

RECESSION-PROOFING YOUR CREDIT DEPARTMENT FOR 2023 AND BEYOND

Presented By:

Christopher E. Ng, Esq.

Gibbs Giden, LLP

cng@gibbsgiden.com

(310) 552-3400 (office)

(310) 990-3855 (cell)

Ongoing Challenges in the Broader Economy

1. Inflationary pressures
2. Looming recession
3. Labor scarcity
4. Increased wages
5. Higher interest rates
6. Rising material costs
7. Tighter lending standards
8. Weakened Commercial Real Estate Fundamentals
9. Continued COVID-19 flare-ups
10. War in Ukraine
11. Lingering semi-conductor shortage
12. Industry transformations (e.g., auto)

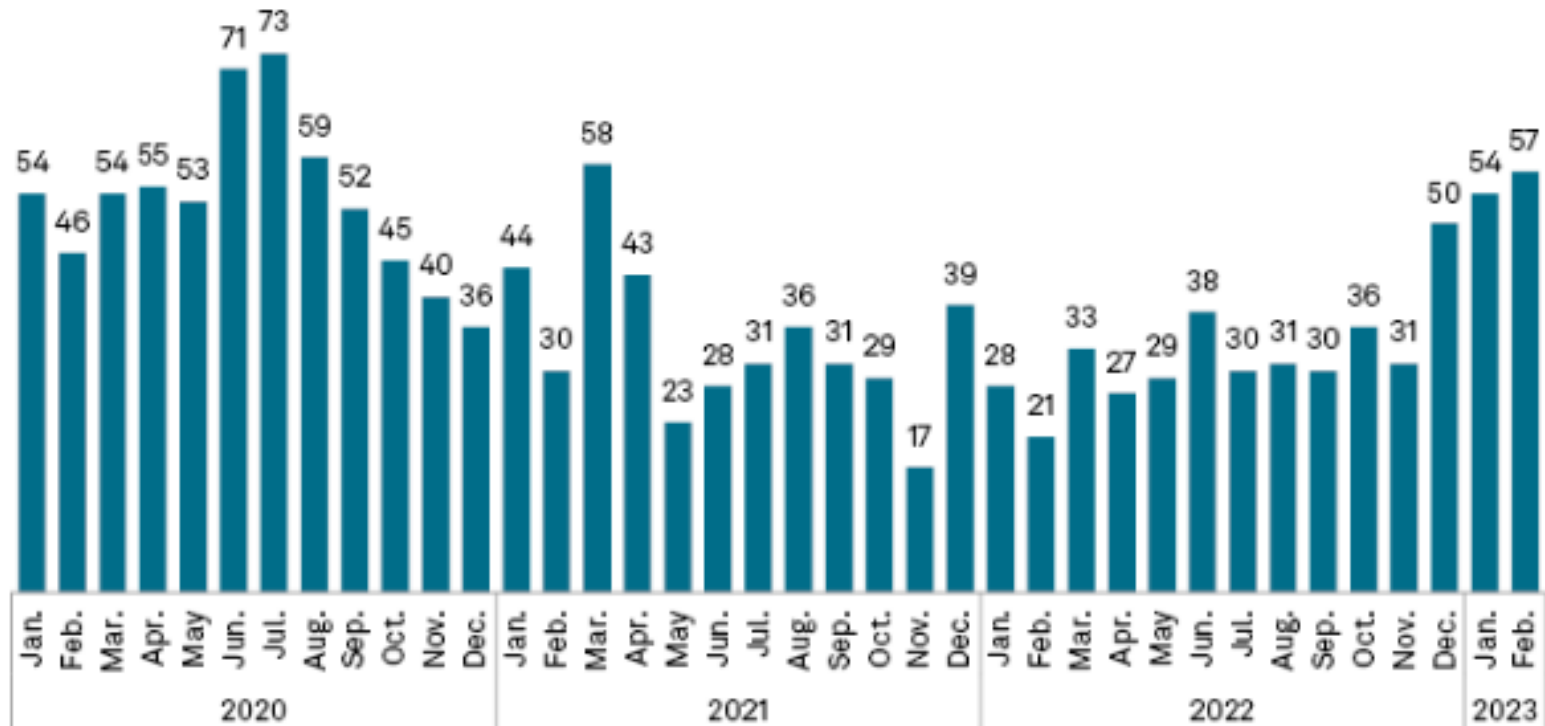
The Start of the Storm?



“ Looking ahead, however, there are some concerns that increased corporate debt levels, rising interest rates and inflation, and a potential global recession may contribute to an increase in bankruptcy filings.

The Start of the Storm?

US bankruptcy filings by month



Data compiled Mar. 2, 2023.

Includes S&P Global Market Intelligence-covered U.S. companies that announced a bankruptcy between Jan. 1, 2020, and Feb. 28, 2023.

S&P Global Market Intelligence's bankruptcy coverage is limited to public companies or private companies with public debt where either assets or liabilities at the time of the bankruptcy filing are greater than or equal to \$2 million, or private companies where either assets or liabilities at the time of the bankruptcy filing are greater than or equal to \$10 million.

Source: S&P Global Market Intelligence.

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The Start of the Storm?

S&P Global Market Intelligence

US corporate bankruptcy filings hit 12-year high in first 2 months of 2023

U.S. corporate bankruptcies are rising in 2023, with the first two months of the year registering the highest total for any comparable period since 2011, according to S&P Global Market Intelligence data.

The Start of the Storm?

Chapter 11 Bankruptcy Filings Increase 83% Y/Y in February

MAR 6, 2023 - 7:14 am



New bankruptcy filings in February registered double-digit year-over-year increases across all major U.S. filing categories, according to data provided by [Epiq Bankruptcy](#).

The 31,889 total new bankruptcy filings in February were up 18% from the 27,006 filings registered in February 2022. Total commercial filings also increased 18% to 1,696 compared with 1,442 in February 2022. Commercial Chapter 11 filings increased 83% to 373 filings, up from 204, and Subchapter V small business elections increased 45% to 120 versus the 83 filings registered last February.

Optimism in Construction

Consensus		Actual \$ 2021	Forecast % Change	
			2022	2023
Dodge Construction Network	Nonresidential Total	—	9.1	6.0
S&P Global, Market Intelligence	Commercial Total	—	6.7	4.5
	Office	—	2.6	3.5
Moody's Analytics	Retail & Other Commercial	—	11.5	3.2
	Hotel	—	-5.4	13.8
FMI	Industrial Total	—	31.0	9.9
ConstructConnect	Institutional Total	—	2.6	5.5
	Health	—	5.0	5.7
Associated Builders and Contractors	Education	—	2.0	5.2
	Religious	—	-8.7	-1.1
Wells Fargo Securities	Public Safety	—	-10.0	5.5
Markstein Advisors	Amusement & Recreation	—	7.5	5.8

1. New Legislation for 2023!



Christopher Ng • You

Managing Partner of Gibbs Giden Locher Turner Senet & Wittbrodt, LLP

now • 🌐



The Governor of California signed nearly 1,000 new bills into law in October 2022 alone, on top of almost 800 other bills signed into law earlier in the year. From a COVID-19 "misinformation" law to dozens of climate-related bills, much of the legislation goes into effect as of January 1, 2023. Of course, many of these new laws impact contractors and the construction industry, including new workers' compensation insurance requirements (even if you don't have employees!)! [#contractors](#) [#constructionindustry](#) [#2023ready](#)

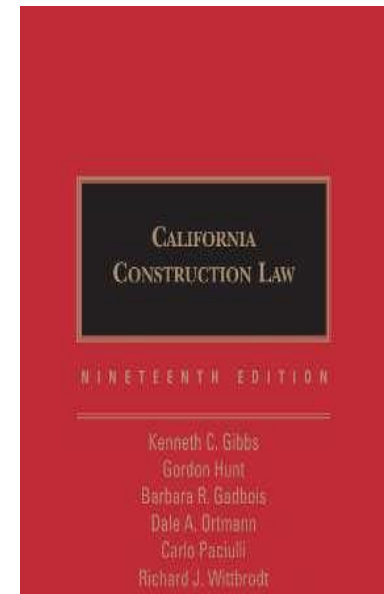


2023 Construction Law Update

[calconstructionlawblog.com](#) • 11 min read

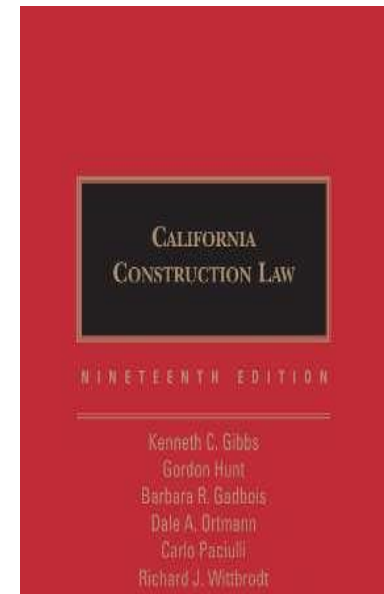
1. Stay Abreast of New Legislation

- AB 607: License Bonds-\$25,000
- AB 1565 (2022) – Amends Labor Code § 218.7 to impose direct contractor liability for subcontractors' failure to pay wages and benefits
- AB 2916: Extends time for CSLB to disclose complaints
- AB 569/1747: Enhanced penalties (up to \$30,000) for willful failure to secure Workers' Compensation / building permits



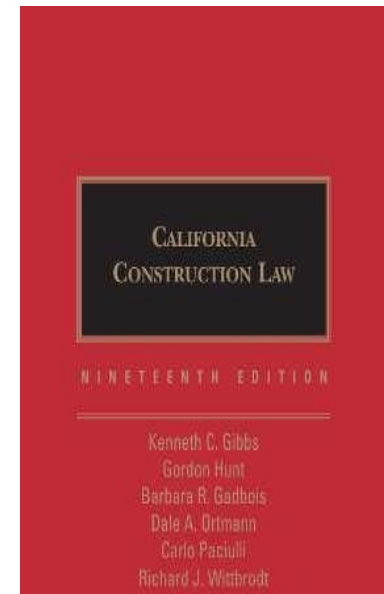
1. Stay Abreast of New Legislation

- SB 216: Requires C-8 concrete contractors and C-20 HVAC contractors carry workers' compensation regardless of whether they have employees; **all contractors must have workers' compensation in 2026...period!**
- AB 2173: 5% cap on retention on public works is permanent unless exception applies



1. Stay Abreast of New Legislation

- SB 1192: Permits architects, engineers, land surveyors, construction project managers and providers of environmental services to substitute securities in lieu of retention withheld by a public agency.
- SB 1422 Public agencies may use alternative no-bid contracting procedures for the installation or purchase and installation of carpet, resilient flooring, synthetic turf and lighting fixtures provided that such work is not performed in connection with new construction.



2. Keep Up with New Judicial Decisions



ABA Forum on Construction Law

Christopher Ng

16h •

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Christopher Ng

Managing Partner of Gibbs Giden Locher Turner Senet & Wittbrodt, LLP

16h •

A significant contractor's licensing case was just handed down by the California Court of Appeal holding that a general contractor who utilizes an unlicensed subcontractor may not turn to the courts to recover compensation for those services if a dispute arises. The decision from the Sixth District reaffirms the principle that Business & Professions Code section 7031 bars all actions, regardless of the equities and however they are characterized, which effectively seek compensation for unlicensed contract work. We will publish a complete summary of this decision in the coming days. To read the case, see *Kim v. TWA Construction (Wong)* (May 13, 2022) <https://lnkd.in/eMW7pCmr> #construction #licensing

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2. Keep Up with New Judicial Decisions

- ***Siry Investments v. Frakhondehpour (July 21, 2022)***

Monetary recover under Penal Code section 496 (= treble damages plus attorney's fees) may apply any time there is a diversion of money or assets from a business provided the requisite intent can be shown.

- ***Kim v. TWA Construction (Wong) (May 13, 2022)***

General contractor who utilizes an unlicensed subcontractor may not recover compensation for that subcontractor's work.

2. Keep Up with New Judicial Decisions

- **Carmel Development Company v. Anderson**

(1) Creditor can apply payments to any obligation it desires when debtor fails to indicate how payment is to be applied; (2) Liens attach to any real property that benefitted from the work performed, not just where work was performed; (3) 7% prejudgment interest applies on lien claims where there is no contractual privity.

- **Domestic Linen Supply Co. v. LJT Flowers**

Inconspicuous arbitration (and possibly other contract) clauses will not be enforced.

- **Stover v. Experian Holdings**

In order to bind parties to new terms pursuant to change-of-terms provision, both parties must have notice that terms have changed and opportunity to review changes.

2. Keep Up with New Judicial Decisions

- **Graylee v. Castro**

Stipulated judgment will be unenforceable penalties when there is no meaningful effort to anticipate amount of damages that may flow from breach of the stipulation; however, stipulated judgments will be enforceable if defendant admits that it owes the sum claimed by plaintiff.

- **Precision Framing Systems, Inc. v. Luzuriaga**

Mechanics lien deemed premature and unenforceable when claimant performed repair work after lien recording.

- **Crosno Construction, Inc. v. Travelers**

“Pay-when-paid” provisions in subcontracts are void when payment is delayed for an unreasonable amount of time.

Sales are Still True Believers



- Your role as the “sales killer” to safeguard the company is more important than ever
- Yes, these remarks from sales should still raise the hair on your back:
 - ✓ *“She can buy this product anywhere, but she really likes us.”*
 - ✓ *“He is a sure bet.”*
 - ✓ *“I don’t think you understand our business.”*
 - ✓ *“Why do you have it in for him?”*
 - ✓ *“She goes to my church.”*
 - ✓ *“I’m going to have to go over your head on this one.”*

3. Stick to Your Credit Policy

“I am TIGHT with my customer - I’d know if there were issues.”



- Sales reps are true believers and keep faith when all others have abandoned hope.
- Your sales rep’s relationship with his/her customer cannot get in the way of you doing your job.
- *Your* relationship with the sales rep or GM cannot get in the way of you doing your job.

3. Stick to Your Credit Policy

- Deviations from your credit policies should be the exception, not the rule
- Clarify ambiguities and when in doubt, ask questions of senior management (e.g., corporate controller, CFO or President)

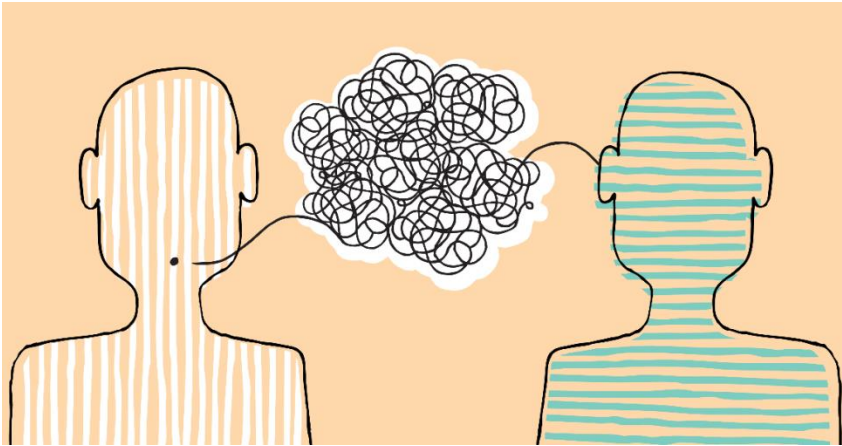


4. Improve Communication with Sales



- Sales and Credit is like any marriage: someone needs to be the bigger person and get the conversation started
- How about: *"Hey, we have had our challenges, but I want to take ownership and move on."*

4. Improve Communication with Sales



- Sales guide to a credit manager's one-word answers:
- **Fine:** This is a word credit managers use to end an argument when we know we are right and you need to shut up.
- **Nothing:** Means something and you need to be worried.
- **Go Ahead:** This is a dare, not permission. Don't do it.
- **Whatever:** This is a credit manager's way of saying "go pound sand."
- **That's OK:** Your credit manager is thinking long and hard about how you are going to pay for your mistake.
- **Wow:** This is not a compliment. We are amazed that one person could be so stupid.

5. Know Your Customer!

General Partnership?

Corporation?

LLC?

Sole proprietor?

Limited partnership?



5. Know Your Customer!

- **LLC/Corporation**

- Entity is distinct from *shareholders*
 - Shelters assets and limits liability for debts incurred by entity
- Entity is distinct from *other corporations/LLCs*
- A great deal of information is available through public record sources

- **Beware of particular challenges:**

- *Who has authority to enter into an agreement on behalf of the entity?*
- *Who are the principals or members?*
- *What is the personal business background and history of the principals applying for credit?*
- *Who will be ultimately liable for the entity's debt?*

5. Know Your Customer!

- **Sole Proprietorship/
General Partnership**

- The sole member/each partner can be held liable for all debt incurred
- In a partnership, each partner is fully liable for the debts of the entity
- Creditor needs only to seek debt recovery from any one member/partner

- **Limited Partnership**

- Consist of general partners and limited partners
- General partners will be jointly and severally liable for the debts
- A general partner may be a corporation
- There are also master limited partnerships, joint ventures, municipal utilities, and cooperatives

6. Update Your Credit Agreement

Christopher Ng posted in Credit Manager Network

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Christopher Ng

Managing Partner of Gibbs Giden Locher Turner Senet & Wittbrodt, LLP

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If your business uses standard form credit, sale, or rental agreements, BEWARE of a brand new California appellate case that invalidated part of a business' standard terms and conditions of sale. In Domestic Linen Supply Co., Inc. v. L J T Flowers, Inc. (12/4/20), the court invalidated an arbitration provision that was included as part of a rental contract's pre-printed standard terms and conditions in 8-point font size without headings, bold text, or italics, "because the clause is as inconspicuous as a frog in a thicket of water lilies."

https://lnkd.in/g-rbg_C #arbitration



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6. Update Your Credit Agreement



CREDIT APPLICATION AND SALES AGREEMENT
ABC Supply, Inc.
Phone (666) 666-6666 | Fax (777) 777-7777
666 Small Blvd | PO Box 666 | Smallville, CA 93302

SALES REP _____

Please complete this application in full (type or print clearly) and submit by fax at (777) 777-7777 or by email in PDF format at abc@abcsupplyinc.com. If applicable, please attach your resale certificate.

CUSTOMER INFORMATION

FULL LEGAL BUSINESS NAME: _____ DBA NAME(S): _____
BUSINESS PHONE #: _____ CELL #: _____ FAX #: _____ EMAIL: _____
FULL MAILING ADDRESS: _____
FULL SHIPPING ADDRESS (IF DIFFERENT): _____
BUSINESS TYPE: ☐ Sole Proprietor ☐ Corporation ☐ LLC ☐ Partnership ☐ Other (Specify) _____
FEDERAL TAX ID #: _____ CONTRACTOR'S LICENSE #: _____ STATE OF INCORPORATION: _____
ESTABLISHED IN (YEAR): _____ ESTIMATED MONTHLY PURCHASES: \$ _____ CA RESALE #: _____
ACCOUNTS PAYABLE CONTACT NAME: _____ PHONE #: _____ EMAIL: _____
IS A PURCHASE ORDER # REQUIRED? ☐ YES ☐ NO DO YOU WANT INVOICES SENT BY EMAIL? ☐ YES ☐ NO

OWNER/OFFICER INFORMATION

NAME AND TITLE:	NAME AND TITLE:	NAME AND TITLE:
ADDRESS:	ADDRESS:	ADDRESS:
CITY, STATE, ZIP:	CITY, STATE, ZIP:	CITY, STATE, ZIP:
PHONE:	PHONE:	PHONE:
SOCIAL SECURITY#:	SOCIAL SECURITY#:	SOCIAL SECURITY#:
DRIVER LICENSE #:	DRIVER LICENSE #:	DRIVER LICENSE #:
SPOUSE'S NAME:	SPOUSE'S NAME:	SPOUSE'S NAME:

Has Customer or any of its officers ever filed bankruptcy? _____ If yes, list when and where: _____

COMMERCIAL BANK REFERENCE

PRINCIPAL BANK NAME _____ ADDRESS _____
CONTACT NAME _____ PHONE # _____ FAX # _____
CHECKING ACCT. # _____ SAVINGS ACCT. # _____ LOAN ACCT. # _____

COMMERCIAL TRADE REFERENCES

1) TRADE REFERENCE: _____ CONTACT NAME: _____
ACCT. # _____ ADDRESS: _____
PHONE # _____ FAX # _____ EMAIL: _____
2) TRADE REFERENCE: _____ CONTACT NAME: _____
ACCT. # _____ ADDRESS: _____
PHONE # _____ FAX # _____ EMAIL: _____
3) TRADE REFERENCE: _____ CONTACT NAME: _____
ACCT. # _____ ADDRESS: _____
PHONE # _____ FAX # _____ EMAIL: _____

6. Update Your Credit Agreement

TERMS AND CONDITIONS OF SALE

This Credit Application and Sales Agreement ("Agreement") is by and between Customer, on the one hand, and ABC Supply, Inc. and its affiliates, subsidiaries, successors, and assigns (collectively "ABC"), on the other hand. Customer expressly agrees that all purchases made now and in the future from ABC shall be subject to, in accordance with, and governed by, the terms and conditions in this Agreement, unless otherwise agreed to in writing by an officer of ABC. The undersigned warrants and represents that he/she is authorized to enter into this Agreement on behalf of the Customer, and that all representations above are accurate, complete and truthful. Customer further agrees to the following terms:

- Payment Terms:** ABC's credit terms for each sale to Customer are 1/2%/10 net 30 days, unless otherwise stated on an invoice. Payments must be made at or sent to ABC at the address printed on the invoice sent by ABC to Customer, unless ABC instructs the Customer in writing to do otherwise. If Customer pays with a check and it is returned unpaid for any reason, Customer agrees to pay a \$25,000 fee. Any dispute with respect to an invoice, statement, charge or credit on Customer's account, must be received by ABC, in writing, within 10 days of Customer's receipt of such invoice, statement, charge or credit, or Customer waives any such dispute.
- Default:** In consideration of ABC extending credit to Customer, Customer promises full and prompt payment of all indebtedness, obligations and liabilities of every kind, present and future, incurred by Customer for goods purchased from ABC. Customer's failure to make timely payment of any invoice shall result in Customer's account being deemed in default, which may result in the account being placed on a COD basis, suspended, or cancelled; in the event of Customer's default, ABC may (at its option) declare all indebtedness owed by Customer to ABC immediately due and payable. A service charge of 18% per annum (1.5% per month) shall be assessed on all delinquent invoices. If Customer's account is referred to an attorney or collection agency to collect on any indebtedness owed to ABC, Customer agrees to pay upon demand from ABC, all costs of collection, including reasonable attorneys' fees and court costs.
- Security Agreement:** ~~Customer~~ ABC provide security for the payment of the full price of goods furnished hereunder. Customer grants ABC a first priority purchase money security interest in and to said goods (and all proceeds and proceeds therefrom) until paid in full. Customer authorizes ABC to file a UCC financing statement to perfect this security interest.
- Customer Credit Information:** Customer acknowledges that ABC is relying upon the information provided in this Agreement to determine whether to extend credit to Customer and in what amount. ABC reserves the right to approve or disapprove any request for extension of credit in its sole discretion. Customer authorizes ABC to contact the Commercial Trade References provided by Customer ~~for the purpose of~~ for the purpose of extending credit and thereafter renewing, maintaining and enforcing the terms of such extension of credit. Customer authorizes the Commercial Bank Reference named herein to release information requested ~~for the purpose of~~ for the purpose of obtaining and/or reviewing Customer's credit. Customer warrants that it is not a "consumer" under State and Federal Law and Customer certifies that all requests for the extension of credit are for business purposes only and are not intended for the extension of credit for personal, family or household purposes. Customer agrees it has a continuing duty and will inform ABC immediately in writing of any changes to the information provided by Customer in this Agreement. Customer represents to ABC that it is solvent as of the date of this Agreement and continues to warrant and represent that it is solvent each time it orders goods from ABC.
- LIMITED WARRANTY:** ABC warrants to Customer for a period of one (1) year from the date of sale that all goods furnished are free from material defects, subject to industry standard tolerances and variations. ABC will replace any goods that are found to be defective within one (1) year from the date of sale of such goods, or at ABC's option, refund the price paid for such defective goods. **THE LIMITED WARRANTY SET FORTH IN THIS PROVISION IS EXCLUSIVE AND GIVEN IN LIEU OF ALL OTHER EXPRESS AND IMPLIED WARRANTIES OF ANY TYPE AND KIND IN CONNECTION WITH THIS SALE, WHETHER IMPLIED BY OPERATION OF LAW OR OTHERWISE, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND WHICH ARE EXCLUDED AND DISCLAIMED IN ALL RESPECTS AND FOR ALL PURPOSES.**
- Cancellations and Returns:** Customer may not cancel any order of goods without ABC's express written consent. Any cancellation so authorized shall be subject to a cancellation/restocking charge of 25%, plus all applicable freight. Unused goods, processed material or specially manufactured materials not normally carried in ABC's inventory may not, under any circumstances, be returned. The amount of credit, if any, allowed to Customer for returned goods shall be at the sole discretion of ABC.
- Damages and Limitation of Liability:** **IN NO EVENT SHALL CUSTOMER OR ANY THIRD PARTY HAVE THE RIGHT TO RECOVER FROM ABC FOR ANY LOSS, DAMAGE, COST OF REPAIR, OR INCIDENTAL, PUNITIVE, SPECIAL, CONSEQUENTIAL OR LIQUIDATED DAMAGES OF ANY KIND (INCLUDING BUT NOT LIMITED TO, LOST PROFITS OR DAMAGES FOR LOSS OF EFFICIENCY OR DELAY TO ANY PROJECT ON WHICH THE GOODS ARE USED OR ORDERED OR INTENDED FOR USE), WHETHER BASED UPON WARRANTY, CONTRACT, STRICT LIABILITY, NEGLIGENCE OR ANY OTHER CAUSES OF ACTION ARISING IN CONNECTION WITH THE DESIGN, MANUFACTURE, SALE, TRANSPORTATION, INSTALLATION, USE, OR REPAIR OF THE GOODS SOLD BY ABC. NOTWITHSTANDING THE FOREGOING, CUSTOMER AGREES THAT ABC'S LIABILITY, IF ANY, SHALL BE EXCLUSIVELY LIMITED TO REPLACEMENT OF ANY NON-CONFORMING GOODS, OR AT ABC'S OPTION, REFUND OF THE PURCHASE PRICE PAID FOR SUCH NON-CONFORMING GOODS.**
- Governing Law and Venue:** Customer agrees this all issues and disputes relating to this Agreement shall be construed under the laws of the State of California. Customer further agrees that the exclusive jurisdiction and venue for any legal action brought to enforce any and all disputes relating to this Agreement shall be Kern County, California, unless ABC initiates said legal action to enforce statutory remedies (such as enforcing claims on mechanics lien, stop payment notices, payment bonds, etc.) in connection with a debt incurred by Customer; in such case, the jurisdiction and legal venue will be determined by the requirements of the law of the state where such statutory remedies are to be enforced.
- Severability:** If any term, condition or provision of this Agreement is found to be invalid or unenforceable, such term, condition, or provision shall be severed out and the remainder of this Agreement shall be valid and enforceable ~~in the fullest extent~~ in the fullest extent permitted by law.
- Copies and Electronic Signatures:** Customer agrees that ABC may, at ABC's sole discretion, accept, utilize and rely upon a facsimile copy, electronic copy or photocopy of this Agreement, in lieu of an original document. Customer acknowledges that, by transmitting a facsimile copy, electronic copy or photocopy of this document to ABC, Customer, and the undersigned Guarantor (if applicable), agree to be bound by the terms and conditions contained in this Agreement to the same extent as if an original were transmitted to ABC. Customer, and Guarantor (if applicable), waive any right to object to the use of a copy in place of the original and any right to require ABC to subsequently produce an original document.
- Complete Agreement:** This Agreement is the complete written expression of the parties' agreement and supersedes any prior agreements between Customer and ABC. ABC objects to any additional or conflicting terms transmitted by Customer in any purchase order or other writing. No waiver, alteration or modification by Customer of any of the provisions hereof shall be binding upon ABC unless specifically assented to in a signed writing by an officer of ABC.

SIGNATURE: _____ DATE: _____
PRINT NAME: _____ TITLE: _____

CONTINUING PERSONAL GUARANTY

For value received and in order to induce ABC Supply, Inc. (hereinafter, "ABC") to extend credit to Customer, the undersigned (hereinafter, "Guarantor") unconditionally, absolutely and irrevocably guarantees and promises to pay to ABC any and all indebtedness and perform all obligations owed by Customer to ABC now existing or arising in the future. Guarantor waives all notices and demands of any kind and hereby agrees to any arrangements or agreements between ABC and Customer, including without limitation, to a change in the amount of credit extended to Customer, terms of sale, compromise, extension, increase or alteration of the amount, or terms of any indebtedness owed by the Customer, and Guarantor agrees the same shall in no way reduce, impair, discharge or release Guarantor's obligations. Guarantor agrees that ABC may enforce this Guaranty against Guarantor and pursue payment from Guarantor, without having to first seek payment from, sue, or exhaust its remedies, against Customer or any other guarantor. The incorporation, merger, sale, or reorganization of Customer or ABC shall not terminate or affect Guarantor's obligations which will continue as to credit extended to or by such other entity. This Guaranty's obligations are absolute and shall continue in force until thirty (30) days after written notice of termination is received and receipt is acknowledged in writing by an officer of ABC, except that such termination shall not affect the liability of Guarantor with respect to obligations created or incurred prior to such date, or extensions or renewals of, interest accruing on, or fees, costs, or expenses, including reasonable attorney fees, incurred with respect to, such obligations on or after such date. Guarantor warrants and represents that the information provided is true, complete and correct and Guarantor understands that ABC is relying upon the information provided by Guarantor to determine whether to extend credit to Customer and in what amount. Guarantor authorizes ABC to credit and evaluate Guarantor's credit and financial information at any time and from any source, including Guarantor's non-business consumer credit report to further evaluate the creditworthiness of the undersigned as Guarantor ~~in connection with~~ in connection with the extension of business credit as contemplated in this Agreement.

GUARANTOR'S SIGNATURE: _____ DATE: _____
PRINT NAME: _____ SOCIAL SECURITY #: _____ PHONE: _____

Equal Credit Opportunity Act (ECOA): The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has, in good faith, exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Division of Credit Practices, 6th Street and Pennsylvania Avenue NW, Washington, DC 20580. If Customer's application for business credit is denied or there is a denial of a request for an increase in business credit, Customer may request from ABC a written statement of the specific reasons for the denial within 60 days from the date Customer is notified of ABC's decision.

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6. Update Your Credit Agreement

- The Credit Agreement is the best opportunity to establish contract rights, duties and obligations
 - ✓ Authorization to Run Credit Checks
 - ✓ Limits liability
 - ✓ Limits warranties
 - ✓ Forum Selection
 - ✓ Attorney's Fees and Service Charges
 - ✓ Personal Guarantee
 - ✓ Provides a standing objection to conflicting terms from buyer (*this is important as we'll see later*)

6. Update Your Credit Agreement

- Complete and current Credit Agreements must be the rule
 - ✓ **Periodically** update your standard credit agreement form
 - ✓ **Regularly** ensure your customer's credit agreement is current and accurate
 - ✓ **Always** *verify* that complete terms and conditions were transmitted
- Don't blindly rely on a "signed" Credit Agreement...



3. "Bulletproof" Your Credit Agreement

CREDIT AGREEMENT

Customer Name: _____
____ Corporation ____ Partnership ____ Sole Proprietorship ____ Limited Liability Co. State of Origin: _____
Street Address: _____ P.O. Box: _____
City: _____ State: _____ Zip: _____ Telephone: _____ Fax: _____
Type of Business: _____ No. of Years in Business: _____
Name of Predecessor Businesses: _____
Person to Contact Regarding Invoices: _____ Phone: _____
Parent Company: _____
Street Address: _____ P.O. Box: _____
City: _____ State: _____ Zip: _____
Telephone: _____ Fax: _____
Federal ID#: _____ Sales Tax Exempt #: _____ (Attach copy of form)

INFORMATION ON PRINCIPALS defined as:

For Proprietorship or Partnership: List all Owners and/or Partners.

For Corporation or Limited Liability Company: List all Officers, Directors, Members and Majority Stockholders.

Name	Home Address	Phone	Social Sec. No.	Position
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Have any of the companies or principals listed above ever been a debtor in a bankruptcy proceeding? _____

Has any judgment ever been entered against any of the companies or principals listed above? _____

Are there any legal actions or arbitration pending against any of the companies or principals listed above? _____

CREDIT REFERENCES (Attach separate schedule if necessary)

Primary Bank:

Name: _____ Account #: _____ Phone: _____

Address: _____ Contact Name: _____

Other Bank:

Name: _____ Account #: _____ Phone: _____

Address: _____ Contact Name: _____

TRADE REFERENCES

Name: _____ Account #: _____ Phone: _____

Address: _____ Contact Name: _____

Name: _____ Account #: _____ Phone: _____

Address: _____ Contact Name: _____

Name: _____ Account #: _____ Phone: _____

Address: _____ Contact Name: _____

Please attach separate financial statement of assets and liabilities.

TERMS AND CONDITIONS

1. I/we certify that this information is correct, complete and that we are able to pay within thirty days of each invoice date. I/we further understand that Seller will rely on this information for the extension of credit. I/we authorize Seller from time to time to obtain Business and Consumer Credit Reports on Customer or any principals listed above or to obtain credit and funding information from any other source. This is not an agreement by Seller to lend money; it is an agreement by Customer for the benefit of Seller if Seller determines to extend credit. Seller may change credit limits or other credit terms at any time, in its sole discretion. No modifications may be made otherwise to this Agreement, except in a writing signed by Seller.

2. Customer agrees that any amount not paid within 30 days of invoice date will carry interest at the rate of 1 1/2% per month, both before and after judgment, and further agrees to pay all costs incurred in collection, including attorney's fees in the amount of 1/3 of the total balance due if this account is placed with an attorney for collection, whether suit is filed or not. Customer expressly agrees to submit to personal jurisdiction in Virginia and agrees that the forum for any litigation pursuant to this Agreement or any other contract between Seller and Customer, whether Seller or Customer brings suit, shall be the County of Fairfax, Virginia. This Agreement shall be governed by and construed in accordance with the laws of Virginia.

3. Customer further agrees to pay all amounts due under this Agreement until Seller has received written notice closing this account, mailed U.S. Mail Certified Return Receipt Requested. In the event other entities or individuals order or use the labor or materials pursuant to this Agreement, it is agreed that both the Customer and such other legal entities or individuals shall be obligated for all amounts due under this Agreement.

4. All mechanic's lien, payment bond or similar waivers or restrictive endorsements on checks shall be effective only to the total dollar amount of payments actually received without any bankruptcy filing for ninety days thereafter. Customer agrees that Seller retains its mechanic's lien, payment bond or other legal rights for unpaid deliveries, regardless of what other waiver documents may imply otherwise. Customer further understands that Seller has a policy of enforcing mechanic's lien and payment bonds rights on all projects in the event of payment default and intends that all payments are in exchange for those rights. Seller has the right to determine, in its sole discretion, how to apply payments and which invoices to pay with all payments received on this account, despite any advice to the contrary. Any endorsement or letter with a payment stating that it is "payment in full" or words of similar meaning shall have no effect and shall not be an accord and satisfaction or novation.

5. Customer agrees that all funds owed to Customer from anyone or received by Customer to the extent those funds result from the labor or materials supplied by Seller shall be held in trust for the benefit of Seller (Trust Funds). Customer agrees it has no interest in Trust Funds held by anyone, to segregate, and to promptly account for and pay to Seller all such Trust Funds.

6. Seller agrees to replace or, at Seller's option, repair any defective goods within a reasonable time. Buyer's remedies for any delay or any defect in the materials are subject to and limited by any limitations contained in the manufacturer's terms and conditions to Seller. Further, Buyer's sole and exclusive remedy and Seller's limit of liability for any and all loss or damage resulting from defective goods shall be for the purchase price of the particular delivery and materials with respect to which loss or damage is claimed, plus any transportation charges actually paid by the Buyer. In no event shall Seller be liable for any damage due to delay of any type, not consequential, special or punitive damages. THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

7. Buyer shall make a careful inspection at the time of delivery. Buyer's failure to give written notice specifying any claim within ten (10) days of delivery shall constitute an unqualified acceptance of the labor and material as shown on delivery tickets and a waiver of all claims of shortages, damage or defect or any other claim. Seller will not be liable for any damage, warranty or remedy and back charges will not be accepted without prior notification, an opportunity to view and repair, replace or otherwise cure, and approval by Seller. No returned product will be accepted without prior approval. A restocking charge of 25% will apply on products approved for refund. Seller may stop the manufacture or supply of any labor or materials when it, in its sole discretion, determines that Buyer is in breach of this Agreement or any other contract with Seller, or Seller has insecurity with respect to funding or creditworthiness, until payment is made and any dispute or insecurity has been resolved.

By: _____

Name Printed: _____

Title or capacity: _____

Date: 9-11-14

By: _____

Name Printed: _____

Title or capacity: _____

Date: _____

GIBBS GIDEN ATTORNEYS AT LAW
LOCHER TURNER SENET & WITTBRODT LLP

6. Update Your Credit Agreement (Common Issues with Signatures)

Unauthorized Agent

- Who is the signatory?
- When in doubt, verify the signer's authority to enter into the contract.

Digital/Electronic Signature

- Generally, *copies* are OK.
- Consider authentication software.
- Consider separate electronic signature agreement.

Forgery

- Consider requesting personal information (drivers' license, etc.) unique to the signatory.

6. Update Your Credit Agreement (Common Issues with Transmission)

- **Scenario 1**

- You fax/scan a quotation that references the “attached” T&Cs, but the T&Cs aren’t attached

- **Scenario 2**

- You fax/scan a quotation or credit application with T&Cs, but the customer scans/faxes the quotation back without the T&Cs (or poor-quality copy)

- **Scenario 3**

- You fax/scan a quotation to the customer, and in response, customer sends payment *without* signing and returning quotation.

7. Know *Force Majeure* and Price Escalation

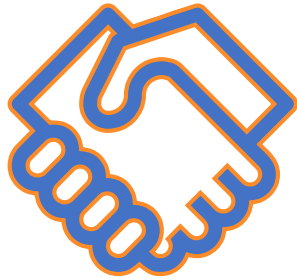
- Ongoing supply chain issues and related price escalation is creating havoc for many manufacturers, distributors, and end-users
- Talk the talk and understand force majeure, impracticability, price escalation, and adequate assurances in your contracts and UCC
- Understand your “contract”...
 - ✓ Quotation
 - ✓ Purchase Order
 - ✓ Online Terms and Conditions
 - ✓ Contracts incorporated by reference

7. Know *Force Majeure* and Price Escalation: Consult the Contract

- Price Escalation Clause
- Force Majeure Clause
- Most Favored Customer Status
 - ✓ ***“Priority allocation status given ... for Materials which are in short supply.”***
- Continuous Supply and/or Capacity Commitment
 - ✓ ***“At all times during the Term, Provider shall ensure that it has the capacity to supply Company...”***
- Notice Provisions
- Limitation of Liability & Waivers of Consequential Damages
- Termination / Suspension Provisions
- Obligations to Mitigate Damages

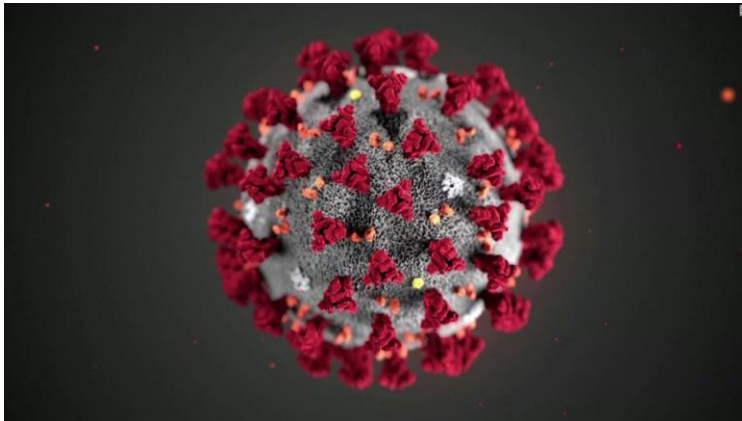
7. Know *Force Majeure* and Price Escalation:

Price Escalation Clause may cover time & money:



“If material or equipment, which the contractor is required to supply are not available due to a shortage or unavailability, then an acceptable substitute shall be found and an adjustment in the contract price shall be made accordingly. A delay in obtaining delivery of the substitute item shall be a legitimate reason for an extension of the contract time.”

7. Know *Force Majeure* and Price Escalation



- **Force majeure** is often defined as casualties or causes that are unforeseeable, unavoidable, objectively insurmountable, and beyond parties' reasonable control.
- Contract may: (1) provide inclusive definition of triggering events; (2) set forth specific relief granted (e.g., time extension); and (3) list procedural obligations to get relief (e.g., give notice within 10 days, submit mitigation plan within 20 days).
 - ❖ ***Related common law defenses***
 - ✓ ***Impossibility***
 - ✓ ***Impracticability***
 - ✓ ***Frustration of Purpose***

**UCC § 2-615:
IMPRACTICABILITY
DEFENSE FOR
SELLERS**

- **UCC § 2-615:** Delay in delivery or non-delivery is **excused** when it becomes “**commercially impracticable**” because of:
(1) unforeseen circumstances; or
(2) by “compliance in good faith with any applicable foreign or domestic governmental regulation or order.”

UCC § 2-609: RIGHT TO ADEQUATE ASSURANCES

- **UCC § 2-609:** When reasonable grounds for insecurity exists, either buyer or seller :
(1) “may in writing **demand adequate assurance** of due performance” (i.e., ability of seller to timely deliver goods; ability of buyer to pay for goods); and (2) until it receives such reasonable assurances, “may, if commercially reasonable, **suspend any performance....**”

8. Beware of the “Secured” Account Fable

- *Personal guarantees and joint check agreements may give you a layer of comfort, but are NOT security.*
 - ✓ **UCC-1** probably \neq security
 - ✓ **Promissory Note** \neq security
 - ✓ **Deed of Trust** with sufficient equity = security



SECURED

8. Beware of the “Secured” Account Fable

- Properly perfected job rights (liens, stop payment notices and bond claims) = security
 - ✓ **Ensure** you are not a “*supplier to a supplier*”
 - ✓ **Verify** you have proper job information
 - ✓ **Timely** serve your preliminary notice
 - ✓ **Timely** enforce your statutory remedies
 - ✓ **Corroborate** that your materials were incorporated into the project

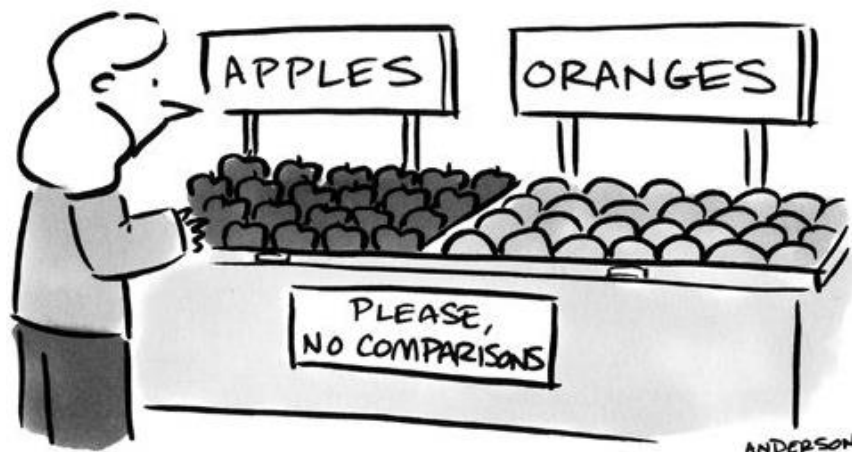


SECURED

9. Repayment Plans Are Not All Alike

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- Beware of the statute of limitations
- Document repayment plans in a signed agreement
- Insist on security or other leverage (e.g., confession/cognovit)
- Use a thorough promissory note form

9. Repayment Plans Are Not All Alike



- *I'll Just Use My Handy Dandy Promissory Note Form"*
- Your Note may supersede the terms of the Credit Agreement
- Ensure your form contain adequate terms and conditions (interest, attorney's fees, forum selection clause, etc.)?

9. Repayment Plans Are Not All Alike



- Beware of Unenforceable Liquidated Damages Provisions in Notes and Settlement Agreements
- Graylee v. Castro (2020)
 - ✓ Stipulated judgments will be unenforceable penalties when there is no meaningful effort to anticipate the amount of damages that may flow from a breach of the stipulation.

9. Repayment Plans Are Not All Alike

Creditors should consider the following:

- (1) use title “Forbearance Agreement” rather than “Settlement Agreement”;
- (2) require the debtor/defendant acknowledge in the settlement documents that the full amount is due and owing and the amount to be paid reflects an undisputed debt, as distinct from a compromise of disputed claims;
- (3) if the debtor makes each payment when due, then it may deduct the agreed-upon discount amount from the final payment due;
- (4) time of the essence with respect to each payment due and the discount is conditioned upon timely full payments, otherwise the remaining balance due shall be immediately due and payable;
- (5) discounted amount due is an inducement for prompt/earlier payment of agreed-upon debt and not a compromise of the actual amount owed;
- (6) breach will result in the cessation of the creditor’s forbearance and enforcement of the debtor’s agreement to pay the full amount actually due;
- (7) payments should add up to the total amount due without discount; and
- (8) ensure that any surcharge is proportional to the damages resulting from the payment default (i.e., limited to reasonable estimation of interest, attorney fees and costs)

10. Understand That The World Does Not Always Revolve Around Your Terms

Contract terms come in many forms...

- ✓ Credit Agreement
- ✓ Personal Guaranty
- ✓ Quotation
- ✓ Sales Order Confirmation / Acknowledgment
- ✓ Invoice
- ✓ Delivery Receipt
- ✓ Email
- ✓ Online Terms and Conditions
- ✓ Promissory Note
- ✓ Prime Contract (*incorporation by reference!*)
- ✓ Subcontract (*incorporation by reference!*)
- ✓ **Purchase Order**

10. Understand That The World Does Not Always Revolve Around Your Terms

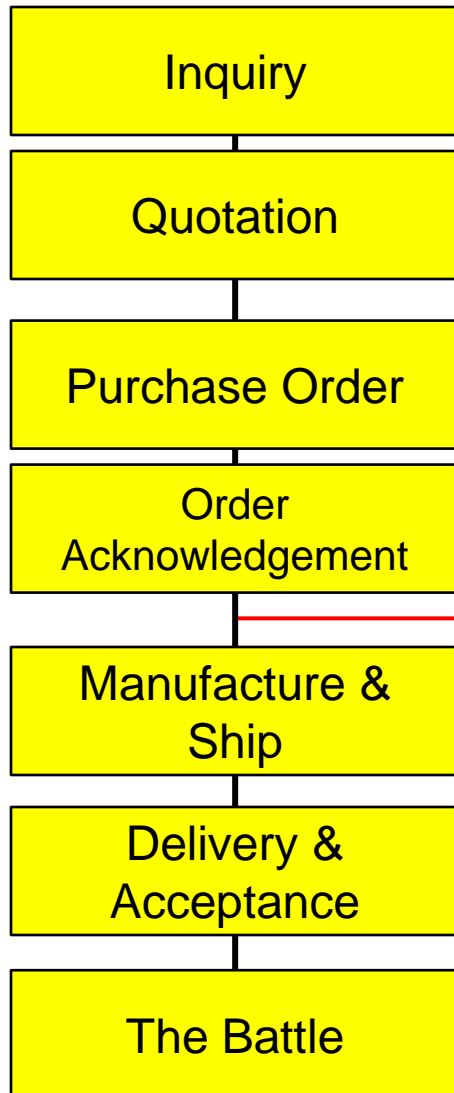
One federal court described the *Battle of the Forms* (UCC § 2-207) as:



“a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair.”

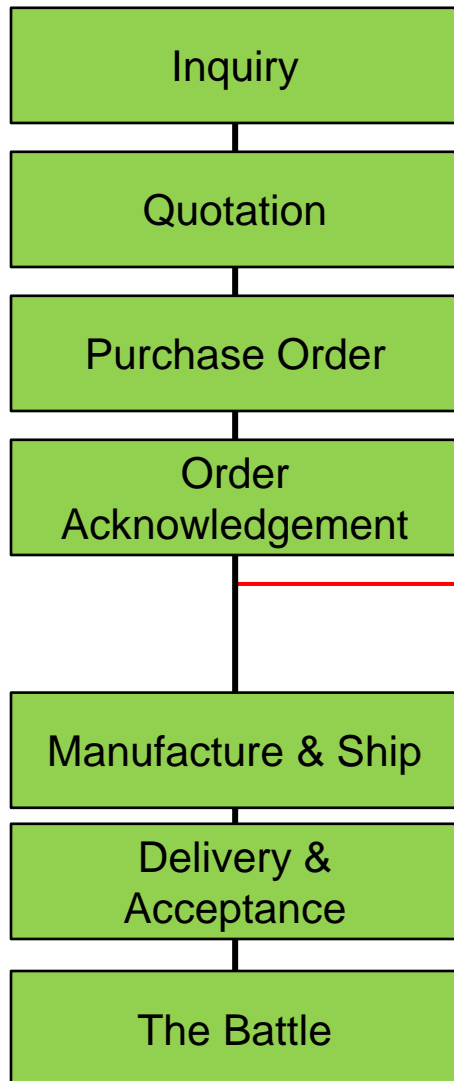
Reaction Molding Techs., Inc. v. Gen. Elec. Co., 588 F.Supp. 1280 (E.D.Pa.1984)

10. Seller's Acknowledgement is Not a Counteroffer



- “Please quote price and delivery”
 - Generally not considered to be an offer, but instead an invitation to negotiate
 - May contain Seller’s T&Cs
 - Usually considered to be the “offer”
 - Typically contains Buyer’s boilerplate T&Cs
 - T&Cs generally say “acceptance is limited to the terms of the offer and Buyer objects to any additional or different terms of Seller.”
 - Typically considered to be the “acceptance”
 - Contains additional and different T&Cs, but does not expressly require Buyer’s acceptance of those additional or different T&C’s
 - Does not constitute a Counteroffer
- **Contract exists per UCC 2-207(1)**
- Battle of the forms over whose T&Cs apply
 - “Knockout rule” applies to Buyer’s and Seller’s different terms
 - “Material alteration “ and “Buyer’s objection in advance” rule apply to Seller’s “additional terms”
 - **Net result—Buyer wins the Battle of the Forms**

10. Seller's Acknowledgement is a Counteroffer



- “Please quote price and delivery”
 - Generally not considered to be an offer, but instead an invitation to negotiate
 - May contain Seller’s T&Cs
 - Usually considered to be the “offer”
 - Typically contains Buyer’s boilerplate T&Cs
 - T&Cs generally say “acceptance is limited to the terms of the offer and Buyer objects to any additional or different terms of Seller.”
 - Usually considered to be the acceptance
 - Nearly always contains different or additional T&Cs
 - **Acceptance is made conditional on Buyer’s assent to Seller’s terms**
 - Constitutes a counteroffer unless Buyer accepts Seller’s terms
 - Buyer usually does not accept or remains silent
- **No Contract (Buyer or Seller can walk away)**
- Conduct manifesting existence of contract over the “negotiated” or “dickered” terms (product, price, quantity, delivery 2-207(3))
 - More conduct manifesting existence of contract
 - Battle of the forms over whose T&Cs apply
 - No written contract existed
 - 2-207(3) says conduct forms a contract, terms are what is agreed (negotiated terms) plus UCC gap fillers
 - **Net result—Buyer wins the battle of the forms**

10. How Sales of Goods Contracts are Formed



1. By signed agreement



2. By exchange of purchase and sale documents



3. By conduct

10. Understand That The World Does Not Always Revolve Around Your Terms

PURCHASE ORDER	
SECTION 2. PRICE The Supplier agrees to detail below and submit for approval the following items and quantities of materials and equipment to be furnished and installed in accordance with the drawings and specifications of the project.	
SECTION 3. PAYMENT (a). The Contractor shall pay the Supplier the sum as noted in the schedule of values as provided in the contract within 30 days after the date of completion of the work.	
SECTION 4. CHANGES The Contractor may make any change in the work under this Agreement, and the Supplier shall be bound to comply with such changes. Any change in the work shall be agreed to in writing by the Contractor and the Supplier.	
SECTION 5. PROTECTION OF EXISTING UTILITIES The Supplier shall be responsible for the protection of all existing utilities shown on the drawings and in the field. The Supplier shall be responsible for the cost of any damage to existing utilities.	
SECTION 6. APPROVALS All drawings and specifications shall be approved by the Engineer before construction begins. The Supplier shall be responsible for obtaining all necessary permits.	
SECTION 7. COMPLETION The Supplier shall complete the work within the time specified in the contract. The Supplier shall be responsible for the cost of any delay in completion.	
SECTION 8. DISPUTE RESOLUTION In the event of any dispute between the Contractor and the Supplier, the dispute shall be resolved by arbitration in accordance with the rules of the American Arbitration Association.	
SECTION 9. ATTORNEY'S FEES In the event either party institutes suit against the other party, or against the surety of the other party, in connection with any dispute or matter arising under this Agreement, the prevailing party shall be entitled to recover a reasonable attorney's fee in addition to any other relief granted.	
IN WITNESS WHEREOF, the parties hereto have executed this Subcontract by their proper officers or duly authorized agents.	
CONTRACTOR GSE CONSTRUCTION COMPANY, INC. DATE: _____	
SUPPLIER Schwing Bioset DATE: _____	

To/Vendor:
ABC Company, Inc
123 Sesame Street
Wonderland, CA 4

Ship To:
GSE Construction
1020 Shannon Court
Livermore, CA 945

Note: A two work
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PO Number
123-45678

WHEREAS the Co
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FOR THE CONST
IMPROVEMENTS

NOW THEREFOR

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SECTION 7. COM
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If any action is br
Purchase Order, I
County, California

“Boilerplate” Reverse Side of ABC Purchase Order (UCC Battle of the Forms)

PURCHASE ORDER TERMS AND CONDITIONS

In these Terms and Conditions, the “Deliverables” mean those items described in the purchase order on the reverse side; the “Company” means Mechatronics, Inc., Mechatronics, National Precision Ball, National Precision Bearing, Silverthin Bearing, and their respective assigns; and “Vendor” means the firm or person from whom the Company proposes to purchase the Deliverables. The Company offers to purchase from Vendor the Deliverables described in the Purchase Order on the reverse side of the terms, conditions and provisions set forth herein.

1. **Price.** Vendor warrants that the prices for the items or services covered by this Purchase Order are not less favorable than those currently extended to any other customer for the same or similar items or services in similar quantities. In no event is this order to be filled at higher prices than last previously quoted or charged without Company’s written consent. In the event Vendor reduces its prices during the term of this order, Vendor agrees to reduce the price hereof correspondingly. Vendor warrants that the prices shown on this Purchase Order shall be complete, and no additional charges of any type will be added without Company’s express written consent. Such additional charges include, but are not limited to, shipping, packaging, labeling, custom duties, taxes, storage, insurance and boxing. If partial shipments are made for the convenience of Vendor, any additional transportation charges will be paid by Vendor.
2. **Terms.** This Offer may be accepted only on the exact terms set forth in this Purchase Order and any additional or different terms or conditions which may appear in any communication from Vendor are hereby objected to and shall not be effective or binding unless contained in a writing signed by the Company referring to this purchase order. This Offer shall be deemed accepted on the earlier of the date (a) when a purchase order confirmation is received from Vendor or (b) when Vendor begins work on the Deliverables. Unless otherwise indicated in the Purchase Order, Company shall pay each invoice in full within 45 (forty-five) days of receipt of the invoice or acceptance of the Deliverables covered by the invoice, whichever is later.
3. **Delivery.** Delivery by Vendor of the Deliverables shall be as shown in the “Ship to” block on the face of this Purchase Order or as otherwise directed by Company. Unless otherwise specified on the face of this Purchase Order, all products will be packaged by Vendor in suitable containers to permit safe and secure transportation and handling. Time is of the essence. Delivery shall be strictly in accordance with the schedule set forth in the Purchase Order. Vendor shall expend its best efforts to conform to the mutually agreed upon delivery date or dates. Items delivered more than fifteen (15) days prior to the Purchase Order item delivery schedule, may at Company’s option, be returned to Vendor at Vendor’s expense. Vendor agrees to notify Company as soon as possible after Vendor becomes aware that it will not be able to deliver any or all of the Deliverables on the date specified for delivery, and Company may thereupon at its sole discretion (a) terminate this purchase order in whole or in part without liability to Company and without waiving any rights to recover damages (including incidental and consequential damages) under the Uniform Commercial Code (“UCC”) as adopted in the State of Washington, or (b) require Vendor to use additional effort, including premium effort, and shall ship via air or other expedited routing to avoid or to minimize delay to the maximum extent possible and all at no charge to Company or change in the price and without prejudice to any of Company’s rights or remedies, whereupon Vendor shall use such efforts.
4. **Risk of Loss and Insurance.** The risk of loss from any casualty to the Deliverables, regardless of the cause or of the casualty, shall be on Vendor until the Deliverables have been delivered as provided in paragraph 3 and accepted in the manner provided under paragraph 6. Unless otherwise specified in the Purchase Order, all shipments shall be F.O.B. Preston, Washington, or if International C.I.F. Preston, Washington or other destination specified by Company. Vendor agrees to insure the Deliverables from and against all reasonable and customary hazards and risks of injury and destruction from the time the Deliverables are identified to the contract to the time of delivery. Insurance shall be placed with reputable underwriters and shall name Company as a loss payee as its interests may appear, and such policy shall waive subrogation rights against Company.
5. **Inspection at Vendor’s Premises.** At the request of Company, the Deliverables shall be subject, at any time prior to delivery, to inspection by Company at the premises of Vendor. Vendor, upon such request and without cost to Company, shall provide reasonable facilities and assistance for the safety and convenience of such inspectors. At the time of inspection, Vendor shall make available to the inspectors copies of all such information relating to the Deliverables, including all specifications, drawings, samples, and descriptions, requested by inspectors to facilitate this inspection. This inspection shall be deemed as preliminary only and the Deliverables shall be subject to final inspection and acceptance after delivery at Company’s place of business.
6. **Adequate Assurances.** In the event that Company learns of a non-conformity of the Deliverables prior to delivery, Company may demand from Vendor adequate assurances of cure and Vendor shall provide such assurances, both as to the particular Deliverables in question and as to future installments. If, within ten business days after such demand, in the event of Vendor’s failure to provide adequate assurances, Company may in its sole discretion terminate this contract in whole or in part (including with respect to future installments) without liability to Company and without waiving any rights to recover damages (including incidental and consequential damages) from Vendor or to purchase such Deliverables elsewhere and hold Vendor accountable for “cover” as defined in the UCC as adopted in the State of Washington.
7. **Final Inspection.** Vendor shall inspect and test the Deliverables prior to their shipment to Company. Notwithstanding any prior payment or prior inspection by Company of the Deliverables, acceptance of the Deliverables shall be subject to final inspection by Company after delivery at Company’s place of business. Company shall be entitled to inspect the Deliverables in any manner that is possible and commercially reasonable, including utilizing persons not employed by Company for the purpose of making the inspection.
8. **Acceptance of Deliverables.** In no event shall acceptance of the Deliverables occur until Company has had a reasonable period of time to conduct a final inspection of Deliverables, however inspection within ten business days following receipt at the delivery point specified in paragraph 4 above shall be conclusively deemed reasonable. Notwithstanding the foregoing, where the Deliverables are an integral part of or a component of a system, acceptance of the Deliverables shall not occur until Company has had a reasonable period of time to conduct a final inspection of the entire system. Company, at Company’s option, may reject quantity over shipments that are not specifically covered by a properly executed Change Order to this Purchase Order, and such over shipments are subject to return by Company to Vendor at Vendor’s expense.
9. **Warranty.** The Deliverables shall be in conformity with the highest standards of quality and professionalism. Vendor warrants that the Deliverables shall be free from defects in design, materials and workmanship and shall conform to all applicable requirements, specifications, samples, drawings and descriptions either provided by or to Company, including, without limitation, all requirements, specifications, samples, drawings and descriptions contained or referenced in any other documentation provided or produced by Vendor, shall conform to all applicable requirements of law and government regulation, and shall otherwise be merchantable and fit and suitable for their intended purposes. Vendor further warrants that it owns the Deliverables and has the power to, and shall, transfer the Deliverables to Company free and clear of liens, encumbrances and interests of any kind. These warranties shall survive delivery, inspection, acceptance and payment.
10. **Remedies for Non-Conformity.** Without prejudicing Company’s other rights and remedies, Company may return at Vendor’s sole expense all Deliverables which do not conform to Vendor’s warranties for a full refund of all sums then paid for the Deliverables. Company may, in addition, return all quantities of Deliverables tendered after the delivery date or in quantities in excess of those ordered. In the event of a non-conforming delivery, Company may, at its option, (a) demand repair and/or replacement of non-conforming Deliverables, whereupon Vendor shall repair or replace such merchandise, (b) terminate the relevant purchase order without waiving rights to recover damages (including incidental and consequential damages) or to purchase replacement goods from other suppliers and (c) hold Vendor liable for cost of “cover” as defined in the UCC.
11. **Installment Contracts.** Where Vendor is to deliver Deliverables to Company in multiple shipments, it is expressly recognized and agreed that a breach which is substantial with respect to any one installment is conclusively substantial with respect to the entire contract.
12. **Default Remedies.** Upon the occurrence of any one or more of the following events, Company shall have the right, at Company’s option, in any outstanding order, to (i) cancel and terminate any contract for the purchase of Deliverables without cost or liability to Company and/or (ii) purchase the Deliverables elsewhere and charge Vendor with the difference between the net price for which the Deliverables are actually purchased and the price recorded on this purchase order and/or (iii) exercise all other rights and remedies available to Company under the UCC: (a) Vendor’s insolvency or inability to meet its obligations as they become due; (b) filing of a voluntary or involuntary petition of bankruptcy by or against Vendor; (c) institution of legal proceedings against Vendor by creditors or stockholders; (d) appointment of a receiver for Vendor by any court of competent jurisdiction; (e) Vendor’s failure to perform or comply with any term or condition in this contract or any order, including Vendor’s failure to deliver any Deliverables to Company when due; (f) any warranty made by Vendor is or becomes untrue or incorrect; or (g) Vendor fails to give adequate assurances of performance within ten days from the demand therefore from Company. In the event of Vendor’s bankruptcy or insolvency Company shall be entitled to collect from Vendor its attorney’s fees and litigation expenses. The rights and remedies provided herein are cumulative and not exclusive of any rights and remedies provided by law or in equity.
13. **Warranty of Infringement/Vendor’s Authority.** Vendor represents and warrants that the Deliverables and any and all other items, technology, and rights and properties of any nature developed by Vendor under this Purchase Order shall be original to Vendor and shall not infringe in any respect on the right or property of any others. Vendor shall not, without prior written approval of Company, use any equipment, suppliers, facilities, or proprietary information of any other party in Vendor’s performance under this Purchase Order. Vendor further represents and warrants that Vendor is fully authorized to enter and to perform under this Purchase Order, without infringing any of Vendor’s other commitments, agreements, or understandings. Vendor shall defend, indemnify and hold Company and its agents and owners harmless from and against any and all losses, claims, damages, liabilities, obligations, costs and expenses (including reasonable attorneys’ fees) arising from or based upon any breach of Vendor’s representations or warranties or the use of the Deliverable or any of the rights and properties.
14. **Indemnity.** Vendor agrees to defend, indemnify, release and hold harmless Company, its directors, officers, employees and agents against and from any and all liabilities, claims, demands, suits, causes of action, losses, penalties, fines, expenses and damages, including reasonable attorneys’ fees and court costs for personal injury or bodily injury, including death, to any person and for damages to the property of anyone (including property of Company), arising out of or in connection with the use or sale of the Deliverables, from any patent or hidden defects in the quality of the Deliverables, or any breach of warranty given by Vendor with respect to the Deliverables. No limitation of liability of Vendor contained in any other writing shall be binding on or effective against Company.
15. **Right of Setoff.** Claims for monies due or to become due from Company shall be subject to deduction by Company for any setoff or counterclaim arising out of this or any other of Company’s orders placed with Vendor or contracts made with Vendor. Company expressly reserves all such rights against Vendor and its assignees.
16. **Compliance with Laws, Rules & Regulations.** Vendor agrees to comply with all applicable State, Federal, and local laws in the purchase, manufacture, processing and delivery of the Deliverables. If violation of such laws has or does occur, Vendor will indemnify and save harmless Company from all loss, penalties, or payments of sums of money on account of such violation.
17. **Employees, Agents, and Subcontractors.** If Vendor uses any agents or subcontractors (“persons”) in its performance under this Purchase Order, Vendor shall first request and receive Company’s consent to such assistance and Vendor shall require each such person to be covered by a written agreement binding such person to the terms of paragraph 15 of this Purchase Order for the benefit of Company or its Assignee.
18. **Assignment of Purchase Order by Company.** The Purchase Order is assignable by Company upon written notice to Vendor, subject, however, to Vendor’s written consent, which shall not be unreasonably withheld. Notwithstanding the foregoing, the consent of Vendor shall not be required for the assignment of this Purchase Order by Company to (i) an entity which controls, is subject to common control, or is controlled by Company, or (ii) an unrelated entity that is a national bank or financial institution or an affiliate thereof. Assignment by Company pursuant to this paragraph shall have no effect on, or serve to diminish in any way, Company’s rights and remedies under this Purchase Order.
19. **Protection of Confidential Information.** Vendor acknowledges and agrees that Company’s business and future success depends on the preservation of the trade secrets and other confidential information of Company and its affiliates, licensors, suppliers, customers and prospective customers (“Confidential Information”). The Confidential Information includes, without limitation, the Deliverables and all specifications, drawings, prototypes, technical information, patent applications and information, procedural and business and financial information, product and marketing plans, personnel information, know-how and any ideas, concepts, product, methods, inventions, procedures or information that are proprietary to Company, its affiliates, its licensors or its actual or prospective suppliers of customers or that Company is required to keep confidential, whether developed by or provided to Vendor. Vendor agrees to protect and to preserve as confidential during and after the term of this Purchase Order all the Confidential Information at any time known to Vendor. Vendor agrees to take appropriate action to protect and preserve the confidentiality of the Confidential Information and at a minimum to utilize the same effort to safeguard such Confidential Information as it utilizes to protect its own confidential or proprietary information. Vendor shall not disclose any of the Confidential Information without the prior written consent of Company, and Vendor shall neither use nor allow others to use any of the Confidential Information for any purpose other than for the sole benefit of Company as authorized by the Purchase Order, unless specifically approved in writing in advance by Company. Vendor’s obligation under this paragraph shall survive any completion or termination of this Purchase Order. Because a violation by Vendor of the provisions of this paragraph could cause irreparable injury to Company and there is no remedy at law for such violation, Company shall be entitled, in addition to all other remedies available at law or in equity, to equitable relief, including injunction and specific performance without posting a bond, as a remedy for any such violations. In the event Company incurs any expenses by reason of Vendor’s breach of any term of this paragraph, such actual expenses, including, but not limited to, attorneys’ fees, court costs and other expenses, shall be paid by Vendor to Company.
20. **Notices.** All notices and approvals shall be in writing and given (i) in person; (ii) if mailed, by registered or certified mail, postage and charges prepaid to the address in this paragraph; or (iii) by a national courier service. Notices shall be effective on the earlier of the actual receipt or five (5) days after mailing. All notices to the Vendor shall be directed to the address set forth on the face of this Purchase Order. All notices to Company shall be directed to:

Mechatronics, Inc., 6152 - 304th Avenue SE Preston, WA 98050 Telephone: 425-222-5900

21. **No Assignment by Vendor.** Vendor’s obligations under this Purchase Order are personal and are not assignable to others and any purported assignment shall be void. Without limiting the generality of the foregoing, Company shall have no obligation to pay any invoice designating that payment be made to anyone other than Vendor, provided however, that following receipt by Vendor directing Company to pay a third party, payment in accordance with any such notice shall conclusively satisfy the obligations to Vendor with respect to this Purchase Order.
22. **Relation of Parties.** The relationship of the parties is one of independent contractors, and neither Vendor nor Company intend to create any partnership, joint venture, employment, or agency. Vendor shall not represent to anyone that Vendor is an agent of Company or otherwise authorized to bind or commit Company in any way.
23. **Governing Law.** This Purchase Order shall be governed by and interpreted in accordance with the laws of the State of Washington which are in force on the date of this Purchase Order without reference to the United Nations Convention on Contracts for the International Sale of Goods. Unless the contract requires otherwise, all terms used in this Purchase Order and that are defined in the UCC shall have the meaning stated in the UCC.

10. Buyer's Nuclear Weapon

THIS PURCHASE ORDER IS **EXPRESSLY LIMITED TO**,
AND **EXPRESSLY MADE CONDITIONAL ON**, SELLER'S
ACCEPTANCE OF THE TERMS OF THE ORDER AND THE
ATTACHED _____ PURCHASE ORDER TERMS AND
CONDITIONS. (A COPY OF THE PURCHASE ORDER
TERMS AND CONDITIONS IS AVAILABLE AT [INSERT
URL].) BUYER **OBJECTS TO ANY DIFFERENT OR
ADDITIONAL TERMS.**

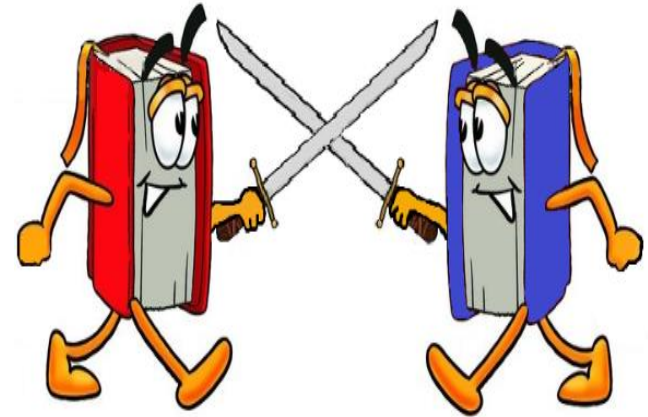
Acknowledged and Accepted By Seller:

Name: _____

Date: _____

10. Understand That The World Does Not Always Revolve Around Your Terms

- **The UCC is pro-buyer and your customer almost always wins the “Battle of the Forms”**
- Ask sales for a copy of any written P.O.
- In the event the customer has issued a written P.O., be on the **alert** for objectionable terms and conditions, e.g.:
 - ✓ Objections to seller’s terms and conditions
 - ✓ Indemnity
 - ✓ Damages
 - ✓ Warranties
 - ✓ Arbitration
 - ✓ Incorporation by reference
 - ✓ Online terms and conditions
- Customer’s P.O.s should *never* be signed.
- Our leverage = refuse to ship until resolved.



10. Understand That The World Does Not Always Revolve Around Your Terms

Why do we worry about the Battle of the Forms and UCC Gap Fillers?

- ✓ Implied warranties of merchantability and fitness
- ✓ No limit of liability for Seller
- ✓ Incidental and consequential damages apply
- ✓ 4 year statute of limitations
 - Ex: Purchase Order – 3 year SOL; Invoice – 1 year SOL.
Result? 4 year SOL!
- ✓ Full palette of Buyer's remedies still in play

****Buyer wins the Battle of the Forms****

10. The Dilemma

Purchase Order

- 100 oak entry doors, 6 ft. x 3 ft.
- \$300 per door, payment due on delivery
- Deliver on 4/1/11
- *3 year warranty that doors are of stainable quality

Invoice (Acknowledgment of Order)

- 100 oak entry doors, 6 ft. x 3 ft.
- \$300 per door, payment due on delivery
- Deliver on 4/1/11
- *Limited 1 year warranty that the doors are of stainable quality
- *Arbitration required in the County of Los Angeles if there is a dispute.

***NOTE: pre-printed boilerplate term on
reverse side of P.O. / Invoice.**

11. Handle the Turnip with Care

- Telltale warning signs of insolvency:

- ✓ Change in Pay Habits
- ✓ Dramatic Increase in Purchases – “loading up”
- ✓ Trade Reports
- ✓ Invalid Backcharges
- ✓ Personnel Changes / Downsizing
- ✓ Computer Problems
- ✓ Bad Checks
- ✓ Exceeding Requested Credit Limit
- ✓ Customer Changes Business Name
- ✓ Payments from third parties

11. Handle the Turnip with Care

- Dealing with your customer's slide into bankruptcy
 - ❑ Consider your preference exposure and defenses
 - ❑ Insist on payments/guarantees from third parties
 - ❑ Convert customer from credit to COD/COO/CIA
 - ❑ Manage Timing of Credit Extensions (New Value)
 - ❑ Consider Applying Payments to Most Recent Invoices (Ordinary Course)
 - ❑ Obtain and properly perfect purchase money security interest in product delivered (generally, not a preference)
 - ❑ Consider withholding/modifying statutory waivers

11. Handle the Turnip with Care

- Consider Requesting Adequate Assurances

UCC § 2-609: When reasonable grounds for insecurity exists, either buyer or seller: (1) “may in writing demand **adequate assurance** of due performance” (i.e., ability of seller to timely deliver goods; ability of buyer to pay for goods); and (2) until it receives such reasonable assurances, “may, if commercially reasonable, suspend any performance....”

11. Handle the Turnip with Care

- Post-Bankruptcy Strategy

- ☐ Dischargeability of Debt / Fraud
- ☐ Claims against Guarantors / Third Parties
- ☐ Alter Ego Claims
- ☐ Post-Petition Supplier to D.I.P.
- ☐ Proof of Claim
- ☐ 503(b)(9) Administrative Claim
- ☐ Statutory Liens
- ☐ Critical vendor status



GIBBS GIDEN ATTORNEYS AT LAW

LOCHER TURNER SENET & WITTBRODT LLP

11. Handle the Turnip with Care

- Consider Preference Defenses

- ☐ Subsequent New Value
- ☐ Ordinary Course of Business
- ☐ Contemporaneous Exchange of Value
 - Releases of statutory rights
- ☐ Failure to comply with Small Business Reorganization Act of 2019 Amendments
 - Trustee's due diligence requirements (11 USC 547(B))
 - Proper venue for claims under \$25K (28 USC 1409(B))

12. Know the Arrows in Your Judgment Enforcement Quiver

- Best Bang For Your Judgment Enforcement Bucks
 - ✓ Efficient Judgment Perfection
 - ✓ Notice of entry of judgment
 - ✓ Debtor examination
 - ✓ Third party examination
 - ✓ Abstract of judgment (real property lien)
 - ✓ Bank levies
 - ✓ Levies upon receivables and other property
 - ✓ Wage garnishment
 - ✓ Amending judgment

13. Remain Active in Your Collections

- Empower Yourself
- Stay Current with Legal Trends
- Talk the Talk
- Understand the Strategy
- Make Sure Your Attorney is a Specialist
- Problem-Solve Early with Your Attorney
- Good Cop v. Bad Cop
- Stay Connected



13. Remain Active in Your Collections

XYZ CORPORATION CASE STATUS CHART (UPDATED JUNE 1, 2015)

MATTER	CUSTOMER NAME	NAMED DEFENDANTS	CASE # / COURT	PRINCIPAL CLAIM	AMOUNT COLLECTED	STATUS/ NOTES	HEARING DATES / DEADLINES	RECOMMENDED ACTION
001	JohnDoe Corporation	JohnDoe Corporation; John Doe; Trixie Ownership Corp.; ABC Surety Co.	N/A	\$99,999.99	\$7,500.00 (from ABC Surety Co.)	<ul style="list-style-type: none"> 5/1/15: Demand letters sent to Defendants. 5/10/15: Received response from ABC Surety Co. to demand letter and check for \$7,500 5/15/15: Telephone call with John Doe and Trixie Ownership re settlement 	<ul style="list-style-type: none"> Statute of Limitations for Lawsuit: October 1, 2015 	<ul style="list-style-type: none"> Continue to negotiate with Customer; set early mediation for September 15 and if no settlement by September 20, file lawsuit.
002	Jane Doe Partnership, L.P.	Jane Doe Partnership, L.P.; Jane Doe; John Doe; Bill Dough; Liberty Mutual Insurance Company	San Diego County Superior Court / Case# To Be Assigned	\$100,000.00	\$0	<ul style="list-style-type: none"> 5/1/15: Demand letters sent to Defendants. 5/12/15: Lawsuit drafted; waiting for client approval. 	<ul style="list-style-type: none"> Statute of Limitations for Lawsuit: September 28, 2015 	<ul style="list-style-type: none"> File lawsuit
003	Acme Energy, Inc.	Acme Energy, Inc.; Acro Energy Technologies, Inc.; Acro Energy Technologies Corp.; John J. Fleming	San Francisco Superior Court / Case# CGC-12-520454456	\$1,232,599.15	\$200,000	<ul style="list-style-type: none"> Complaint filed 5/1/12 First Amended Complaint filed 5/23/12 6/29/12: Answer to complaint filed by Acro entities; cross-complaint filed by Acro against XYZ. Fleming's response is due on or before 8/31/12 per agreement of counsel. 8/22/12: XYZ's Demurrer to Cross-Complaint and Reply Brief re Attachment filed. 8/23/12: Agreement on major settlement points. Settlement \$1.2M over 12 months; \$200,000 every 60 days. 9/5/12: Fully executed settlement documents transmitted to Acro's attorney. Writ of Attachment Hearing is off-calendar. 9/12/12: Acro filed request for dismissal of cross-complaint (with prejudice) 9/15/12: Received first payment of \$200,000 	<ul style="list-style-type: none"> Case management conference: July 10, 2013 at 10:30 AM in Department 610 Trial Date: December 22, 2013 Settlement payment schedule (\$200,000 each): 9/15/12; 11/15/12; 1/15/13; 3/15/13; 5/15/13; 7/15/13 	<ul style="list-style-type: none"> Ensure timely receipt of settlement payments and send notices of default when appropriate.

13. Remain Active in Your Collections

- Understand Your Attorney's Billing Practices
- Standard v. Hybrid Fee Arrangements
- Fixed Fee Demand Letters
- Early Payment Discount
- Complementary Services (e.g., Training, Seminars, Research)
- Legal Research Fees
- Taking Advantage of Technology (e.g., Email, CourtCall, etc.)
- Copy Charges / Telephone Calls
- Legal Placement Checklist / Form

Client Legal Placement Checklist
(Attorney-Client Privilege / Attorney Work Product)

Date	
Customer Name	
Business Type (e.g., corporation, partnership, sole proprietorship)	
Customer Contact Name(s)	
Customer Contact Email(s)	
Principal Amount Due	
Guarantor(s)	
Other Possible 3 rd Party Liability (e.g., account payors; sureties)	
Relevant Dispute Information (e.g., backcharges; bad check)	
Business Relationship Concerns?	
Status of Collection Efforts	
Legal Action Requested (if limited) (e.g., demand letter only; record mechanics lien; file lawsuit)	

Documents	In Client File? (Yes/No)	Attached? (Yes/No)	Comments:
Credit Application			
Statement of Account			
Guarantee			
Purchase Order			
Contract / Master Supply Agreement			
Invoices / Sales Order Confirmation			
Delivery Receipts			
Correspondence			
Collection Notes			
Job Information Sheet (attach Project Security Addendum)			

Project Security Addendum

Project Information

Project Name / Address		Public or Private?	
Owner			
Direct Contractor			
Lender (if any)			
Payment Bond Surety (if any)			
Principal Claim Amount		Total Value Furnished	Total Amount Paid
Date Preliminary Notice Served			
Date Last Furnished Material			
Date of Notice of Completion			
Date of Actual Completion			

Project Remedies

Date of Mechanics Lien	
Date of Stop Payment Notice	
Date of Notice of Payment Bond Claim	
Date of Customer License Bond Surety Claim	

14. Consider Your Prejudgment Options



14. Consider Your Prejudgment Options

- *Expand Demand Letter Distribution*
- “Bad Check” Letter
- Considerations When Filing Complaint:
 - ✓ State vs. Federal Court
 - ✓ Forum / Venue
 - ✓ Contract
 - ✓ Intentional Torts = Punitive Damages
 - ✓ Penal Code = Treble Damages + Attorney’s Fees
 - ✓ Claims against Third Parties
 - ✓ ***Writ of Attachment***
- Prompt Discovery

14. Turning the Screws Against 3rd Parties

- Guarantors
- Sureties
- Joint Check Agreements
- Commercial Code claims against banks
- Sureties
- Unjust Enrichment Claims
- Alter Ego and Successor Liability
- UVTA (Uniform Voidable Transactions Act) of 2022
 - ✓ Writ of Attachment against all Transferee's assets
 - ✓ Burden on Defendants to disprove (1) insolvency and (2) good faith / reasonably equivalent value exchanged

THANK YOU!



Presented By:

Christopher E. Ng, Esq.
cng@gibbsgiden.com

Gibbs Giden LLP
California and Nevada
(310) 552-3400 (office)
(310) 990-3855 (cell)