CC §1793.1(a)(1).</li> <li>• Weise, <i>Plain English Will Set the UCC Free</i>, 28 Loyola L Rev 371 (1994); Weise, <i>Simplification in Drafting—the Uniform Commercial Code Article 9 Experience</i>, 74 Chicago-Kent L Rev 1309 (Fall 1999) (co-author).</li> <li>• Use of “plain English” for SEC filings. SEC Rules 421(b), (d); U.S. Securities and Exchange Commission, <i>A Plain English Handbook: How to Create Clear SEC Disclosure Documents</i> (Aug. 1998); <a href="http://www.sec.gov/pdf/handbook.pdf">http://www.sec.gov/pdf/handbook.pdf</a>.</li> </ul>
<p><i>Deceptive Practices</i></p> <ul style="list-style-type: none"> <li>• <b>Borrower waives all of his or her rights under applicable law.</b></li> </ul>	<ul style="list-style-type: none"> <li>• In consumer transactions, it constitutes an “unfair or deceptive act or practice” to (1) include provisions in a contract “which are prohibited by law” or (2) insert an unconscionable provision. CC §1770(a)(14), (19).</li> </ul>
<b>Drafting Considerations for Lawyers</b>	
<p><i>Conduct during negotiations</i></p> <ul style="list-style-type: none"> <li>• <b>The parties acknowledge that each is represented by its own counsel and is relying solely on its own counsel for advice.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Attorney liable for misrepresentation to other party to agreement when attorney promised to draft a provision one way but drafted it another way. <i>Cicone v URS Corp.</i> (1986) 183 CA3d 194, 227 CR 887.</li> </ul>

<p><i>Changes in documents</i></p> <ul style="list-style-type: none"> <li>• <b>“Marked to show changes” versions of the agreement are prepared using software provided by third parties. Neither Lender nor its counsel makes any representations, express or implied, that the software prepares accurate indications of all changes.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Attorney to one party does not have duty to other party to assure that written documentation accurately reflects oral agreements of the parties. <i>Fox v Pollack</i> (1986) 181 CA3d 954, 226 CR 532.</li> <li>• Attorney engaged in contract negotiations has an ethical duty to advise opposing counsel who is drafting agreement that opposing counsel has omitted a provision that the parties agreed would be included in the agreement. ABA Informal Ethics Opinion 86-1518 (Feb. 9, 1986).</li> <li>• Lender’s counsel has duty to borrower to advise borrower and its counsel of changes made in loan documents not otherwise indicated by preparation of “redline.” <i>Wright v Pennamped</i> (Ind App 1995) 657 NE2d 1223.</li> </ul>
<p><b><i>Preliminary Agreements; Commitment Letters; Letters of Intent</i></b></p>	
<p><i>Binding nature</i></p> <ul style="list-style-type: none"> <li>• <b>This Letter of Intent is subject to the approval of the Loan Committee of Lender.</b></li> <li>• <b>Neither execution of this letter of intent nor participation in subsequent negotiations shall create any obligation on the part of the undersigned. The undersigned shall have the right at its sole and absolute discretion to terminate its participation in negotiations without any further obligation or liability to any other party to this letter of intent.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Agreement subject to board of directors’ approval is binding subject to good faith obligation of board to consider the agreement. <i>Jacobs v Tenneco West, Inc.</i> (1986) 186 CA3d 1413, 231 CR 351; <i>Jacobs v Freeman</i> (1980) 104 CA3d 177, 163 CR 680. See also <i>Copeland v Baskin Robbins U.S.A.</i> (2002) 96 CA4th 1251, 117 CR2d 875 (contract to negotiate an agreement may be enforceable).</li> <li>• Agreement written on scrap of paper enforceable when it contains essential terms of deal. <i>Levin v Knight</i> (9th Cir 1986) 780 F2d 786.</li> <li>• Designating a document as an “agreement in principle” or as a “letter of intent” does not of itself make it a non-binding agreement. <i>Roth v Garcia Marquez</i> (9th Cir 1991) 942 F2d 617; <i>Republic of Nicaragua v Standard Fruit Co.</i> (9th Cir 1991) 937 F2d 469.</li> <li>• Proposal letter to a prospective borrower did not become binding obligation to make a loan; the letter obligated the lender to conduct due diligence but nothing further. <i>Clardy Mfg. Co. v Marine Midland Bus. Loans, Inc.</i> (5th Cir 1996) 88 F3d 347.</li> <li>• Handshake following negotiations does not mean that parties have entered into a binding agreement. <i>Rennick v O.P.T.I.O.N. Care, Inc.</i> (9th Cir 1996) 77 F3d 309.</li> </ul>

<p><i>Additional terms</i></p> <ul style="list-style-type: none"> <li>• <b>The Definitive Agreement shall contain additional terms, conditions, representations, warranties, and covenants customary for transactions of this type.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Parties may not be able to include in final documents terms not addressed in preliminary agreement and not customary for agreements of this type. See <i>999 Corp. v C.I.T. Corp.</i> (9th Cir 1985) 776 F2d 866; <i>Teachers Ins. &amp; Annuity Ass'n v Butler</i> (SD NY 1986) 626 F Supp 1229.</li> </ul>
<p><b><i>Date and Time</i></b></p>	
<p><i>General</i></p> <ul style="list-style-type: none"> <li>• <b>The parties hereto have executed this lease the day and year first above written.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Date on contract or instrument presumed to be correct. Evid C §640.</li> <li>• Transfer of property in writing <i>presumed</i> to have been delivered on the date of the transfer document. CC §1055.</li> <li>• Interest on instrument accrues from date of instrument unless otherwise stated. Com C §3112(a).</li> <li>• Reference to “standard time” (lower case) means time in effect, whether “Standard” or “Daylight Savings” time. <i>Miracle Auto Ctr. v Superior Court</i> (1998) 68 CA4th 818, 80 CR2d 587.</li> </ul>
<p><i>“As of” date</i></p> <ul style="list-style-type: none"> <li>• <b>Borrower has caused this Note to be duly executed, sealed, and delivered as of the date first above written.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Consider use of “as of” provision for date of agreement to seek to have effective date different from date of actual signing of agreement.</li> <li>• Consider effect on duration of agreement.</li> </ul>
<p><i>Conditional date</i></p> <ul style="list-style-type: none"> <li>• <b>This Commitment Letter shall be deemed effective as of the date it is accepted by Lender at its office as above set forth.</b></li> <li>• <b>This Security Agreement shall take effect immediately upon execution by the Borrower, and the execution hereof by Bank shall not be required as a condition to the effectiveness of this agreement.</b></li> <li>• <b>This Loan Agreement shall become effective as of [date] only upon the satisfaction of all of the following conditions precedent: [list].</b></li> </ul>	<ul style="list-style-type: none"> <li>• Interest on residential loan may not begin accruing until close of escrow or when loan proceeds made available to borrower. CC §2948.5.</li> <li>• Consider whether to notify parties when condition satisfied and agreement becomes effective.</li> </ul>
<p><b><i>Recitals</i></b></p>	
<ul style="list-style-type: none"> <li>• <b>The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Recitals “conclusively presumed to be true between the parties” to an agreement. Evid C §622; <i>Park Terrace Ltd. v Teasdale</i> (2002) 100 CA4th 802, 122 CR2d 797. Recitals may be used to assist in construction of a written transfer of property. CC §1068.</li> <li>• Recitals tell “story” of deal for persons implementing or litigating transaction.</li> </ul>

<b>Definitions</b>	
<ul style="list-style-type: none"> <li>• An accounting term not otherwise defined has the meaning assigned to it in accordance with GAAP.</li> <li>• It is the intention of the parties hereto that this Agreement is entered into pursuant to the provisions of the UCC. Any applicable provisions of the UCC not specifically included herein shall be deemed a part of this Agreement in the same manner as if set forth herein at length; and any provisions of this Agreement that might in any manner be in conflict with any provision of the UCC shall be deemed superseded by the UCC.</li> <li>• Whenever this Indenture refers to a provision of the Trust Indenture Act, such provision is incorporated by reference in and made a part of this Indenture.</li> </ul>	<ul style="list-style-type: none"> <li>• Consider whether to tie to definitions in a code, e.g., references to GAAP may not produce desired results because GAAP definitions may not have same meaning as businessperson expects or GAAP definition may not exist. See Corp C §114.</li> <li>• State whether parties intend to use definitions from outside source when using terminology from another source.</li> <li>• If incorporating provisions of another law, consider whether to incorporate its definitions.</li> <li>• "Incorporation by reference" means that the incorporated document is made an actual part of the document into which it is incorporated. <i>Republic Bank v Marine Nat'l Bank</i> (1996) 45 CA4th 919, 53 CR2d 90.</li> </ul>
<b>Third Parties</b>	
<p><i>Third Party Beneficiaries</i></p> <ul style="list-style-type: none"> <li>• This Agreement has been made and is made solely for the benefit of the parties to this Agreement, and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.</li> </ul>	<ul style="list-style-type: none"> <li>• Contract made expressly for third party may be enforced by third party. May want to state that there are no third party beneficiaries. CC §1559; <i>Eastern Aviation Group, Inc v Airborne Express, Inc.</i> (1992) 6 CA4th 1448, 8 CR2d 355; <i>Soderberg v McKinney</i> (1966) 44 CA4th 1760, 52 CR2d 635.</li> </ul>
<p><i>Assignment</i></p> <ul style="list-style-type: none"> <li>• Buyer shall not voluntarily or by operation of law assign, transfer, mortgage, sublet, or otherwise transfer or encumber all or any part of Buyer's interest in this Agreement, without Seller's prior written consent, which Lessor shall not unreasonably withhold.</li> <li>• Lender may assign its rights under this Agreement only to a financial institution with assets in excess of \$ [amount].</li> </ul>	<ul style="list-style-type: none"> <li>• Anti-assignment provisions interpreted narrowly, and general language may not cover transfer of less than whole interest or transfers by gift or operation of law. Consider broad definition of "assignment" to limit assignability. See CC §1995.220; <i>Trubowitch v Riverbank Canning Co.</i> (1947) 30 C2d 335, 182 P2d 182; <i>Chapman v Great Western Gypsum Co.</i> (1932) 216 C 420, 14 P2d 758. In the absence of effective limitation, generally can assign rights. CC §1458. See Com C §§9406–9408.</li> <li>• Restriction on transfer of lease that requires lessor's consent, but does not provide a standard, automatically includes a reasonableness standard. CC §1995.260.</li> <li>• May not prohibit assignment of right to money due under account, chattel paper, or general intangible, although assignee may not have right to enforce against obligor. Com C §§9406, 9408.</li> </ul>

	<ul style="list-style-type: none"> <li>• Sale of interest in owner of interest in contract is not “assignment” of interest in contract itself. <i>United States Cellular, Inv. Co. v GTE Mobilnet, Inc.</i> (9th Cir 2002) 281 F3d 929.</li> <li>• Assignment of “all” rights means “all” rights. <i>Knott v McDonald’s Corp.</i> (9th Cir 1998) 147 F3d 1065.</li> </ul>
<p><i>Delegation</i></p> <ul style="list-style-type: none"> <li>• <b>Regardless of Lender’s consent, no assignment shall release Borrower of Borrower’s obligation or alter the primary liability of Borrower to pay the Obligations and to perform all other obligations to be performed by Borrower hereunder.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Assignment does not release assignor from obligations under contract; assignor may become secondary obligor. CC §1457; <i>Meredith v Dardarian</i> (1978) 83 CA3d 248, 147 CR 761; Restatement (Third) of Suretyship and Guaranty §1 (1996).</li> <li>• Cannot delegate duty without consent of person entitled to benefit of obligation. CC §1457 does not provide a standard for granting or withholding consent, but should include a reasonableness standard.</li> </ul>
<p><i>Binding on successors and assigns</i></p> <ul style="list-style-type: none"> <li>• <b>Each and all of the provisions hereof shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors or assigns of Borrower, and the heirs, executors, successors, and administrators of Borrower, and upon the [permitted] assigns [of Borrower, if any assignment has been made with the consent in writing of Lender].</b></li> <li>• <b>The term “Beneficiary” shall mean the owner and holder, including pledgees, of the note secured hereby.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Assignee who voluntarily accepts benefits of transaction “consents” to assumption of obligations. CC §1589.</li> <li>• Surviving entity in merger by operation of law “subject to all the debts and liabilities of each” party to the merger. Corp C §1107(a).</li> <li>• Make sure provision is consistent with assignment and delegation clause.</li> </ul>
<p><b>Notice</b></p>	
<p><i>Actual or constructive</i></p> <ul style="list-style-type: none"> <li>• <b>All notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed to have been duly “delivered” either (i) when hand delivered to the other party or (ii) three business days after the same have been deposited in a United States post office with first class postage prepaid and addressed to the parties as follows:</b></li> <li>• <b>Borrower shall give Lender notice of any Event of Default upon Borrower having notice of such event.</b></li> <li>• <b>“Notice” or “knowledge” under this Agreement shall mean only the conscious awareness of information by [name persons].</b></li> </ul>	<ul style="list-style-type: none"> <li>• Constructive notice of a fact includes “actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact.” CC §§18, 19.</li> <li>• The filing of a document (e.g., UCC financing statement) does not of itself constitute notice for purposes outside of Article 9. Com C §§9304(5), 9309.</li> <li>• Notice of a fact deemed received when recipient has actual knowledge of it, or from all facts and circumstances <i>known</i> to recipient, recipient has reason to know it exists. Com C §§1201(25), 3302.</li> </ul>

<p><i>Methods</i></p> <ul style="list-style-type: none"> <li>• <b>Any notice required or permitted to be given hereunder shall be in writing and may be given by personal delivery or by certified mail, and if given personally or by mail, shall be deemed sufficiently given if addressed to Lessee or Lessor at the address noted below.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Notice “given” when giver of notice takes “such steps as may be reasonably required to inform the other in ordinary course whether or not the other actually comes to know of it.” Com C §1201(26).</li> <li>• Consider providing for alternative modes of delivery, e.g., telecopy, e-mail, posting on web page, and air delivery services.</li> <li>• Consider providing for effect of notice that arrives after business hours (e.g., fax).</li> <li>• Consider calendaring notice periods arising under contract (e.g., notice of breach).</li> <li>• Consider indicating whether contract provisions affecting notice are exclusive or provide a safe harbor.</li> <li>• Provide method for changing information regarding delivery of notice.</li> </ul>
<p><i>Presumption</i></p> <ul style="list-style-type: none"> <li>• <b>Any notice shall be conclusively deemed to have been received by a party hereto and be effective on the day on which delivered to such party at the address set forth on the first page hereof or, if sent to a party by mail, on the third Business Day after the day on which mailed to its address hereinabove mentioned.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Correctly addressed letter presumed to have been received in the ordinary course of the mail. Evid C §641.</li> <li>• Consider defining notice to take evidentiary rules into account and to specify number of days after mailing that notice is effective.</li> </ul>
<p><i>Organizations</i></p> <ul style="list-style-type: none"> <li>• <b>Any check tendered as payment in full of any obligations must be directed to the attention of “Disputed Accounts.”</b></li> </ul>	<ul style="list-style-type: none"> <li>• Consider limiting effectiveness of notice to an organization to notice delivered to a particular person. Com C §§1201(27), 3311.</li> </ul>
<b>Signatures</b>	
<p><i>Which documents</i></p> <ul style="list-style-type: none"> <li>• <b>Borrower agrees to execute any additional documents deemed necessary by lender to assure the perfection of the security interest created hereunder.</b></li> </ul>	<ul style="list-style-type: none"> <li>• May need power of attorney, coupled with an interest, to make this type of provision irrevocable and effective.</li> </ul>
<p><i>Whose required—corporate</i></p> <ul style="list-style-type: none"> <li>• <b>The undersigned has full power and authority to enter into this agreement on behalf of the Company.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Corporate documents bearing signatures of two officers from specified categories cannot be invalidated by corporation for lack of authority. Corp C §313; <i>Snukal v Flightways Mfg., Inc.</i> (2000) 23 C4th 754, 98 CR2d 1.</li> <li>• Corporate articles, bylaws, and minutes may limit persons who may sign documents.</li> </ul>

<p><i>Whose required—individual</i></p> <ul style="list-style-type: none"> <li>• Any Borrower who is a married woman hereby expressly agrees that recourse may be had against her separate property for all obligations secured hereunder.</li> <li>• Any married person signing this Note agrees that recourse may be had against community assets and against his or her separate property for the satisfaction of all obligations contained herein.</li> </ul>	<ul style="list-style-type: none"> <li>• Transfer of interest in community real property requires signature of both spouses, even if property held in name of one spouse only. Fam C §1102.</li> <li>• Separate property of one spouse not available for satisfaction of obligation entered into by other spouse. Fam C §913.</li> <li>• Community property may not be liable for debt incurred during marriage if property is received by one spouse upon dissolution and debt is assigned to the other spouse. Fam C §916.</li> <li>• Equal Credit Opportunity Act may limit ability to obtain legally signatures of spouse not involved in the transaction. Fed Reserve Bd Reg B, §202.7(d)(3); <i>Silverman v Eastrich Multiple Investor Fund, L.P.</i> (3d Cir 1995) 51 F3d 28; <i>U.S. v ITT Consumer Fin. Servs.</i> (9th Cir 1987) 816 F2d 48.</li> </ul>
<p><i>Counterparts</i></p> <ul style="list-style-type: none"> <li>• Each of the counterparts of this Agreement executed simultaneously herewith by all parties hereto shall be deemed an original of this Agreement.</li> <li>• The signature page of each counterpart may be detached from such counterpart and attached to a single document which shall for all purposes be treated as an original.</li> </ul>	<ul style="list-style-type: none"> <li>• Provide for execution in counterparts on separate pieces of paper.</li> </ul>
<p><i>Method</i></p> <ul style="list-style-type: none"> <li>• Each party shall adopt as its signature an electronic identification consisting of symbol(s) or code(s) which are to be affixed to or contained in each Document transmitted by such party (“Signatures”). Each party agrees that any Signature of such party affixed to or contained in any transmitted document shall be sufficient to verify such party originated such Document.</li> <li>• Fax signatures shall be deemed as legally effective as a signed original.</li> <li>• Duly acknowledged facsimile signatures shall be deemed as originals.</li> </ul>	<ul style="list-style-type: none"> <li>• May include party’s mark. CC §14.</li> <li>• “Signed” may include “any symbol executed or adopted by a party with present intention to authenticate a writing.” Com C §1201(38); <i>Estate of Stephens</i> (2002) 28 C4th 665, 122 CR2d 358 (person can sign for another without written authority when person signing acts as a mere amanuensis, signing at his request as a ministerial act, without discretion); “authentication” of a “record” suffices in some situations. Com C §9102(a)(7), (69).</li> <li>• Printed name in an advertisement served as “signature” to cause ad to operate as an “offer.” <i>Donovan v RRL Corp.</i> (2001) 26 C4th 261, 109 CR2d 807.</li> <li>• Consider providing for signature by telecopy, telegram, or electronic means. See Electronic Signatures in Global and National Commerce Act (E-Sign) (15 USC §§7001–7031); Uniform Electronic Transactions Act (CC §§1633.1–1633.17).</li> </ul>

<p><i>Personal liability</i></p> <ul style="list-style-type: none"> <li>• <b>The obligations of the Debtor hereunder shall not be binding upon any of the Trustees, shareholders, officers, or agents of the Debtor personally, but only on the trust estate of the Debtor.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Corporate officers and other agents should clearly indicate that they are signing in a representative capacity, to avoid possible personal liability. Com C §3402; Prob C §18000; <i>Home Fed. Sav. &amp; Loan Ass'n v Ramos</i> (1991) 229 CA3d 1609, 284 CR 1.</li> </ul>
<b>Performance</b>	
<p><i>Discretionary approval clause</i></p> <ul style="list-style-type: none"> <li>• <b>Publisher has the right in its discretion to terminate the publishing relationship with Author after receiving the Manuscript.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Right of a party in its "discretion" to approve performance of other party or other matter must be exercised in good faith. <i>Chodos v West Publishing Co., Inc.</i> (9th Cir 2002) 292 F3d 992, 997 (applying California law).</li> </ul>
<p><i>Best efforts clause</i></p> <ul style="list-style-type: none"> <li>• <b>Seller will use all reasonable means to make delivery on the date wanted as indicated on the face of this order.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Best efforts clause will require affirmative efforts in excess of those otherwise required by good faith obligation. <i>R.B. Matthews, Inc. v Transamerica Transp. Servs., Inc.</i> (9th Cir 2001) 945 F2d 269 (applying California law); <i>Bloor v Falstaff Brewing Co.</i> (2d Cir 1979) 601 F2d 609 (promisor must use total capabilities).</li> </ul>
<p><i>Termination of contract</i></p> <ul style="list-style-type: none"> <li>• <b>Until such obligations are satisfied in full, such termination shall not affect the security interest granted hereby and the duties, covenants, and liabilities of Debtor hereunder, and all the terms, conditions, and provisions hereof relating thereto shall continue to be fully operative until all transactions entered into and obligations incurred hereunder have been fully disposed of, concluded, and/or liquidated.</b></li> <li>• <b>This agreement shall terminate after written notice from either party to the other that no further loans are to be made hereunder is received and Borrower pays in full all outstanding loans made hereunder and all other indebtedness of Borrower to the Bank secured hereby.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Consider drafting right of a party to terminate or suspend its performance upon other party's default. CC §§1440, 1689; Com C §§2609, 2610.</li> <li>• Consider providing that termination does not terminate the "contract" as a whole and right to damages. Com C §§2703, 2711.</li> <li>• May want to have certain covenants survive completion of agreement, such as borrower's obligation to indemnify secured party for environmental costs incurred by lender arising out of collateral and increases in costs.</li> </ul>

<p><i>Commercial impracticability</i></p> <ul style="list-style-type: none"> <li>• <b>No party shall be liable for any failure to perform its obligations in connection with any Transaction or any Document, where such failure results from any act of nature or other cause beyond such party’s reasonable control (including without limitation, any mechanical, electronic, or communications failure).</b></li> </ul>	<ul style="list-style-type: none"> <li>• Performance excused when (1) prevented by operation of law or act of other party, even if contract provides to the contrary, or (2) prevented by “superhuman” cause, unless parties agree to the contrary. CC §1511.</li> <li>• Impossible condition is void and does not require satisfaction. CC §1441.</li> <li>• Performance excused when made impracticable by event the nonoccurrence of which was a basic assumption on which the contract was made. Com C §2615. Consider providing for parties to undertake a greater or lesser obligation in the event of the occurrence of particular events specified in the contract that would otherwise excuse or not excuse performance or were based on a basic assumption on which the contract was made. See <i>Horsemen’s Benevolent &amp; Protective Ass’n v Valley Racing Ass’n</i> (1992) 4 CA4th 1538, 6 CR2d 698.</li> <li>• Force majeure clause that applies to a party’s “obligations” does not excuse performance of express provisions. <i>San Mateo Comm. College Dist. v Half Moon Bay Ltd. Partnership</i> (1998) 65 CA4th 401, 76 CR2d 287.</li> </ul>
<p><i>Time of the essence</i></p> <ul style="list-style-type: none"> <li>• <b>Time is of the essence.</b></li> <li>• <b>Time is expressly made of the essence in connection with the payment of the rent called for herein and the performance of any of the terms and conditions of this lease by Lessee.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Clause not given effect if it works a forfeiture. CC §3275.</li> </ul>
<p><b>Waivers</b></p>	
<p><i>General</i></p> <ul style="list-style-type: none"> <li>• <b>Borrower waives all exemptions.</b></li> </ul>	<ul style="list-style-type: none"> <li>• May waive provisions of a law unless enacted for a “public reason” or waiver would be against “public policy.” CC §§3513, 3268.</li> <li>• May not waive UCC obligations of good faith, diligence, reasonableness, care, and commercial reasonableness. Com C §§1102(3), 9602.</li> <li>• UCC permits parties to determine by agreement standards for performance of nonwaivable duties if standards are not “manifestly unreasonable.” Com C §§1102(3), 9603(a).</li> </ul>

<p><i>Real property rights</i></p> <ul style="list-style-type: none"> <li>• Guarantor does hereby waive all right to claim any property, including homestead, as exempt from levy, execution, sale, or other legal process.</li> </ul>	<ul style="list-style-type: none"> <li>• Borrower may not waive protective provisions of real property foreclosure rules at time of “making or . . . renewing” loan. CC §2953; <i>Palm v Schilling</i> (1988)199 CA3d 63, 244 CR 600. See also <i>DeBerard Props. Ltd. v Lim</i> (1999) 20 C4th 659, 85 CR2d 292.</li> </ul>
<p><i>Guarantors</i></p> <ul style="list-style-type: none"> <li>• Guarantor hereby waives any defense arising by failure of Bank to obtain, perfect, maintain, or keep in force any security interest in any property of Debtor.</li> <li>• Guarantor hereby waives any defense based upon any failure of Bank to give Guarantor notice of any sale or other disposition of any property securing any or all of the Indebtedness, or any failure by Bank to dispose of any such property in a commercially reasonable manner.</li> </ul>	<ul style="list-style-type: none"> <li>• May be appropriate to waive effect of changes in underlying obligation, obligation to pursue principal first, notice, and related matters. See CC §§2787–2856. In general, cannot waive rights arising under UCC Article 9. See Com C §9602.</li> <li>• Waivers of defenses must be highly “explicit.” <i>Cathay Bank v Lee</i> (1993) 14 CA4th 1533, 18 CR2d 420. See CC §2856.</li> <li>• Cannot waive creditor’s obligation of good faith. <i>Sumitomo Bank v Iwasaki</i> (1968) 70 C2d 81, 73 CR 564.</li> <li>• Cannot waive guarantor’s right to notice and commercial reasonableness of personal property foreclosure sale. <i>Security Pac. Nat’l Bank v Kirkland</i> (9th Cir 1990) 915 F2d 1236 (applying California law).</li> <li>• Guaranty of <i>collection</i> (as distinct from a guaranty of <i>payment</i>) may require efforts to collect from debtor. CC §§2800, 2802; Com C §3419.</li> <li>• CC §2856 contains legally sufficient exemplars of waivers of certain specific guarantor rights.</li> </ul>
<p><i>Jury Trial Waivers</i></p> <ul style="list-style-type: none"> <li>• <b>TO THE FULLEST EXTENT PERMITTED BY LAW, AND AS SEPARATELY BARGAINED-FOR CONSIDERATION, EACH BORROWER HEREBY WAIVES ANY RIGHT TO TRIAL BY JURY (WHICH LENDER ALSO WAIVES) IN ANY ACTION, SUIT, PROCEEDING, OR COUNTERCLAIM OF ANY KIND ARISING OUT OF OR RELATING TO ANY OF THE LOAN DOCUMENTS, THE OBLIGATIONS, OR THE COLLATERAL. EACH BORROWER HEREBY EXPRESSLY ACKNOWLEDGES THE INCLUSION OF THIS JURY TRIAL WAIVER THROUGH THE INITIALS OF ITS DULY AUTHORIZED REPRESENTATIVE.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Predispute contractual jury trial waivers are not enforceable under California law. Jury trial waivers in civil cases are permitted only after the lawsuit has been initiated and only as prescribed by CCP §631. <i>Grafton Partners LP v Superior Court</i> (Aug. 4, 2005, No. S123344) 2005 Cal Lexis 8586.</li> </ul>

<p><i>Accepting varied performance</i></p> <ul style="list-style-type: none"> <li>• <b>Waiver by Lessor of any breach of any term or condition of this lease shall not constitute a waiver of subsequent breaches.</b></li> <li>• <b>By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive its right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.</b></li> <li>• <b>No waiver by Lessor of any provision hereof shall be deemed a waiver of any other provision hereof.</b></li> <li>• <b>If at any time a dispute shall arise as to any amount of money to be paid by one party to the other under the provisions hereof, the party against whom the obligation to pay the money is asserted shall have the right to make payment “under protest” and such payment shall not be regarded as a voluntary payment; and there shall survive the right on the party of said party to institute suit for recovery of such sum.</b></li> </ul>	<ul style="list-style-type: none"> <li>• May want to provide that express waiver or decision not to enforce rights in one circumstance does not create any obligation to grant future waivers.</li> <li>• May accept performance not in accordance with provisions of contract if make “explicit reservation of rights.” Com C §1207.</li> <li>• Generally, tender of payment-in-full check will be effective. Com C §3311; <i>Woolridge v J.F.L. Elec., Inc.</i> (2002) 96 CA4th Supp 52, 117 CR2d 771. Consider providing that course of performance will not operate to waive provisions of contract or modify it. See Com C §2208.</li> <li>• May prospectively retract waiver arising out of course of performance and reinstate original obligation by giving “reasonable notification . . . that strict performance will be required.” Com C §2209(5); <i>Noyes v Habitation Resources, Inc.</i> (1975) 49 CA3d 910, 123 CR 261.</li> </ul>
<p><b><i>Jurisdiction and Venue</i></b></p>	
<p><i>Consent to Jurisdiction</i></p> <ul style="list-style-type: none"> <li>• <b>EACH BORROWER WAIVES ANY OBJECTION TO JURISDICTION OF ANY ACTION INSTITUTED AGAINST IT AS PROVIDED HEREIN AND AGREES NOT TO ASSERT ANY DEFENSE BASED ON LACK OF JURISDICTION.</b></li> <li>• <b>This Agreement shall be governed by and construed according to the laws of the State of California, to the jurisdiction of which the parties hereto submit.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Consent to personal jurisdiction enforceable if “freely negotiated” and not “unreasonable and unjust.” <i>Burger King v Rudzewicz</i> (1985) 471 US 462, 85 L Ed 2d 528, 105 S Ct 2174.</li> </ul>
<p><i>Forum Selection</i></p> <ul style="list-style-type: none"> <li>• <b>EACH BORROWER HEREBY CONSENTS TO THE JURISDICTION OF ANY STATE OR FEDERAL COURT LOCATED WITHIN LOS ANGELES COUNTY OF THE STATE OF CALIFORNIA AND WAIVES PERSONAL SERVICE OF ANY AND ALL PROCESS UPON IT AND CONSENTS THAT ALL SUCH SERVICE OF PROCESS BE MADE BY CERTIFIED MAIL DIRECTED TO BORROWER AT THE ADDRESS STATED ABOVE.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Forum selection clause enforceable in the absence of unreasonableness or serious inconvenience when other party has notice of provision. <i>Carnival Cruise Lines, Inc. v Shute</i> (1991) 499 US 585, 113 L Ed 2d 622, 111 S Ct 1522; <i>Smith, Valentino &amp; Smith, Inc. v Superior Court</i> (1976) 17 C3d 491, 131 CR 374; <i>Intershop Communications, AG v Superior Court</i> (2002) 104 CA4th 191, 127 CR2d 847 (mandatory clause unenforceable only if unreasonable); <i>CQL Original Prods., Inc. v National Hockey League Players Ass’n</i> (1995) 39 CA4th 1347, 46 CR2d 412; <i>Lifeco Servs. Corp. v Superior Court</i> (1990) 222 CA3d 331, 271 CR 385.</li> </ul>

	<ul style="list-style-type: none"> <li>• Forum selection clause not enforceable when it operates as a waiver of important rights. <i>America Online, Inc. v Superior Court</i> (2001) 90 CA4th 1, 108 CR2d 699.</li> <li>• Language that a particular court “shall have jurisdiction” treated as permissive and not mandatory, permitting venue in other locations. <i>Dockside, Ltd. v Sea Technology, Ltd.</i> (9th Cir 1989) 875 F2d 762.</li> <li>• Venue selection clause not enforceable. <i>Alexander v Superior Court</i> (2003) 114 CA4th 723, 8 CR3d 111.</li> </ul>
<b>Choice of Law</b>	
<p><i>Enforceability</i></p> <ul style="list-style-type: none"> <li>• <b>This Loan Agreement shall be governed by the laws of the State of California.</b></li> <li>• <b>This Agreement and all transfers and assignments hereunder, and all rights of the parties, shall be governed as to validity, construction, enforcement, and in all other respects by the laws of the State of California (without regard to choice-of-law rules).</b></li> </ul>	<ul style="list-style-type: none"> <li>• In the absence of a choice-of-law clause, court will apply interest analysis.</li> <li>• Court will generally uphold choice-of-law provision if transaction bears a “reasonable” relationship to the state chosen. <i>Nedlloyd Lines B.V. v Superior Court</i> (1992) 3 C4th 459, 11 CR 330; <i>Hambrecht &amp; Quist Venture Partners v American Med. Int’l, Inc.</i> (1995) 38 CA4th 1532, 46 CR2d 33 (state of incorporation provides sufficient basis for choice-of-law clause). See also Com C §1105; Restatement (Second) of Conflict of Laws §187 (1971).</li> <li>• Court will not enforce choice-of-law provision if application of the chosen jurisdiction’s law will violate a “fundamental” public policy of the state whose law would apply in the absence of a choice-of-law clause, if that state has a materially greater interest in having its law enforced with regard to that issue. <i>Washington Mut. Bank v Superior Court</i> (2001) 24 C4th 906, 75 CR2d 151; <i>Guardian Sav. &amp; Loan Ass’n v MD Assocs.</i> (1998) 64 CA4th 309, 103 CR2d 320. See also <i>Paracor Fin., Inc. v General Elec. Capital Corp.</i> (9th Cir 1996) 96 F3d 1151 (may not use choice-of-law clause to preclude claims under the securities laws of states <i>not</i> identified in the choice-of-law clause).</li> <li>• Even in the absence of a substantial relationship, California court will enforce provision for application of California law if transaction involves \$250,000 or more. CC §1646.5, CCP §410.40.</li> </ul>

<p><i>Scope of Clause</i></p> <ul style="list-style-type: none"> <li>• <b>The transactions contemplated by and the provisions of this Security Agreement shall be governed by and construed in accordance with the laws of the State of Delaware.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Reference to the “law” of another jurisdiction includes its “local laws” and statutes of limitations, but not its choice-of-law rules. <i>Hambrecht &amp; Quist Venture Partners v American Med. Int’l, Inc.</i> (1995) 38 CA4th 1532, 46 CR2d 33; Restatement (Second) of Conflict of Laws §8 (1971).</li> </ul>
<p><b>Statute of Limitations</b></p>	
<p><i>Waiver</i></p> <ul style="list-style-type: none"> <li>• <b>The right to plead the statute of limitations as a defense to any and all obligations secured hereby is hereby waived, to the full extent permissible by law.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Waiver of statute may not add more than four years to duration. CCP §360.5.</li> </ul>
<p><i>Contractual</i></p> <ul style="list-style-type: none"> <li>• <b>All claims shall be made within six months of the closing.</b></li> <li>• <b>No action arising out of this Bond may be brought against the Surety unless such action is commenced within 12 months following the date of Default. If the foregoing limitation is shorter than that permitted to be fixed by agreement under any statute controlling the construction of this Bond, the shortest permissible statutory limitation of time shall govern and shall supersede the time limitation herein stated.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Notice periods for informing other party of its breach of contract are often not clear as to what must happen within the stated period: Claim must accrue? Give notice of claim? File action?</li> <li>• May not extend statute of limitations in connection with sale of goods. Com C §2725(1).</li> <li>• May not reduce statute of limitations in connection with sale of goods to less than 1 year. Com C §2725(1).</li> <li>• May shorten statute of limitations if reasonable period preserved. <i>Dempsey v Norwegian Cruise Line</i> (9th Cir 1992) 972 F2d 998; <i>Investors Life Ins. Co. v Superior Court</i> (1989) 208 CA3d 1070, 256 CR 598. See also <i>Hambrecht &amp; Quist Venture Partners v American Med. Int’l, Inc.</i> (1995) 38 CA4th 1532, 46 CR2d 33 (choice-of-law clause includes shorter statute of limitations of chosen jurisdiction).</li> </ul>
<p><b>Compound Documents</b></p>	
<p><i>Multiple documents</i></p> <ul style="list-style-type: none"> <li>• <b>Nothing contained in this Security Agreement shall in any way limit the terms and provisions of any other agreement between the parties, but each and every term and provision of this agreement shall be in addition to the terms and provisions of such other agreement.</b></li> <li>• <b>Any event of default shall occur under, or Borrower shall default in the performance or observance of any term, covenant, condition, or agreement contained in, any of the Other Agreements, and such default shall continue beyond any applicable period of grace.</b></li> </ul>	<ul style="list-style-type: none"> <li>• When a transaction involves multiple agreements, conform boilerplate in each agreement to provide for consistent results.</li> <li>• Consistency is especially important for default clauses; consider a definition of default in one agreement with default clauses in other agreements tied back to single definition.</li> <li>• A group of documents may add up to a security agreement under the “composite document” theory. <i>In re Amex-Protein Dev. Corp.</i> (9th Cir 1974) 504 F2d 1056.</li> </ul>

<p><i>Incorporation by reference</i></p> <ul style="list-style-type: none"> <li>• <b>This Agreement shall be subject to the rules of the National Association of Securities Dealers</b></li> <li>• <b>Debtor hereby grants a security interest in the collateral described in the Appraisal Report.</b></li> <li>• <b>[Financing statement description of collateral.]</b></li> </ul>	<ul style="list-style-type: none"> <li>• Incorporation of provisions of another document by reference not enforceable unless incorporation by reference is clear, incorporated document is readily available, and the incorporation has been called to attention of the other party to the agreement. <i>Chan v Drexel Burnham, Lambert, Inc.</i> (1986) 178 CA3d 632, 223 CR 838.</li> <li>• Existence of clause in a related agreement will not operate to incorporate it into another agreement in the absence of incorporation language. <i>Marsch v Williams</i> (1994) 23 CA4 250, 28 CR2d 398.</li> <li>• Incorporation of non-public document into a security agreement may work, but will not work for a financing statement. <i>Terpstra v Michelosen (In re Product Design &amp; Fabrication, Inc.)</i> (Bankr ND Iowa 1994) 182 BR 803.</li> </ul>
<p><b><i>Integration</i></b></p>	
<ul style="list-style-type: none"> <li>• <b>This Loan Agreement constitutes the entire agreement between the parties and recites the entire consideration given and accepted by the parties, and no representations not expressed herein or endorsed hereon have been made by either party or their agents.</b></li> <li>• <b>This Loan Agreement contains all agreements of the parties with respect to any matter mentioned herein. No prior agreement or understanding pertaining to any such matter shall be effective.</b></li> <li>• <b>This Agreement, including the Exhibits and other agreements referred to herein, is the entire agreement between the parties, and supersedes and rescinds all prior agreements relating to the subject matter hereof.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Execution of contract in writing “supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.” CCP §1625.</li> <li>• Terms set forth in a writing intended as a “final expression” of agreement as to terms set forth in agreement may not be contradicted by evidence of prior agreement or contemporaneous oral agreement. CCP §1856(a).</li> <li>• Terms may still be explained or supplemented with evidence of “consistent” additional terms unless contract “is intended also as a complete and exclusive statement of the terms of the agreement.” CCP §1856(b); Com C §2202(b).</li> </ul>
<p><b><i>Parol Evidence</i></b></p>	
<ul style="list-style-type: none"> <li>• <b>This Agreement, including the Exhibits and other agreements referred to herein, is the entire agreement between the parties, and supersedes and rescinds all prior agreement relating to the subject matter hereof.</b></li> </ul>	<ul style="list-style-type: none"> <li>• May explain or supplement terms, subject to express terms of agreement, by course of dealing, usage of trade, and course of performance. CCP §1856(c); Com C §§1205, 2202(b), 2208.</li> <li>• May use parol evidence to explain meaning of terms of integrated agreement <i>only</i> if offered meaning does not contradict written agreement and evidence is offered to prove a meaning to which the written agreement is “reasonably susceptible.” <i>Banco Do Brasil, S.A. v Latian, Inc.</i> (1992) 234 CA3rd 973, 285 CR 870; <i>Consolidated World Inv. v Lido Preferred Ltd.</i> (1992) 9 CA4th 373, 11 CR2d 524.</li> </ul>

<b>Modifications</b>	
<p><i>Duty to make</i></p> <ul style="list-style-type: none"> <li>• <b>This Loan Agreement constitutes the entire agreement of the parties and neither party has any obligations to make any changes or modifications.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Party to a contract has no inherent good faith or fiduciary duty to make modifications. <i>Los Angeles Equestrian Ctr., Inc. v City of Los Angeles</i> (1993) 17 CA4th 432, 21 CR2d 313; <i>Racine &amp; Laramie, Ltd. v Department of Parks &amp; Recreation</i> (1992) 11 CA4th 1026, 14 CR2d 335.</li> </ul>
<p><i>Writing requirement</i></p> <ul style="list-style-type: none"> <li>• <b>This Lease may be modified in writing only, signed by the parties in interest at the time of the modification.</b></li> <li>• <b>This Agreement cannot be changed or terminated orally.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Written contract may be amended by oral agreement supported by new consideration, "unless the contract otherwise expressly provides." CC §1698.</li> <li>• Written contract for sale of goods may be modified by oral agreement without new consideration unless contract requires a signed writing. Com C §2209(2).</li> </ul>
<p><i>Approval</i></p> <ul style="list-style-type: none"> <li>• <b>Any modifications to this Loan Agreement are not effective until approved in writing by an officer of Lender.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Parties may "approve" amendments through course of conduct, in the absence of contract language to the contrary. <i>Kern County Water Agency v Belridge Water Storage Dist.</i> (1994) 18 CA4th 77, 22 CR2d 354.</li> </ul>
<b>Severability</b>	
<ul style="list-style-type: none"> <li>• <b>The invalidity of any provision of this Lease, as determined by a court of competent jurisdiction, shall in no way affect the validity of any other provision hereof.</b></li> <li>• <b>To the extent any provision of this Agreement is not enforceable under applicable law, such provision shall be deemed null and void and shall have no effect on the remaining portions of this Agreement.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Typical clause may not be effective if unenforceable provision is essential part of agreement. CC §§1599, 1608; <i>Keene v Harling</i> (1964) 61 C2d 318, 38 CR 513.</li> <li>• Severability clause could not be invoked against party for whom the clause was not intended to benefit. <i>D'Sa v Playhut, Inc.</i> (2000) 85 CA4th 927, 102 CR2d 495.</li> <li>• Consider inviting court to adjust unenforceable clause to achieve intent of parties (e.g., covenant not to compete).</li> <li>• Consider identifying clauses that, if unenforceable, should cause entire contract to fail.</li> </ul>
<b>Exhibits</b>	
<ul style="list-style-type: none"> <li>• <b>All rules and regulations hereinafter set forth shall be deemed an integral part of this lease.</b></li> <li>• <b>Attached hereto is an addendum which constitutes a part of this Lease.</b></li> <li>• <b>This agreement is subject to the terms and conditions on the reverse side hereof.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Consider whether appropriate to incorporate exhibits into agreement. May inadvertently modify a provision of the contract.</li> </ul>

<b>Conspicuous</b>	
<ul style="list-style-type: none"> <li>• <b>BEFORE OPENING THIS ENVELOPE, YOU SHOULD CAREFULLY READ THE FOLLOWING TERMS AND CONDITIONS. OPENING THIS ENVELOPE INDICATES YOUR ACCEPTANCE OF THESE TERMS AND CONDITIONS. IF YOU DO NOT AGREE WITH THEM, YOU SHOULD PROMPTLY RETURN THE ENTIRE PACKAGE, AND YOUR MONEY WILL BE REFUNDED.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Term is “conspicuous” when “a reasonable person against whom it is to operate ought to have noticed it,” e.g., all caps, contrasting type or color, or larger type. Com C §1201(10); <i>Bassett v American Gen. Fin., Inc.</i> (9th Cir 2002) 285 F3d 882 (term in a contract is “conspicuous” if “a reasonable person in the buyer’s position would not have been surprised to find the [term] in the contract”).</li> <li>• Warranty disclaimers must be conspicuous. Com C §2316(2).</li> <li>• Stock transfer restrictions and the like must be conspicuous. Corp C §418; Com C §8204.</li> <li>• Certain waivers or limitations in consumer-related transactions must be conspicuous.</li> </ul>
<b>Rules of Construction</b>	
<p><i>General</i></p> <ul style="list-style-type: none"> <li>• <b>This Deed of Trust shall be construed without regard to any presumption or rule requiring construction against the party causing such instrument or any portion thereof to be drafted.</b></li> <li>• <b>This Indenture may not be used to interpret another indenture, loan, or debt agreement of the Company. Any such indenture, loan, or debt agreement may not be used to interpret this Indenture.</b></li> </ul>	<ul style="list-style-type: none"> <li>• In the event of uncertainty in language of an agreement, interpret against person who caused the uncertainty to exist—usually the drafter. CC §1654. Consider waiving this rule for all parties.</li> <li>• Construe provisions most favorable to the person in whose favor the provision was made. CCP §1864. Consider waiving this rule for all parties.</li> </ul>
<p><i>Meaning of Certain Words</i></p> <ul style="list-style-type: none"> <li>• <b>The terms “includes” and “including” shall not be construed to imply any limitation.</b></li> <li>• <b>Secured party may take possession of the collateral or sell it in place.</b></li> <li>• <b>Creditor may proceed against the debtor or the guarantor or both.</b></li> </ul>	<ul style="list-style-type: none"> <li>• “Or” is not exclusive. Bankruptcy Code §102 (11 USC §102).</li> <li>• <i>Kelly v William Morrow &amp; Co.</i> (1986) 186 CA3d 162, 231 CR 497 (use of word “or” interpreted to mean “and/or”).</li> <li>• “Includes” is not limiting. Bankruptcy Code §102 (11 USC §102).</li> <li>• Use of “may” does not require an act by a party to the contract.</li> </ul>
<p><i>Headings and Labels</i></p> <ul style="list-style-type: none"> <li>• <b>The captions and headings herein are for convenience of reference only and shall not be construed as a part of this Agreement.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Consider whether heading <i>should</i> aid in interpretation of agreement.</li> <li>• <i>Den Norske Bank, A.S. v First Nat’l Bank of Boston</i> (1st Cir 1996) 75 F3d 49 (court used captions to interpret the agreement, notwithstanding provision in the agreement rejecting use of captions in interpretation of the agreement).</li> </ul>

<p><i>Printed versus Written Words</i></p> <ul style="list-style-type: none"> <li>• <b>Any conflict between the printed provisions of this Lease and the typewritten or handwritten provisions shall be controlled by the typewritten or handwritten provisions.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Handwritten terms control typed terms, and typed terms control printed terms. CC §1651; Com C §3114.</li> </ul>
<p><i>Counting of Days</i></p> <ul style="list-style-type: none"> <li>• <b>A Legal Holiday used with respect to a particular place of payment is a Saturday, a Sunday, or a day on which banking institutions at such place are not required to be open. If a payment date is a Legal Holiday at such place, payment may be made at such place on the next succeeding day that is not a Legal Holiday, and no interest shall accrue for the intervening period.</b></li> <li>• <b>This option must be exercised within 30 days prior to the expiration of this option.</b></li> </ul>	<ul style="list-style-type: none"> <li>• If no time expressed to perform an act, assume a reasonable time. CC §1657; Com C §2309(1).</li> <li>• For acts provided by law, exclude first day and count the last. CC §10.</li> <li>• When contract provides for performance on a holiday, act may be performed on next business day. CC §11.</li> <li>• “Holidays” include Sundays and other days commonly thought of as holidays. CC §7; Govt C §6700.</li> <li>• Instrument payable on Saturday, Sunday, or holiday may be paid on next business day. CC §11.</li> <li>• “To,” “until,” “till” and “from” include the date mentioned; “after” excludes the date mentioned. Uniform Customs and Practice for Documentary Credits (500) (1993), Article 47.</li> <li>• “Within” may mean “without.” <i>Wilson v Gentile</i> (1992) 8 CA4th 759, 10 CR2d 713.</li> </ul>
<p><b><i>Arbitration and ADR</i></b></p>	
<p><i>Agreement</i></p> <ul style="list-style-type: none"> <li>• <b>Any controversy or claim arising out of or relating to this Agreement, or the breach hereof, shall be settled in accordance with the Commercial Arbitration Rules of the American Arbitration Association.</b></li> <li>• <b>If a dispute arises out of or related to this contract, or the breach thereof, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association [before resorting to arbitration].</b></li> </ul>	<ul style="list-style-type: none"> <li>• Agreements to arbitrate claims generally enforceable. CCP §§1280–1284.3.</li> <li>• Arbitration rules may inadvertently be triggered by other agreements, such as agreement to retain appraiser. <i>Coopers &amp; Lybrand v Superior Court</i> (1989) 212 CA3d 524, 260 CR 713.</li> <li>• Incorporation of provisions of another agreement may pick up its arbitration provision. <i>Boys Club, Inc. v Fidelity &amp; Deposit Co.</i> (1992) 6 CA4th 1266, 8 CR2d 587.</li> <li>• Consider providing agreed rules for applicable law, arbitrator qualifications, obligation to follow the law, and the like.</li> </ul>

<p><i>Scope of agreement</i></p> <ul style="list-style-type: none"> <li>• <b>All claims relating to this Agreement shall be arbitrated.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Agreement to arbitrate claims “arising from” contract does not give arbitrator authority to arbitrate tort claims. <i>Cobler v Stanley, Barber, Southard, Brown &amp; Assoc.</i> (1990) 217 CA3d 518, 265 CR 868.</li> <li>• Agreement to arbitrate claims “arising out of or relating to” contract creates authority to arbitrate tort claims and agreement to arbitrate “any” controversy creates authority to award punitive damages in arbitration. <i>Mansdorf v California Physicians Serv., Inc.</i> (1978) 87 CA3d 412, 151 CR 388.</li> <li>• Language agreeing “to arbitrate any dispute, claim or controversy” was not specific enough to require arbitration of claim against the employer for sexual harassment and rape. <i>Prudential Ins. Co. v Viernes</i> (9th Cir 1994) 42 F3d 1299.</li> <li>• <i>Armendariz v Foundation Health Psychcare Servs., Inc.</i> (2000) 24 C4th 83, 99 CR2d 745 (agreement to arbitrate must have “modicum of bilaterality”); <i>Pardee Constr. Co. v Superior Court</i> (2002) 100 CA4th 1081, 123 CR2d 288 (judicial reference provisions in real estate sales agreements rendered contracts unconscionable, adhesive, and contrary to public policy); <i>Szetela v Discover Bank</i> (2002) 97 CA4th 1094, 118 CR2d 862 (agreement that attempts to prevent one party to arbitration agreement from acting as class representative is unconscionable).</li> <li>• <i>Ferguson v Countywide Credit Indus., Inc.</i> (9th Cir 2002) 298 F3d 778 (arbitration provision in employment agreement was substantively unconscionable because it compelled arbitration of claims employees were most likely to bring against employer, but exempted from arbitration claims employer was most likely to bring against its employees).</li> </ul>
<p><i>Power of arbitrator</i></p> <ul style="list-style-type: none"> <li>• <b>The Arbitrators may not award any remedy that a court could not award.</b></li> <li>• <b>The Arbitrators shall apply the law of the State of California as it exists on the date of the arbitration.</b></li> </ul>	<ul style="list-style-type: none"> <li>• In the absence of a restriction in the arbitration agreement, any remedy fashioned by the arbitrator is enforceable if it “bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly, by the arbitrator.” <i>Advanced Microdevices, Inc. v Intel Corp.</i> (1994) 9 C4th 362, 367, 36 CR2d 581.</li> <li>• Consider limitations on remedies.</li> <li>• Arbitrator did not exceed its powers by erroneously deciding a contested issue of law or fact. <i>Moncharsh v Heily &amp; Blase</i> (1992) 3 C4th 1, 10 CR2d 183.</li> </ul>

## Representations and Warranties

### Nature

- **The statements, representations, and warranties contained herein and in any other document or instrument delivered by or on behalf of any party are and shall be deemed and construed to be continuing representations and warranties. The parties, each to the other, further covenant and agree that their representations and warranties shall survive the closing.**
- May not survive closing in the absence of express language.
- Representations create claims under tort law, generally limited to negligence. A warranty, however, under contract law, creates strict liability. In addition, representations and warranties each may provide different remedies and be subject to different statutes of limitation, based on tort law and contract law. *Quality Wash Group B, Ltd. v Hallak* (1996) 50 CA4th 1687, 58 CR2d 592. See also *Rogath v Siebenmann* (2d Cir 1997) 129 F3d 261 (warranty is term of contract “purchased” by the buyer and buyer’s specific reliance on accuracy is not determinative); *CBS, Inc. v Ziff-Davis Publishing Co.* (NY 1990) 553 NE2d 997.
- Warranties are not statement that particular facts exist; they are promises to make the other party whole if the other party is damaged by the non-existence of particular facts. See Weise, *Bringing Further Clarity to Agreements: The Use of Warranties, Guaranties, and Indemnities*, 9 CEB Cal Bus L Prac 73 (Spring 1994).
- Warranty or representation to “best knowledge” relates to state of mind of person making the statement or promise, not to the existence of the underlying facts. *Dirico v Fuqua Chrysler Plymouth, Inc.* (Ind App 1990) 562 NE2d 756.
- Borrower may have recourse liability for breach of a representation or warranty, notwithstanding nonrecourse provisions of note. *U.S.X. Corp. v Prime Leasing, Inc.* (3d Cir 1993) 988 F2d 433.

### Exclusions of pre-contractual warranties

- **No express or implied representations, warranties, or inducements have been made by any party to any other party except as set forth in this Agreement.**
- Clause in a contract limiting the scope of warranties and representations to those set forth expressly in the contract did not prevent a claim for fraud in the inducement. *Ron Greenspan Volkswagen, Inc. v Ford Motor Land Dev. Corp.* (1995) 32 CA4th 985, 38 CR2d 783.
- Even in the face of an integrated contract, a party can show fraud in the inducement unless the alleged fraud involves a promise “directly at variance with the promise of the writing.” A disclaimer of any external representations is not a provision of the agreement that is “directly at odds” with an alleged oral statement. *Airs Int’l, Inc. v Perfect Scents Distributions, Ltd.* (ND Cal 1995) 902 FSupp 1141.

<b>Conditions and Covenants</b>	
<ul style="list-style-type: none"> <li>• Each provision of this Loan Agreement performable by Borrower shall be deemed both a covenant and a condition.</li> <li>• Borrower will pay the Commitment Fee at the closing of the Loan.</li> <li>• Lender has no obligation to make an Advance in the event Borrower suffers a material adverse change in its business or prospects.</li> </ul>	<ul style="list-style-type: none"> <li>• Terms that could be characterized as either a condition or a covenant will be construed as a covenant when possible to preserve duties under agreement. Restatement (Second) of Contracts §227(1) (1981). See also <i>Pittman v Canham</i> (1992) 2 CA4th 556, 3 CR2d 340; <i>Steve Schmidt &amp; Co. v Berry</i> (1986) 183 CA3d 1299, 228 CR 689; <i>Richardson v Hislop</i> (1930) 109 CA 440, 293 P 168.</li> <li>• “Material adverse change” clauses and carve-outs should be drafted with great care. <i>Allegheny Energy, Inc. v DQE, Inc.</i> (WD Pa 1999) 74 F Supp2d 482.</li> <li>• Court may not enforce “material adverse change” condition when application of condition is not in good faith because it is “pretextual.” <i>Sinclair Broadcast Group, Inc. v Bank of Montreal</i> (SD NY, Feb. 21, 1995, No. 94 Civ 4677 (LMM)) 1995 US Dist Lexis 1969.</li> </ul>
<b>Interest and Late Charges</b>	
<p><i>General</i></p> <ul style="list-style-type: none"> <li>• Borrower will pay the principal one year from the date of this Note.</li> </ul>	<ul style="list-style-type: none"> <li>• All loans presumed to bear interest unless “otherwise expressly stipulated” in writing. CC §1914.</li> <li>• Interest rate assumed to apply annually, unless otherwise stated in contract. CC §1916.</li> </ul>
<p><i>Compound interest</i></p> <ul style="list-style-type: none"> <li>• All accrued but unpaid interest shall bear interest at the rate set forth above.</li> <li>• Borrower will pay interest at the rate of 13 percent per annum, payable at the time of the sale of the Collateral. Should interest not be so paid it shall thereafter bear like interest as the principal.</li> </ul>	<ul style="list-style-type: none"> <li>• Interest does not compound unless “clearly expressed” in writing. CC App §2 (following CC §1916.12).</li> <li>• Language in debt instrument must clearly provide for compounding of interest; parol evidence is irrelevant for these purposes. <i>Curry v Moody</i> (1995) 40 CA4th 1547, 48 CR2d 627.</li> </ul>
<p><i>Usury Savings Clause</i></p> <ul style="list-style-type: none"> <li>• In no event shall interest payable hereunder exceed the maximum rate allowed by law.</li> </ul>	<ul style="list-style-type: none"> <li>• Many lenders are exempt from usury limitations. In non-exempt transactions, a savings clause may override an agreement with interest in excess of the maximum permissible rate, if not usurious on its face. See Cal Const art XV, § 1; <i>Smith v Dominguez (In re Dominguez)</i> (9th Cir 1993) 995 F2d 883. See generally Martinson &amp; Jain, <i>California Usury Law for the Lender’s Lawyer</i>, 20 CEB Cal Bus L Prac 1 (Winter 2005).</li> </ul>

<p><i>Late charges</i></p> <ul style="list-style-type: none"> <li>• <b>In the event Borrower fails to make each payment of principal on time under this Workout Agreement, the principal amount owed by Borrower shall increase from \$500,000 to \$700,000.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Settlement agreement providing that debtor could pay one amount in satisfaction of claim, but that default would result in judgment of significantly higher amount, is a “forfeiture,” and the creditor can not enforce it. <i>Sybron Corp. v Clark Hosp. Supply Corp.</i> (1978) 76 CA3d 896, 114 CR 306.</li> </ul>
<p><b>Default</b></p>	
<p><i>Existence of default</i></p> <ul style="list-style-type: none"> <li>• <b>An “Event of Default” occurs when the borrower shall default in the performance of any other covenant, condition, obligation, or provision under any loan document, and such default shall constitute an Event of Default under such loan document.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Definition of “event of default” by reference to the definition in a related agreement is not effective when other agreement does not define an “event of default.” <i>Mellon Bank, N.A. v United Bank Corp.</i> (2d Cir 1994) 31 F3d 113. See also <i>Beal Bank v Crystal Props., Ltd., L.P. (In re Crystal Props., Ltd.)</i> (9th Cir 2001) 268 F3d 743 (under terms of note, lender was not entitled to default interest at the time of a default, prior to the lender’s acceleration of the note).</li> </ul>
<p><i>Notice requirements</i></p> <ul style="list-style-type: none"> <li>• <b>That upon default by Trustor in payment of any indebtedness secured hereby, or in performance of any agreement hereunder, Beneficiary may declare all sums secured hereby immediately due and payable.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Occurrence of event of default generally does not amount to a “default” until aggrieved party declares a default.</li> <li>• May want to provide for automatic default without notice to avoid declaration of default violating automatic stay under Bankruptcy Code §362 (11 USC §362).</li> <li>• May not want automatic default if it triggers rights in favor of others, such as a senior secured party; or interfere with pre-default rights, such as right to demand adequate assurance of performance under Com C §2609; <i>Norton Power Partners, LP v Niagra Mohawk Power Corp.</i> (NY 1998) 705 NE2d 636 (right to assurance applies to all contracts).</li> </ul>
<p><i>Cure rights</i></p> <ul style="list-style-type: none"> <li>• <b>In the case of the happening of any of the following events: . . . default shall occur in the payment of principal and such default shall not have been remedied within ninety days . . . then, or at any time thereafter, Bank shall be entitled to declare the Note due and payable.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Does cure right create a condition precedent before default comes into existence or a condition subsequent that causes existing default to go away?</li> </ul>

<p><i>Cumulation of remedies</i></p> <ul style="list-style-type: none"> <li>• <b>No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.</b></li> </ul>	<ul style="list-style-type: none"> <li>• In general, remedies are cumulative unless contract provides otherwise. Com C §§2701, 9601(a)(1).</li> </ul>
<p><b><i>Liquidated Damages</i></b></p>	
<ul style="list-style-type: none"> <li>• <b>Maker and Holder agree that because of any nonpayment, Holder will incur certain costs and expenses including, but not limited to, administrative costs, collection costs, loss of interest, and other direct and indirect costs in an uncertain amount; it would be impractical or extremely difficult to fix the exact amount of such costs in such event; such late charge is a reasonable estimate of such costs; and such late charge shall constitute liquidated damages caused by the Event of Default but only to the extent such late charge is paid by Maker and accepted by Holder and only upon the condition that the Event of Default is completely cured with such payment.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Liquidated damages provision valid unless party challenging provision proves it was “unreasonable under the circumstances existing at the time the contract was made.” CC §1671; Com C §§2718, 10504.</li> <li>• May want to include traditional, conspicuous language about impracticability of calculating damages, although not required for commercial transactions.</li> <li>• “Technical” default may be excused when the “penalty” facing borrower, “when measured against the purpose of the default provision,” is “extreme.” <i>Varel v Banc One Capital Partners, Inc.</i> (5th Cir 1995) 55 F3d 1016.</li> <li>• May not be able to enforce clause when enforcement would violate public policy. <i>Diosdado v Diosdado</i> (2002) 97 CA4th 470, 118 CR2d 494 (may not enforce liquidated damages clause for breach of agreement of fidelity during marriage).</li> </ul>
<p><b><i>Attorney Fees</i></b></p>	
<p><i>Scope</i></p> <ul style="list-style-type: none"> <li>• <b>Maker agrees to pay all costs of collection.</b></li> <li>• <b>Debtor will reimburse Lender for all out-of-pocket expenses incurred by the Lender arising out of this transaction, including filing and recording fees (including the allocated costs of inside counsel), including those had or incurred in the enforcement of any of the provisions of this Agreement, and preparation for, negotiations regarding, consultations concerning, or the defense of legal proceedings involving any claim made or threatened against Lender.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Attorney fee clause may cover fees incurred in defending cross-complaint “inextricably intertwined” with action on the contract. <i>Finalco, Inc. v Roosevelt</i> (1991) 235 CA3d 1301, 286 CR 616.</li> <li>• Language of clause may include provision of fees for tort action arising out of transaction. <i>Xuereb v Marcus &amp; Millichap, Inc.</i> (1992) 3 CA4th 1338, 5 CR2d 154; <i>Moallem v Coldwell Banker Commercial Group, Inc.</i> (1994) 25 CA4th 1827, 31 CR2d 253 (attorney fee clause applying to disputes “relating” to an agreement applies to tort claims).</li> <li>• Attorney fee clause may not cover post-judgment collection efforts because attorney fee clause would be merged into the judgment. May want to provide separately for post-judgment attorney fees. CCP §§685.040, 1021; <i>Chelios v Kaye</i> (1990) 219 CA3d 75, 268 CR 38.</li> <li>• Attorney fee clause may not cover increases in rates unless expressly stated. <i>Severson, Werson, Berke &amp; Melchior v Bolinger</i> (1991) 235 CA3d 1569, 1 CR2d 531.</li> </ul>

	<ul style="list-style-type: none"> <li>• Under contract that provides for attorney fees to be awarded to one party, attorney fees are also available to the prevailing party on the contract. CC §1717.</li> </ul>
<p><i>Mutuality</i></p> <ul style="list-style-type: none"> <li>• <b>If this Agreement gives rise to a lawsuit, the prevailing party shall be entitled to recover its attorneys fees.</b></li> <li>• <b>If any party brings an action to enforce the terms hereof or to declare rights hereunder, the prevailing party in any such action, on trial and appeal, shall be entitled to his or her reasonable attorneys fees to be paid by the losing party as fixed by the Court.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Attorney fee clauses are made mutual by statute. See CC §1717.</li> <li>• Attorney fee clauses are made reciprocal by statute only as to contract claims arising out of contract, even if clause itself also applies to tort claims. <i>Moallem v Coldwell Banker Commercial Group, Inc.</i> (1994) 25 CA4th 1827, 31 CR2d 253.</li> <li>• <i>Wong v Thrifty Corp.</i> (2002) 97 CA4th 261, 118 CR2d 276 (cannot “end run” mutuality by defining right to fees only when other party loses).</li> </ul>
<p><b><i>Allocation of Liability</i></b></p>	
<p><i>Indemnity</i></p> <ul style="list-style-type: none"> <li>• <b>Lessee shall indemnify and hold harmless Lessor from and against any and all claims arising from Lessee’s use of the Premises, or from the conduct of Lessee’s business . . . and shall further indemnify and hold harmless Lessor from and against any and all claims arising from any breach or default in the performance of any obligation on Lessee’s part to be performed under the terms of this Lease, or arising from any negligence of the Lessee, . . . and from and against all costs, attorney’s fees, expenses, and liabilities incurred in the defense of any such claim or any action.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Indemnity against “liability” requires payment by indemnitor when indemnitee becomes liable; in other cases (such as indemnity against “loss”), indemnitee must first suffer the “loss,” <i>i.e.</i>, pay injured person, before recovering from the indemnitor. CC §2778; <i>CC-California Plaza Assoc. v Paller &amp; Goldstein</i> (1996) 51 CA4th 1042, 59 CR2d 382.</li> <li>• Contractual indemnity enforceable unless, at time of act, actor knew it was unlawful. CC §2773.</li> <li>• Indemnity construed to mean compensation even when indemnitee has not incurred an obligation to a third party. <i>Yang Ming Marine Transp. Corp. v Okamoto Freighters Ltd.</i> (9th Cir 2001) 259 F3rd 1086. See also <i>Pasternak v Escrow Agents’ Fid. Corp.</i> (2002) 99 CA4th 907, 121 CR2d 493 (indemnitor does not have discharge rights of a surety).</li> <li>• Indemnitee’s own participation in act does not prevent indemnity unless willful misconduct involved. <i>Smoketree-Lake Murray Ltd. v Mills Concrete</i> (1991) 234 CA3d 1724, 286 CR 435.</li> <li>• Consider providing for notice of pending claim, control of litigation, payment of expenses, control of litigation costs, limitation on number of counsel, and who chooses counsel.</li> </ul>

<p><i>Joint and several liability</i></p> <ul style="list-style-type: none"> <li>• In all cases where more than one party executes this agreement, all words used herein in the singular shall be deemed to have been used in the plural where the context and construction so require, and the obligations and undertakings hereunder are joint and several.</li> <li>• The obligations of Lenders hereunder are several and no Lender shall be responsible for the obligations or Commitments of any other Lender.</li> <li>• Nothing contained in this Agreement and no action taken by Lenders pursuant to this Agreement shall be deemed to constitute Lenders as a partnership.</li> </ul>	<ul style="list-style-type: none"> <li>• Obligations presumed to be joint and not several in the absence of “express words to the contrary.” CC §§1431, 1659, 1660; Com C §3116(a).</li> <li>• Generally, release of one joint debtor does not release others; release may protect co-obligor from contribution obligations to co-obligors unless contract otherwise provides. CCP §877; CC §1543; Com C §3605; <i>Great Western Bank v Kong</i> (2001) 90 CA4th 28, 108 CR2d 266 (assignment of judgment against several primary obligors to one of the obligors extinguishes claims against all primary obligors).</li> <li>• Consider providing that each person signing becomes liable upon execution, even if others in same position do not sign to avoid argument that liability of each is conditioned on execution by all parties.</li> <li>• Consider whether to make some obligations joint and some several.</li> <li>• Obligations denominated as “joint and several” may be primary and secondary (<i>i.e.</i>, guaranty obligations). Restatement (Third) of Suretyship and Guaranty §1 (1996).</li> </ul>
<p><i>Releases</i></p> <ul style="list-style-type: none"> <li>• Lessee hereby agrees that Lessor shall not be liable for injury to Lessee’s business or any loss of income therefrom. . . .</li> <li>• Releasor hereby waives its rights under California Civil Code §1542, which provides as follows: [text of CC §1542.]</li> </ul>	<ul style="list-style-type: none"> <li>• Prospective release will be enforced if written clearly, explicitly, and conspicuously. <i>National &amp; Int’l Bhd. of Street Racers, Inc. v Superior Court</i> (1989) 215 CA3d 934, 264 CR 44; <i>Kurashige v Indian Dunes, Inc.</i> (1988) 200 CA3d 606, 246 CR 310.</li> <li>• Release does not have to refer to “negligence” to release negligence. <i>Sanchez v Bally’s Total Fitness Corp.</i> (1998) 68 CA4th 62, 79 CR2d 902.</li> <li>• <i>Hess v Ford Motor Co.</i> (2002) 27 C4th 516, 117 CR2d 220 (2002) (broad language in a release ostensibly releasing all tortfeasors did not bar plaintiff’s claims against a third party who was not named in the release); <i>Vahle v Barwick</i> (2001) 93 CA4th 1323, 113 CR2d 793.</li> <li>• Release of unknown claims may be effective. <i>Winet v Price</i> (1992) 4 CA4th 1159, 6 CR2d 554. But see <i>Sweat v Big Time Auto Racing, Inc.</i> (2004) 117 CA4th 1301, 12 CR2d 678 (act of negligence that results in injury to the releasee must be reasonably related to the object or purpose for which the release is given). See also CC §1542 re release of unknown claims.</li> <li>• May <i>not</i> prospectively release party from party’s own fraud or willful injury. CC §1668.</li> </ul>

	<ul style="list-style-type: none"> <li>• Prospective release will not be enforced if it “affects” important public policy. <i>Tunkl v Regents of Univ. of California</i> (1963) 60 C2d 92, 32 CR 33; <i>Gavin W. v YMCA of Metropolitan Los Angeles</i> (2003) 106 CA4th 662, 131 CR2d 168 (child care provider’s release of liability was void as against public policy); <i>Cariveau v Halferty</i> (2000) 83 CA4th 126, 99 CR2d 417 (may not include in release an agreement not to report disclosure of illegal activity to public authority).</li> </ul>
<p><i>Limitation of Liability</i></p> <ul style="list-style-type: none"> <li>• <b>Lessor shall not be liable, except as provided by law, for any damage occasioned by failure to keep the premises in repair.</b></li> <li>• <b>Neither party shall be liable to the other for any special, incidental, exemplary, or consequential damages arising from or as a result of any delay, omission, or error in the electronic transmission or receipt of any Documents pursuant to this Agreement, even if a party has been advised of the possibility of damages.</b></li> <li>• <b>Nothing in this Agreement shall prevent Buyer from obtaining specific performance of its rights under this Agreement.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Although frequently analyzed as a “liquidated damages” issue, limitation of liability should be reviewed as a question of release and subject to the limits of CC §§1668, 1671. <i>H.S. Perlin Co. v Morse Signal Devices</i> (1989) 209 CA3d 1289, 258 CR 1.</li> <li>• May try to limit aggrieved party’s ability to recover consequential damages. Com C §2719.</li> <li>• In contracts for sale of goods, should distinguish limitation of type of remedy from limitation on damages. <i>Milgard Tempering, Inc. v Selas Corp.</i> (9th Cir 1990) 902 F2d 703; <i>S. M. Wilson &amp; Co. v Smith Int’l, Inc.</i> (9th Cir 1978) 587 F2d 1363.</li> <li>• Limitations of responsibility in contracts between commercial parties are enforceable. <i>Department of Water &amp; Power of City of Los Angeles v ABB Power T&amp;D Co.</i> (CD Cal 1995) 902 F Supp 1178.</li> </ul>
<p><i>Disclaimer of duties to loan participants</i></p> <ul style="list-style-type: none"> <li>• <b>Lender shall have no liability except for its own negligence. Participant has independently, and without reliance upon representations of Lender . . . made and relied upon Participant’s own credit analysis and judgment to execute the participation agreement.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Disclaimers of duties between lead bank and participants generally enforceable. <i>Banque Arabe AET Internationale D’Investissement v Maryland Nat’l Bank</i> (2d Cir 1995) 57 F3d 146; <i>American Bank &amp; Trust of Coushatta v FDIC</i> (5th Cir 1995) 49 F3d 1064; <i>Bank of the West v Valley Nat’l Bank of Arizona</i> (9th Cir 1994) 41 F3d 471; <i>Chemical Bank v Security Pac. Nat’l Bank</i> (9th Cir 1994) 20 F3d 375.</li> </ul>



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