



*Equipping Lease Professionals For Success*

## **Second Lien Lending**

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**SECOND LIEN LENDING: IMPORTANT PROVISIONS AND ISSUES TO BE  
ADDRESSED IN NEGOTIATING AND DOCUMENTING INTERCREDITOR  
AGREEMENTS**

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Any and all negotiations between Senior Lienholder and a Junior Lienholder with respect to lending to a borrower always depend upon the specific transaction, the relative bargaining strengths of the parties, the Borrower's need for further financing, the strength of the collateral, and the risk tolerance of the lenders. The discussion below outlines issues that the Senior Lienholder and Junior Lienholder will address when negotiating and drafting an Intercreditor Agreement or a Subordination Agreement.

**I. Important Definitions**

Define parties  
Collateral  
Guaranties  
Collateral Documents  
Lien  
Loan Documents  
Proceeds  
Security Agreement  
Obligations/Debt

**A.) Debt.** An important concept in Second Lien Lending, and accordingly, the rights of the Junior Lienholder, is establishing a cap or a limit on what constitutes the actual amount of the Senior Lien debt. The Junior Lienholder desires to minimize the debt beyond the principal, interest, costs and fees so that amounts beyond that are excluded from being paid out of proceeds from the collateral, at least until the Junior Lienholder's debt is paid. In that regard, the parties need to do the following:

- 1.) Junior Lienholder must try to limit rises in the Senior Lienholder's interest rate.
- 2.) Junior Lienholder should try to define the cap at the Borrowing base or original debt incurred and limit intentional overadvances.
- 3.) Senior Lienholder will try and make the definition of "Obligations" as broad as possible so that any and all Obligations currently existing or thereafter incurred will be covered.

## **II. Lien Subordination**

A.) Lien of Junior Lienholder ("Jr") is subordinate to lien of Senior Lienholder ("Sr.")

1.) Lien Subordination should be distinguished from Debt Subordination

- Jr. will request that it is still entitled to receive payments that are not from proceeds of the joint collateral, at least until the Senior Lienholder is paid off. There is no standstill or absolute block on payments to the Junior Lienholder even while the Senior Debt is in payment default.
- Sr. will contend that once there is a default, Jr. cannot enforce its remedies at all and there is a standstill which includes that the Jr. cannot receive payments.

### **EXAMPLE OF DOCUMENT PROVISION IN MULTI-PARTY AGREEMENT**

The Second Lien Collateral Agent, for itself and on behalf of the Second Lien Credit Parties, agrees that, from and after the occurrence of either (i) the written direction of the Required Lender or (ii) the acceleration of the Credit Obligation pursuant to Section 8.02 of the Credit Agreement (in either case as contemplated in clause (i) or (ii) of the parenthetical in Section 2.14(d) of the Credit Agreement), it shall not with respect to the Second Lien Obligations take or receive from or on behalf of Holdings, the borrower or any other Loan Party, directly or indirectly, in cash or other property or by setoff, counterclaim or in any other manner (whether pursuant to any enforcement, collection, execution, levy, foreclosure action or other proceeding or otherwise) any Collateral or any Proceeds of Collateral, unless and until all Senior Secured Obligations have been paid in full in accordance with Section 3.02. Without limiting the generality of the foregoing, unless and until the Senior Secured Obligations have been paid in full, except as expressly provided herein or in the Credit Agreement, the sole right of the Second Lien Credit Parties with respect to the Collateral is to hold a Lien on the Collateral pursuant to the Loan Documents for the period and to the extent granted therein and to receive a share of the Proceeds thereof, if any, after payment in full of the Senior Secured Obligations; provided however, that nothing in this sentence shall be construed to impair the right of the Second Lien Credit Parties to receive payments of principal and interest as provided for the Credit Agreement, and to enforce such right to such payments by bringing suit at law (but not to exercise any rights in respect of the Liens of the Second Lien Credit Parties on the Collateral) with respect to any unpaid amounts of such payments.

2.) **Intercreditor Payment Waterfall Provision**

Typically, the Intercreditor Agreement contains a provision specifying the order in which proceeds from the collateral are to be applied to the Senior and Junior Lien Debt or the priority of payments if the advances or lending exceed the cap.

- Payments received contrary to such a provision and the priority outline therein must be held in trust by the Jr. for the Sr. and then paid to the Sr.



## **EXAMPLE OF DOCUMENT PROVISION IN MULTI-PARTY AGREEMENT**

Section 4.01 Payments Over. Unless and until all Senior Secured Obligations shall have been paid in full, and Collateral or Proceeds thereof or any payment received by any Second Lien Credit Party from Proceeds of the Collateral shall be segregated and held in trust and forthwith paid over to the Administrative Agent for application to the Finance Obligations in the priority set forth in Section 3.02 in the same form as received, with any necessary endorsements or as a court of competent jurisdiction may otherwise direct. The Administrative Agent is hereby authorized to make any such endorsements as agent for any such Second Lien Credit Party. This authorization is coupled with an interest and is irrevocable.

- **Prepayments.** Sr. should require that Jr. not receive any prepayments

### **B.) Prohibition on contesting and taking liens by Jr.**

- 1.) The Jr. agrees not to contest or assist third parties in contesting the Sr.'s lien. Sr. will request that the lien subordination is absolute for all purposes whereas Jr. will maintain that lien subordination should only be recognized and valid to the extent that the lien and claim of Sr. is valid and enforceable.

## **EXAMPLE OF DOCUMENT PROVISION IN MULTI-PARTY AGREEMENT**

**Section 2.02 Prohibition on Contesting and Taking Liens.** Each Finance Party agrees that it will not at any time institute, encourage or join in as a party in the institution of, or assist in the prosecution of, any action, suit or proceeding (i) contesting or challenging the validity, perfection, priority or enforceability of any Lien held by or for the benefit of any Senior Finance Party to secure the Senior Secured Obligations, or otherwise seeking a determination that any such Liens are invalid, unperfected or avoidable, or are or should be subordinated to the interests of any other Person, (ii) contesting or challenging any collection, enforcement, disposition or acceptance of, or other remedial action with respect to, the Collateral by and Senior Finance Party, to the extent related to satisfying Senior Secured Obligations or (iii) contesting or challenging the validity or enforceability of the Article II. Each of the Second Lien Credit Parties further agrees that it will not, until the payment in full in cash of the Senior Secured Obligations, take a Lien on any property of any Loan Party, other than (i) Liens contemplated in the Loan Documents as in effect on the Closing Date and (ii) Liens contemplated in the documents or instruments from time to time governing the Senior Secured Obligations, which Liens shall at all times until the payment in full in cash of the Senior Secured Obligations be subordinate and junior to the Liens of the Senior Collateral Agent for the benefit of the Senior Finance Parties in the Collateral as herein provided.

- 2.) Situations where the Sr. fails to perfect or maintain perfection may also be distinguished from instances where the Sr. loses its lien due to lender misconduct or fraud

### **III. Exercise of Remedies**

Sr. will maintain that :

- Jr. cannot exercise lien until Sr. is paid
- Jr. cannot liquidate collateral until Sr. is paid



- Jr. cannot contest, protest or object to any action of Sr. as to (a) collateral, (b) rights or remedies under the loan documents, (c) forbearance by Sr., (d) waiving or releasing collateral, (e) will not object to a sale of collateral not being commercially reasonable
- Jr. cannot exercise any of its rights or remedies until the Sr. is paid in full
- Any money received by Jr. is held in trust for Sr. and then paid over to Sr.

A.) **Unsecured Creditor Rights Preserved.** The Jr. takes the position in negotiating terms in an Intercreditor Agreement that the Jr. should be at least no worse off than an Unsecured Creditor. As such, a Jr. will request to be permitted by the Senior Lienholder, to:

- 1.) Exercise remedies to enforce payment as long as the enforcement is not against Jr. Lien collateral.
- 2.) File for involuntary Bankruptcy, Appoint a Receiver (which the Sr. will oppose without its permission and consent)
- 3.) Join other enforcement actions taken by other creditors.
- 4.) Bid at Foreclosure Sales.
- 5.) Take defensive acts to protect challenges to lien.
- 6.) Buy the Sr. Lien debt at par
- 7.) Proceed against Guarantors who are not Debtors under the Intercreditor Agreement. This is where the definition of Obligations becomes important.

#### **IV. Jr. can get payments so long as the obligations are not in default**

#### **V. How proceeds from payments or liquidation of collateral are applied to Sr's debt:**

- First, to interest;
- Second, to costs and expenses;
- Third, to late charges;
- Fourth, to pay principal;
- Fifth, to the Jr.

#### **VI. Releasing Liens.**

A.) It is the decision of the Sr. if and when the Sr. Lien against collateral will be released, unless the Sr. has been substantially paid down.

- 1.) **Jr.'s rights retained.** The Jr. can retain the rights to object to commercial reasonableness of the sale and also should receive advance notice.

2) Sr. will oppose this request and require that the Jr. not be allowed to retain this right and waive it. Is such a waiver enforceable under the Commercial Code?

## **VII. Insurance Proceeds**

- Paid first to the Sr. and the Sr. should have the power of attorney of the Jr. to make claims for it until the Sr. is paid in full.

## **VIII. Collection of accounts receivable**

- Jr. cannot notify account debtors until Sr. is paid

## **IX. Insolvency or Liquidation Proceedings**

- Jr. cannot object, challenge or object to Sr. (a) receiving adequate protection payments; (b) use of cash collateral if Sr. wants cash collateral to be used; Jr Lienholders usually will retain the right to object to fees and budgets unless the Sr. will not allow it (c) Section 363 sales if Sr. wants assets sold so long as liens attach to proceeds; and Jr. can bid at auction (d) obtaining new financing under Sections 363 or 364; (e) object or consent to priming liens so long as Sr. and Jr. retain existing lien position thereafter; (f) object to interest payments received by Sr.; (g) voting for a Plan as the Sr. requests; (h) Jr. will not obtain relief from stay until Sr. is paid.
- If parties are oversecured, then Jr. should be able to get adequate protection payments.
- Jr. shall take no action contrary to the Sr. in bankruptcy
- In the event a payment to the Sr. is a preference or otherwise avoidable then the Sr.'s debt shall be reinstated in full force and effect.
- Sr. can object to the Jr. receiving anything or taking any action contrary to the Sr.

## **X. DIP Financing**

### **A.) Debtor-In-Possession Financing.**

Jr's lien can be primed by DIP Financing liens, however, the Jr's consent to DIP Financing and the use of cash collateral can be achieved if :

- 1.) Cap is agreed on total amount of DIP and Senior Lien debt,
- 2.) Market terms are negotiated; and
- 3.) No layering of liens (i.e, whether the Sr and Jr. Liens will be classified as one class of debt). On

the other hand, the Sr. does not want the liens to be combined because if the Sr. is the only lien on the collateral (at least until the Sr. is paid) then the Sr. may be entitled to receive all of the post-petition interest provided, of course, the collateral is worth more than the debt.

## **XI. Waiver**

Sr. requests:

- Inaction by Sr. is not a waiver of any provisions
- Waiver of all claims by Jr. against Sr. arising out of taking or not taking action with respect to the collateral
- Jr. waives all contentions as to marshalling, appraisal, valuation, or similar requirements a secured creditor may have with respect to another secured creditor

## **XII. Unconditional Obligations**

Sr. wants:

- Rights, interests, agreements, and obligations are unconditional despite (a) lack of validity or enforceability of any loan documents, (b) change in time, manner or payment including any increases of obligations by Sr.; (c) exchange, release or lack of perfection of security interest or collateral; (d) Insolvency or liquidation proceedings; (e) other circumstances which could create a defense.
- In the event the liens of Sr. are determined to be invalid then liens still have priority over Jr. Jr. will contest this provision.

## **XIII. Conflicts in documents**

- Provisions of this Agreement controls

## **XIII. Continuing Nature of Agreement**

- Remains in effect until the obligations are paid

## **XV. Amendment; Modifications; Waivers**

- A.) Amendments that alter the amortization schedule or maturity date can have a negative impact on the Jr. Similarly, where the Sr. would seek to modify the borrowing base or increase the advance rate without the consent of the Jr., absent agreement with the Jr., the Sr. may not be successful. Also, Jr. will usually want sale proceeds to pay down the Sr. debt first.

## **XVI. Notices**



**XVII. Further Assurances**

**XVIII. Governing Law**

**XVIII. Specific Performance**

- Injunctive Relief; waiver of adequacy of adequacy of damages

**XX. Counterparts; Facsimile signatures**

**XXI. Waiver of Jury Trial**

**XXII. Jurisdiction and Venue**

**XXIII. No Assignment of Agreement**

**XXIII. Arm's Length Agreement**

- No party is the drafter
- Represented by counsel

**XXVI. Binding on Successors and Assigns**

**XXVII. Attorneys Fees clause**

## WORKOUT AGREEMENT

This Workout Agreement (the "Agreement") is entered into [DATE] by and between DEBTOR Corporation (together with its subsidiaries and related companies, "DEBTOR" or "Debtor"), a corporation organized and existing under the laws of [STATE], having its principal place of business at [ADDRESS], [GUARANTOR 1] ("Guarantor 1"), with an address at [ADDRESS], [GUARANTOR 2] ("Guarantor 2" and with Guarantor 1, each a "Guarantor"), with an address at [ADDRESS], and the [NAME OF LENDER/LESSOR], a [STATE] Corporation having a place of business at [ADDRESS] (together with its successors and assigns, if any, ["Lessor" OR "Secured Party"]) (Lessor/Secured party, Debtor and each Guarantor may be collectively referred to hereinafter as the "Parties" or individually as a "Party").

### RECITALS

A. On or about [DATE] Lessor/Secured Party and Debtor entered into a written Master Lease/Security Agreement (as modified, the "Master Lease/Security Agreement"). A true, accurate and complete copy of the Master Lease/Security Agreement is annexed hereto as Exhibit "A."

B. On or about [DATE], Lessor/Secured Party and Debtor entered into [Equipment Schedule No. \_\_\_\_ to the Master Lease/Security Agreement] (the "Equipment Schedule"). A true, accurate and complete copy of the Equipment Schedule is annexed hereto as Exhibit "B."

C. On or about [DATE], Debtor made, executed and delivered a promissory note in the principal sum of \$[] in favor of Lessor/Secured Party (the "Note"). A true, accurate and complete copy of the Note is annexed hereto as Exhibit "C."

D. On or about November [DATE], Guarantor 1, executed an individual guaranty in favor of Lessor/Secured Party (the "Guarantor 1 Guaranty"), pursuant to which Guarantor 1 absolutely guaranteed full payment and due performance of any and all debts and obligations of Debtor owing to Lessor/Secured Party then and in the future. A true, accurate and complete copy of the Guarantor 1 Guaranty is annexed hereto as Exhibit "D."

E. On or about November [DATE], Guarantor 2 executed an individual guaranty in favor of Lessor/Secured Party (the "Guarantor 2 Guaranty"), pursuant to which Guarantor 2 absolutely guaranteed full payment and due performance of any and all debts and obligations of Debtor owing to Lessor/Secured Party then and in the future. A true, accurate and complete copy of the Guarantor 2 Guaranty is annexed hereto as Exhibit "E."

F. On or about November [DATE] Debtor and Lessor/Secured Party entered into a Cross-Collateral and Cross-Default Agreement (the "Cross-Collateral and Cross-Default Agreement"). A true, accurate and complete copy of the Cross-Collateral and Cross-Default Agreement is annexed hereto as Exhibit "F."

**G.** The Master Lease/Security Agreement, the Equipment Schedule, the Note, the Cross-Collateral and Cross-Default Agreement, the Guarantor 1 Guaranty, the Guarantor 2 Guaranty, as well as all related documents, may be collectively referred to hereinafter as the "Loan/Lease Documents." The equipment described in the Equipment Schedule may be referred to hereinafter as the "Equipment."

**H.** The Parties have agreed that the following amounts are outstanding under the Loan/Lease Documents as of [DATE]:

Master Lease/Security Agreement	\$[	]
Additional Funds	\$[	]
Late Fees	\$[	]
Restructuring Fee	\$[	]
<b>TOTAL</b>	<b>\$[</b>	<b>]</b>

(as may be adjusted from time to time by the terms of this Agreement, the "Loan/Lease Balance").

**I.** In violation of the terms of the Loan/Lease Documents, Debtor (i) improperly disposed of certain of items of Equipment, (ii) otherwise has failed to fully secure the Loan/Lease Balance, and (iii) has failed to make payments when due under the Loan/Lease Documents.

**J.** On or about [DATE], Lessor/Secured Party filed a complaint against the Debtor in COURT. The action is designated as Civil Case No. XXXXX (the "Action").

**K.** Debtors have agreed to waive, relinquish, release, forbear, drop, not assert or otherwise not raise (hereinafter collectively referred to as the "Waiver" or "Waiver of Defenses") any and all defenses, affirmative defenses, setoffs, claims, challenges, petitions to open and/or strike judgments, counterclaims, cross-claims, new matter, subrogation claims, indemnification actions (hereinafter referred to collectively as "Defenses") including, but not limited to, Defenses against any party and/or any third party defendant, that could or must be raised in connection with any and all of the litigation set forth herein and any of the Indebtedness set forth herein or initiated in connection with any obligation of debtors herein to Lessor/Secured Party, that Debtors now have, did have, or may at any time in the future have, against Lessor/Secured Party in connection with or arising out of any claim, obligation, loan, indebtedness, advance set forth in the various loan agreements and documents by and among Lessor/Secured Party, Lessee and Guarantor which Waiver is and, shall be, absolute, unconditional and irrevocable; and

**L.** Debtors have agreed, do agree and will agree to consent to, confess to and not contest any and all judgments that Lessor/Secured Party has obtained or will obtain in furtherance of this Agreement and collection upon the Indebtedness or in connection with any Loan/Lease Documents Debtors have previously executed of or pertaining to this transaction or the Indebtedness; and

**M.** The Debtor and each Guarantor desires to (a) further secure its obligations under the Loan/Lease Documents; (b) restructure the repayment terms of the Loan/Lease Documents;



and (c) resolve the Action, and have requested that Lessor/Secured Party enter into this Agreement to forbear from pursuit of any legal actions to enforce its rights and remedies under any of the Notes, the Guaranties and all other documents executed in connection with the Indebtedness (the Notes, Guaranties, Suretyship, Mortgages, Forbearance Agreements, Mortgage Consolidation and Participation Agreement and all other documents executed in connection with the Loan and this Agreement are hereinafter collectively referred to as the "Loan/Lease Documentation" or "Loan/Lease Documents"). Lessor/Secured Party has agreed to do so under the terms and conditions set forth herein.

N. Debtors hereby, individually, jointly and severally, ratify and reaffirm their obligations to Lessor/Secured Party as set forth above. Debtors hereby admit that each of them is in default, inter alia, for failure to timely pay to Lessor/Secured Party the principal balance, late charges, all accrued interest, and any other costs and fees due and owing under the Notes and the other Loan/Lease Documents. Debtors further acknowledge and agree that by reason of such events of default, Debtors are obligated and responsible to pay to Lessor/Secured Party the entire outstanding balance due under the Loans.

**NOW, THEREFORE**, in consideration of these promises and the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which the Parties hereby acknowledge, the Parties hereby agree as follows:

#### **AGREEMENT**

1. Incorporation of Recitals. The foregoing Recitals are incorporated herein by reference.

#### **ARTICLE I – THE LOAN/LEASE BALANCE**

1. Debtor agrees to repay the Loan/Lease Balance as follows:

(a) At closing, Debtor shall pay to Lessor/Secured Party the sum of \$[ ], for late fees incurred thereby and recoverable under the Loan/Lease Documents.

(b) At closing, Debtor shall pay to Lessor/Secured Party the sum of \$[ ] as a Restructuring Fee.

(c) At closing, Debtor shall make, execute and deliver to Lessor/Secured Party an Amended Promissory Note (the "Amended Note") providing for the payment of the principal amount of \$[ ] pursuant to the terms and conditions and in the form of the document annexed hereto as Exhibit "G." This Agreement shall be of no force and effect until and unless Debtor has made, executed and delivered the Amended Note to Lessor/Secured Party.

2. At or prior to closing, Debtor shall execute and deliver to Lessor/Secured Party a "pay proceeds" letter in the form of the document annexed hereto as Exhibit "H."

3. The Parties acknowledge and agree that the Amended Note is a consolidation of existing obligations under the Note and the "pay proceeds" letter and that this Agreement, the Amended Note, and any related documents in no way constitute a novation. The Amended Note is not a cancellation, pay off, liquidation, extinguishment, or annulment of the Loan/Lease Documents, this Agreement, and/or any related agreements. It is the intent of the parties that said Loan/Lease Documents and or agreements, and all liens, security interests or other encumbrances heretofore granted in favor of Lessor/Secured Party remain in full force and effect except as expressly modified herein. Debtors acknowledge and admit that they have no Defenses, setoff, counterclaim or challenge to the payment of any sums owing under any of the Loan/Lease Documents, nor do they have any Defenses, setoff, counterclaim or challenge to the extent and validity of the security interests granted to Lessor/Secured Party in any of the Collateral as defined in the Loan/Lease Documents, or the enforcement of any of the terms or conditions of all of the Loan/Lease Documents. No modification of the terms of the Notes, Mortgages or Guaranties or Suretyship or other Loan/Lease Document shall constitute a refinancing of any existing secured obligation, and no gap in security shall be deemed to have been created by this Agreement. Debtors consent to the entry of any and all judgments against them in connection with, and pertaining to, the Indebtedness.

4. At Closing, Debtor shall pay to Lessor/Secured Party the sum of \$[ ] as attorneys fees for the restructuring of the Loan/Lease.

## **ARTICLE II – SECURITY FOR THE LOAN/LEASE BALANCE**

### **1. Security Interest - The Equipment**

As security for the full and timely payment of the Loan/Lease Balance, Lessor/Secured Party holds and shall continue to hold, a first priority and continuing security interest in and upon the Equipment and all proceeds of the Equipment.

### **2. Security Interest – The Real Property**

As further security for the full and timely payment of the Loan/Lease Balance, the Guarantors, contemporaneously with the execution of this Agreement, shall pledge to Lessor/Secured Party a promissory note for \$[ ] guaranteed by a mortgage over the real property referred to as Lot X, Property No. XXX registered at ["PLACE"] in the form of the documents attached hereto as Exhibit "I" (the "Real Property"). This Agreement shall be of no force and effect until Debtor has delivered the Mortgage to Lessor/Secured Party. On or before [DATE], the Guarantors shall deliver to Lessor/Secured Party that certain promissory note in the amount of \$[ ] guaranteed by a mortgage created as per deed number XXX executed on [DATE] before Notary [NAME].

### **3. Security Interest – The Insurance Policies**

(a) As further security for the full and timely payment of the Loan/Lease Balance, Debtor and/or each Guarantor shall have caused (i) those certain life insurance policies and any and all insurance proceeds realized thereunder issued by INSURANCE COMPANY 1



("Insurance Company 1"), and (ii) those certain commercial auto policies and any and all insurance proceeds realized thereunder issued by INSURANCE COMPANY 2 ("Insurance Company 2") to be delivered to Lessor/Secured Party, true and correct copies of which are annexed hereto as Exhibit "J and "K" respectively, (collectively, as amended, the "Insurance Policies").

(b) This Agreement shall be of no force and effect until the following items have been executed and delivered to Lessor/Secured Party: (i) a true, correct and certified copy of Endorsements to each of the Insurance Policies which specifically list Lessor/Secured Party as "Loss Payee" and/or "Primary Beneficiary" under the Insurance Policies; (ii) true, correct and certified copies of Certificates of Insurance which evidence Lessor/Secured Party as "Loss Payee" and/or "Beneficiary" under the Insurance Policies; (iii) true, complete and certified copies of the Insurance Policies; and (iv) proof that the Insurance Policies are presently in effect for Guarantor 1 and Guarantor 2 (the "Policyholders"), including but not limited to, true and complete copies of relevant Certificates of Insurance issued directly by [INSURANCE COMPANY] or a duly authorized agent of [INSURANCE COMPANY]. At all times during the term of this Agreement, each Guarantor shall maintain the Insurance Policies in full force and effect under the same terms and conditions as of the date hereof.

#### **4. Security Interest – The Accounts Receivable**

(a) As further security for the full and timely payment of the Loan/Lease Balance, Debtor, contemporaneously with the execution of this Agreement, shall assign to Lessor/Secured Party certain designated accounts receivable from COMPANY (the "Accounts Receivable") in the form of the documents attached hereto as Exhibits "L" and "M" (the "Accounts Receivable Assignments").

(b) This Agreement shall be of no force and effect until Debtor and each Guarantor have executed the Accounts Receivable Assignments and delivered the same to Lessor/Secured Party.

#### **5. Security Interest – Additional Collateral**

(a) As further security for the full and timely payment of the Loan/Lease Balance, Debtor, contemporaneously with the execution of this Agreement, hereby grants to Lessor/Secured Party a security interest in the following property (hereinafter referred to as the "Additional Collateral"):

(i) all inventory of Debtor whether now owned or hereafter acquired;

(ii) all equipment of Debtor, whether now owned or hereafter acquired, including, but not limited to, all present and future machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and recordkeeping equipment, parts and tools, and the goods described in any Equipment schedule to a Loan/Lease Document or hereafter furnished to Debtor by Lessor/Secured Party;

(iii) each and every right of Debtor to the payment of money, whether such right now exists or hereafter arises, whether such right to payment arises out of a sale, lease



or other disposition of goods or other property by Debtor, out of rendering services by Debtor, out of a loan by Debtor, out of the overpayment of taxes or other liabilities of Debtor, or otherwise arises under any contract or agreement, whether such right to payment is or is not already earned by performance, and howsoever such right to payment may be evidenced, together with all other rights and interests (including all liens and security interests) which Debtor may at any time have by law or agreement against any account debtor or other obligor obligated to make any such payment or against any of the property of such account debtor or other obligor; and

(iv) all general intangibles of Debtor including but not limited to all present and future debt instruments, chattel paper, accounts, loans and obligations receivable and tax refunds.

## **6. Continuing Security Interest**

Lessor/Secured Party's security interest in the Equipment, the Real Property, the Additional Collateral, the Insurance Policies, and the Accounts Receivable now held or hereafter acquired by Debtor or any of the Guarantors shall not be terminated in whole or in part unless and until all indebtedness of every kind, due or to become due, owed by Debtor, any affiliate, any subsidiary and/or each Guarantor to Lessor/Secured Party under this Agreement, any Exhibit to this Agreement, the Loan/Lease Documents, and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into, is fully paid and satisfied and all of Debtor's and/or any Guarantors' obligations under this Agreement, the Loan/Lease Documents, any Exhibit to this Agreement and any other agreement between Debtor, any affiliate, any subsidiary, and/or any Guarantor and Lessor/Secured Party, whether now in existence or hereinafter entered into have been performed in full.

## **7. Security Documents**

Debtor and each Guarantor, respectively, in order to set forth the terms and conditions under which the Equipment, the Real Property, the Additional Collateral, the Insurance Policies and/or the Accounts Receivable will be held by Lessor/Secured Party, shall execute and deliver to Lessor/Secured Party, in form and substance reasonably satisfactory to Lessor/Secured Party, as applicable, any and all other security agreements, hypothecation agreements, assignments, mortgages, pledge agreements, financing statements, notices of lien, guarantees and any other documents relating to any security as Lessor/Secured Party shall reasonably require from time to time (all herein referred to collectively as the "Security Documents").

## **8. Filing and Recording**

Debtor and Guarantors hereby authorize Lessor/Secured Party to file any financing statement or notice of lien in respect of any security interests identified or created pursuant to this Agreement which may at any time be required or which, in the reasonable opinion of Lessor/Secured Party, may at any time be desirable, although the same may have been executed only by Lessor/Secured Party, or, as necessary to perfect any security interest hereunder, to sign such financing statement or notice of lien on behalf of Debtors and any Guarantor and file the

same. Debtor and each Guarantor hereby irrevocably designate Lender, its agents, representatives and designees as agents and attorneys-in-fact for Debtor and each Guarantor, respectively, for this purpose and acknowledge that this is a power coupled with an interest and that it is irrevocable. In the event that any re-recording or re-filing thereof (or the filing of any statements of continuation or assignment of any financing statement) is required to protect and preserve security interests in favor of Lessor/Secured Party, Debtor and each Guarantor shall bear the cost and expense of causing the same to be recorded and/or refiled at the time and in the manner reasonably required by Lessor/Secured Party.

### **ARTICLE III – THE ACTION**

Concurrently with the execution of this Agreement, the parties will enter into a Stipulation of Settlement to be so ordered by the Court in the form annexed hereto as Exhibit \_\_\_\_ which will provide for the discontinuance of the action without prejudice but with the Court retaining jurisdiction for the purposes of enforcing the terms of the Workout Agreement.

### **ARTICLE IV – CROSS-DEFAULT, CROSS-COLLATERAL**

#### **1. Generally.**

To induce Lessor/Secured Party to enter into this Agreement, Debtor and each Guarantor have agreed and hereby agree that this Agreement is intended to create cross-default and cross-security between and among this Agreement, any Exhibit to this Agreement, the Loan/Lease Documents and any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into.

#### **2. Cross-Default.**

A default or Event of Default under any Loan/Lease Document, this Agreement, any Exhibit to this Agreement, or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into, shall be deemed to be a default or Event of Default under all such agreements.

#### **3. Cross-Collateral.**

All presently existing and hereafter acquired property in which Lessor/Secured Party has or shall have a security interest, including, but not limited to, the Equipment and the Additional Collateral shall secure the repayment and performance of all of the liabilities and obligations of Debtor and each Guarantor to Lessor/Secured Party of every kind and character whether joint or several, direct or indirect, absolute or contingent, due or to become due, and whether under any Loan/Lease Document, this Agreement, any Exhibit to this Agreement, or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into, or otherwise. Debtor and each Guarantor further agrees that Lessor/Secured Party's security interest in the property covered by any Loan/Lease Document, this Agreement, any Exhibit to the Agreement, or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into, now held or hereafter acquired by Debtor and/or Guarantor shall not be terminated in whole or in part until and unless all indebtedness of every kind, due or to become due, owed by Debtor or any Guarantor to Lessor/Secured Party is



fully paid and satisfied and the terms of any Loan/Lease Document, this Agreement, any Exhibit to the Agreement, or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into, have been fully performed by Debtor and/or any Guarantor. It is further agreed that Lessor/Secured Party is to retain its security interest in all property covered under any Loan/Lease Document, this Agreement, any Exhibit to this Agreement, or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into, or otherwise, as security for payment and performance under each such agreement notwithstanding the fact that one or more of such agreements may become fully paid.

#### **ARTICLE V - REPRESENTATIONS, WARRANTIES AND COVENANTS**

To induce Lessor/Secured Party to enter into this Agreement, Debtor and each Guarantor, jointly and severally, in addition to those set forth elsewhere herein, make the following representations, warranties, and covenants which shall be deemed to be continuing representations, warranties and covenants so long as the Loan/Lease Balance remains unpaid:

1. Each of the Recitals is true and accurate;
2. Debtor and each Guarantor have adequate power and capacity to enter into, and perform under this Agreement, the Loan/Lease Documents and any Exhibit to this Agreement;
3. Debtor is duly qualified to do business wherever necessary to carry on their present business and operations, including the Jurisdiction(s) where the Equipment is or is to be located;
4. This Agreement has been duly authorized, executed and delivered by Debtor and each Guarantor and constitute valid, legal and binding agreements, enforceable in accordance with their terms, except to the extent that the enforcement of remedies may be limited under applicable bankruptcy and insolvency laws;
5. Debtor has taken all appropriate and necessary corporate action to authorize the execution, delivery, and performance of this Agreement and each Exhibit to this Agreement;
6. No approval, consent or withholding of objections is required from any governmental authority or entity with respect to the entry into or performance by Debtor or any Guarantor of this Agreement except such as have already been obtained or the failure of which would have a material adverse effect on Debtor's or any Guarantor's ability to perform thereunder;
7. The entry into and performance by Debtor and each Guarantor of this Agreement will not: (i) violate any judgment, order, law or regulation applicable thereto or any provision of the Certificate of Incorporation or bylaws of Debtor, or (ii) result in any breach of, constitute a default under or result in the creation of any lien, charge, security interest or other encumbrance upon any item of Equipment pursuant to any indenture, mortgage, deed of trust, bank loan or



credit agreement or other instrument (other than this Agreement) to which Debtor and/or any Guarantor is a party;

8. There are no suits or proceedings pending or threatened in court (except the Action) or before any commission, board or other administrative agency against or affecting Debtor or any Guarantor, which if decided there against will have a material adverse effect on the ability of Debtor or any Guarantor to fulfill its obligations under this Agreement;

9. Any financial statement delivered to Lessor/Secured Party will be prepared in accordance with generally accepted accounting principles consistently applied. As of the date hereof, there has been no development or event nor any prospective development or event, which has or could have, or could reasonably be expected to have a material adverse effect on the financial condition of Debtor or any Guarantor;

10. Debtor is and will be at all times validly existing and in good standing under the laws of the jurisdiction of its incorporation;

11. All representations, warranties and statements pertaining to the Equipment, the Additional Collateral, the Real Property, the Accounts Receivable and the Insurance Policies are true and accurate;

12. Neither Debtor nor any Guarantor will guaranty any loan instrument or incur any new debt on or after the date of this Agreement that will impact its obligations herein or result in a material adverse change in its, his or her financial condition or the financial condition of each other;

13. Debtor and each Guarantor represents and warrants that the Additional Collateral is owned by Debtor and is free and clear of any and all liens, encumbrances and/or charges;

14. Debtor and each Guarantor represents and warrants that Lessor/Secured Party holds and shall continue to hold a first priority and continuing security interest in the Equipment, which cannot be modified, revoked or defeated and which is enforceable in accordance with their respective terms, subject to applicable bankruptcy and insolvency laws and laws affecting creditors' rights and the enforcement thereof generally;

15. Lessor/Secured Party and Debtor agree, *inter alia*, that the Lease was and is intended by both parties of the Lease to be and is, in fact, a "Finance Lease" as defined under Article 2A of the Uniform Commercial Code ("UCC"), and that the provisions of Article 2A of the UCC with respect to enforceability and finality of all Lease terms and conditions, including, *inter alia*, the Disclaimer of Warranties and Claims and Limitation of Remedies provision of the Lease, remain fully applicable under this Agreement;

16. If LESSEE is relying upon the furnishing of a thing or service by a manufacturer, supplier or vendor as part of the underlying lease transaction, then LESSEE understands, agrees and concedes that LESSOR has no legal, contractual, equitable or moral obligation to furnish said thing or service, even if the failure to receive such thing or service frustrates the central purpose of the contract for LESSEE, or anyone else, and that, notwithstanding the failure to

receive said thing or service, LESSEE's obligation to remit any and all payments in a timely manner under the LEASE shall continue unabated and without defense by LESSEE to complete payment under, and as required by, the LEASE. LESSEE understands and agrees that, in the event any manufacturer, supplier or vendor should cease furnishing the thing or service relied upon by LESSEE in connection with the underlying lease transaction, the LESSEE will be solely responsible for procuring and financing such thing or service, at LESSEE'S own expense, at whatever price or other term is necessary or required to continue the furnishing of the thing or service uninterrupted to LESSEE, without set-off, deduction, recoupment or counterclaim. Failure to obtain said substituted thing or service, for whatever reason, is not a defense to payment in full to LESSOR.

17. Debtor and each Guarantor shall not, without the prior written consent of Lessor/Secured Party, in any manner dispose, transfer or surrender any of its, his or her assets that would result in a material adverse change in its, his or her financial condition;

18. Debtor and each Guarantor shall not, directly or indirectly, create, incur or permit to exist any lien, encumbrance, pledge, attachment or security interest on or with respect to the Equipment;

19. Debtor and each Guarantor agrees that, notwithstanding any provision to the contrary herein, it will continue to fulfill any and all of its duties and obligations under the Loan/Lease Documents, except as those duties and obligations are expressly modified by this Agreement;

20. No representation or warranty made by Debtor or any Guarantor in this Agreement, in any Exhibit to this Agreement, in any Loan/Lease Document or in any other document furnished or to be furnished from time to time in connection herewith or therewith knowingly contains or will knowingly contain any misrepresentation of a material fact or knowingly omits or will knowingly omit to state any material fact necessary to make the statements herein or therein not misleading. There is no fact known to Debtor or any Guarantor which would reasonably be expected to have a material adverse effect on the business of Debtor or any Guarantor;

21. Debtor and each Guarantor shall give prompt written notice to Lessor/Secured Party of (i) any material action or proceeding instituted by or against Debtor or any Guarantor in any court or by any Governmental Authority, or of any such proceedings known by Debtor or any Guarantor to be threatened against Debtor or any Guarantor which might result in a judgment or judgments, and (ii) any other action, event or condition of any nature known to Debtor or any Guarantor which constitutes an Event of Default, or a material default of Debtor or any Guarantor under any contract, instrument or agreement to which Debtor or any Guarantor is a party or by which Debtor or any Guarantor or any of their properties or assets may be bound or to which any may be subject;

22. Debtor and each Guarantor shall deliver to Lessor/Secured Party all items, documents, writings, reports and information reasonably required by Lessor/Secured Party to consummate this Agreement;



23. Debtor shall do, or cause to be done, all things necessary to preserve, renew and keep in full force and effect its corporate existence (as applicable) and its rights, licenses and permits; shall comply in all material respects with all laws applicable to it, operate its business in a proper and efficient manner and substantially as presently operated or proposed to be operated;

24. Debtor and each Guarantor shall properly pay and discharge: (a) all taxes, assessments and governmental charges upon or against it and its assets, including payroll taxes, prior to the date on which penalties attach thereto, unless and to the extent that such taxes are being diligently contested in good faith and by appropriate proceedings and appropriate reserves therefor have been established; and (b) all lawful claims, whether for labor, materials, supplies, services or anything else which might or could, if unpaid, become a lien or charge upon the properties or assets of Debtor or any Guarantor unless and to the extent only that the same are transferred to bond, being diligently contested in good faith and by appropriate proceedings, and appropriate reserves therefor have been established;

25. The Debtor and each Guarantor shall allow any representative of Lessor/Secured Party to visit and inspect any of the properties of Debtor or any Guarantor to examine the books of account and other records and files of Debtor or any Guarantor to make copies thereof and to discuss the affairs, business, finances and accounts of Debtor or any Guarantor, upon reasonable advance notice to Debtor or any Guarantor and at such reasonable times and as often as Lessor/Secured Party may reasonably request;

26. Debtor shall: (a) make full and timely payments of the [principal and interest] [all amounts] due under this Agreement; (b) duly comply with all the terms and covenants contained in each of the Loan/Lease Documents, and all other instruments and documents given to Lessor/Secured Party pursuant to this Agreement at the times and places and in the manner set forth herein; and (c) at all times maintain the liens and security interests provided for under or pursuant to this Agreement as valid and perfected liens and security interests on the property intended to be covered thereby;

27. Debtor and each Guarantor shall promptly notify Lessor/Secured Party in writing of any material assessment by any taxing authority for unpaid taxes which would reasonably be expected to have a material adverse effect on Debtor or any Guarantor as soon as Debtor or any Guarantor has knowledge thereof;

28. Debtor shall notify Lessor/Secured Party immediately of any change in its name, principal place of business, the office where its books and records are kept or any change in the registered agent of Debtor for the purpose or service of process;

29. Each Guarantor hereby acknowledges, agrees, represents and warrants that the Guarantees cover all the debts and obligations of Debtor to Lessor/Secured Party, present or future, including, but not limited to, the Loan/Lease Balance.

30. The person or persons executing the Loan/Lease Documents are duly authorized representatives of the Debtor to enter into the Loan/Lease Documents and have the capacity to bind the Debtor.



31. Debtor shall maintain insurance on its properties and Collateral consistent with practices in the industry.

32. Debtor shall obtain term life insurance on the life of [Mr. XYZ] for the benefit of Lessor/Secured Party in the sum of \$[ ] provided the same can be obtained with a rating not in excess of ten percent (10%) of standard premiums and pay all premiums due thereon. Provided no Event of Default has occurred under the Transaction Documents, [ ] years from the date hereof, Lessor/Secured Party will assign its interest in the proceeds of the insurance of Mr. XYZ. Any proceeds received by Lessor/Secured Party from such insurance during the [ ] year period shall be applied to the Note in inverse order of maturity.

33. [Debtor shall not create any indebtedness for borrowed money except for purchase money or lease indebtedness for new [ ] equipment approved by Lessor/Secured Party, which approval shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, provided no Event of Default has occurred and is continuing, Lessor/Secured Party will consent to the acquisition of Debtor of new equipment at a cost not to exceed \$[ ] (and such additional amount as Lessor/Secured Party in its sole, but reasonable judgment deems appropriate), provided (A) the total cost of such equipment is 100% financed by the equipment manufacturer, (B) the proceeds of the existing Equipment being replaced or sold for the fair market value of such Collateral (based upon an independent appraisal) is paid to Lessor/Secured Party in cash and applied against last payments of the note; (C) the Debtor continues to pay the Note in accordance with its terms; and (D) unless objected to by the financier of the equipment, the Lessor/Secured Party will be granted a subordinate security interest in the new equipment.]

34. [The Debtor shall not guaranty the indebtedness of any other borrower.]

35. [The Debtor shall not make any distributions to any shareholders/members of the Debtor.]

36. [The Debtor shall not pay Mr. XYZ or Mrs. XYZ collectively any compensation from the Debtor in excess of \$[ ] annually, including all benefits or other payments commonly referred to as "perks" (other than medical and hospitalization).]

37. [Debtor shall provide to Lessor/Secured Party the following:]

(a) quarterly reviewed financial statements, including a balance sheet, income and expense statement and statement of cash flow, not later than forty-five (45) days following the end of each calendar quarter, commencing with the quarter ending [ ] and reviewed annual financial statements, including a balance sheet, income and expense statement and cash flow statement, not later than one hundred twenty (120) days following each year end, and a copy of the tax return filed by each Debtor and Guarantor that submits independent returns and the respective Schedule C information from Mr. XYZ's tax return concerning the Debtors and Guarantors reported on Mr. XYZ's return for the prior year, not later than thirty (30) days following such filings;

(b) a report of any facility acquisitions, acquisitions of new equipment, any closures, any litigation or administrative actions commenced against Debtor, any significant management changes; and

(c) any other information reasonably requested by Lessor/Secured Party.

38. Measured as of October 31, 2004, the sum of the Corporation's Eligible Accounts plus Eligible Inventory divided by the Debtor Indebtedness shall be equal to or greater than 1.5. For purposes of this paragraph, the term "Eligible Accounts" means accounts created by the Corporation in the ordinary course of its business meeting the following qualifications: (1) such accounts arise from bona fide completed transactions and have not remained unpaid for more than ninety (90) days after the invoice date; (2) the amounts of the accounts are absolutely owing to the Corporation and do not arise from sales on consignment or other terms under which payment by the account debtors may be conditional or contingent; (3) each account debtor's chief executive office or principal place of business is located in the United States; (4) there are no setoffs, counterclaims or disputes existing with respect to the accounts; and, (5) such accounts are not accounts with respect to which the account debtor or any officer or employee thereof is an officer, employee or agent of or is affiliated with the Corporation, directly or indirectly, whether it by virtue of family membership, ownership, control, management or otherwise. The term "Eligible Inventory" means Inventory owned by the Corporation meeting the following qualifications: (1) such inventory is not stale; (2) such inventory is not held on consignment; (3) such inventory is not defective; (4) such inventory is located at the Corporation's address as set forth herein; (5) the Corporation is the sole owner of such inventory; (6) such inventory is not subject to any claim, lien, security interest or encumbrance except for the security interest of Lender; (7) such inventory has not been returned to the vendor thereof; and, (8) such inventory has not been revalued upward due to any change in accounting methods.

During each of the calendar quarters ending June 30, 2004 and September 30, 2004, the Corporation shall have generated a Net Profit. The term "Net Profit" means the income and gains of the Corporation determined in accordance with Generally Accepted Accounting Principles consistently applied.

## **ARTICLE VI - DEFAULT AND REMEDIES**

### **1. Events of Default**

The occurrence of any one of more of the following events shall constitute an Event of Default under this Agreement, any Exhibit to this Agreement, any Loan/Lease Document, and any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into and Lessor/Secured Party may in writing declare any such Event of Default if: (a) Debtor and/or any Guarantor fails to pay any sum when due under this Agreement, any Exhibit to this Agreement, any of the Loan/Lease Documents and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into, within five (5) days of its due date; (b) Debtor and/or any Guarantor breaches any of their other obligations, representations, warranties or covenants under this



Agreement, any Exhibit to this Agreement, any Loan/Lease Documents and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into; (c) any representation, warranty or covenant made by Debtor and/or any Guarantor in connection with this Agreement, any Exhibit to this Agreement, any Loan/Lease Document and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into shall be false or misleading in any material respect; (d) on or after the date of this Agreement, the Debtor or any Guarantor becomes insolvent or ceases to do business as a going concern; (e) there has been a material adverse change in the financial condition of Debtor or any Guarantor; (f) any item of Equipment is illegally used; (g) a petition is filed by or against Debtor or any Guarantor under any bankruptcy or insolvency laws; (h) Debtor or any Guarantor is in default, other than a payment default, of the terms of any loan or lease document and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into; (i) if [NAME OF BANK] declares an Event of Default against Debtor and/or the Guarantors under the terms of any agreements between [NAME OF BANK] and Debtor and/or the Guarantors; and (j) if for any reason any Exhibit to this Agreement or any Loan/Lease Document ceases to be in full force and effect in any material respect or any of the liens identified and/or created herein, by any Exhibit to this Agreement or any Loan/Lease Document ceases to be a valid and perfected lien; (k) the death of Mr. XYZ; (l) the sale or transfer by Mr. XYZ of his interest in the Debtor/Guarantors.

## **2. Remedies**

Upon the occurrence of an Event of Default, Lessor/Secured Party shall have all of the rights and remedies enumerated herein and Lessor/Secured Party may, at its sole option and discretion, exercise one or more of the following remedies in addition to those available under any Exhibit to this Agreement, any of the Loan/Lease Documents and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered: (a) terminate any part or all of this Agreement; (b) accelerate and demand the immediate and full payment of all amounts due and owing under this Agreement, any Exhibit to this Agreement, any of the Loan/Lease Documents, and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter; (c) exercise any and all rights and remedies of a secured party under the Uniform Commercial Code and/or the [STATE] Commercial Code as enacted in the applicable jurisdiction and as otherwise granted to Lessor/Secured Party under this Agreement, any of the Loan/Lease Documents, any Exhibit to this Agreement, and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered; (d) by whatever legal means necessary obtain immediate possession of and sell, dispose and/or otherwise take control of the Equipment, the Real Property and/or the Additional Collateral; and (e) exercise any other right or remedy which may be available to Lessor/Secured Party under this Agreement, any Exhibit to this Agreement, the Loan/Lease Documents and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered, or applicable law, or proceed by appropriate court action to enforce the terms hereof or to recover damages for the breach thereof.



(a) Borrower and Guarantors stipulate and agree to surrender possession of the Business Assets to Lessor/Secured Party upon the execution of this Agreement and that thereafter Lessor/Secured Party shall have the unfettered right to possess and liquidate the Business Assets of Borrower as more particularly described in the UCC-1 Financing Statements and Asset List attached hereto and made a part hereof as Attachment 2. Borrower and Guarantors hereby release any and all of their right, title or interest in and to any and all of said Business Assets and stipulate and agree that this Agreement shall serve as a stipulation for a voluntary repossession and seizure of said Business Assets to be used if necessary in any Judicial proceeding or against any third (3<sup>rd</sup>) parties. The net proceeds from the sale of said Business Assets are agreed to be the property of Lender.

(b) Borrower voluntarily surrenders physical possession of the Business Assets to Lessor/Secured Party for the purpose of a sale for the benefit of Borrower and Guarantors' account, in accordance with Article 9 of the Uniform Commercial Code, as adopted in the Commonwealth of Pennsylvania, as revised, July 2001. Borrower and Guarantors, hereby consent to such possession and sale without defense, setoff, counterclaim, deficiency or recoupment, the same as if a Judicial Order granting Lessor/Secured Party the right to seize the Business Assets had been obtained at a Hearing on the merits.

(i) Lessor/Secured Party agrees to provide Notice, in the form attached hereto as Attachment 3, to any and all parties in interest, as required by Revised sections 9-611 and 9-613 of the Uniform Commercial Code, as adopted in the Commonwealth of Pennsylvania, July 2001.

(ii) The risk of loss for the Business Assets shall not pass to Lessor/Secured Party, and, moreover, the Borrower and Guarantors' liability for claims, causes of action and losses arising out of any personal injury liability occurring on their premises shall not be discharged and liability for property loss to the Business Assets shall remain undischarged until the said Business Assets are sold pursuant to this Agreement.

(c) The parties agree that Lessor/Secured Party has the absolute, immediate right to exercise its ownership interest in all of Borrowers accounts receivables ("Accounts Receivable") and that Borrower and Guarantors have and shall deliver to Lessor/Secured Party a true and accurate list of all of Borrowers Accounts Receivable, including the name, address, telephone, entire file and any other supporting documentation of any kind with respect to each Accounts Receivable so that Lessor/Secured Party may immediately proceed with collection thereof. Borrower and Guarantors agree to cooperate with Lessor/Secured Party in collection of said Accounts Receivable, including by testimony if required. The net proceeds received from collection of said Accounts Receivable are agreed to be the property of Lessor/Secured Party and Lessor/Secured Party is entitled to require payment of each such Accounts Receivable directly to it.

(d) Borrower and Guarantors stipulate and agree that Lessor/Secured Parties effected security interest in the Business Assets is unaffected by any purported lien of the landlord. Nevertheless, Borrower and Guarantors shall provide

Lessor/Secured Party with an executed Landlord's Waiver in the form attached hereto and made a part hereof as Attachment 4 contemporaneously with the execution of this Agreement as a condition to any of the agreements of Lessor/Secured Party hereunder becoming enforceable.

(e) Borrower and Guarantors agree that this Agreement constitutes a Stipulation and Consent Order, granting Lessor/Secured Party the right to immediate possession of the Business Assets and Accounts Receivable. Borrower and Guarantors agree that to the best of their ability they will provide the Lessor/Secured Party with access to the Business Premises for the purpose of remarketing and reselling the Business Assets and conducting a Public Auction thereof and collecting the Accounts Receivable, solely as Lessor/Secured Party deems appropriate. Further, Lessor/Secured Party has the option to remove any and/or all of the Business Assets at any time upon reasonable notice to Borrower and Guarantors. Notwithstanding any representation herein to the contrary, Borrower has informed Lessor/Secured Party that rent payments remain unpaid for the Business Premises for the month of July, August and September, 2002. Nevertheless, Borrower has also informed Lessor/Secured Party that borrower anticipates providing Lessor/Secured Party with a Landlord's Waiver executed by the Landlord for the Business Assets located at the Business Premises in the form attached hereto, made a part hereof and marked as Attachment 4, prior to the execution of this Agreement.

(f) The Debtor shall have in good faith made application to at least three (3) commercial asset based lenders acceptable to Lessor/Secured Party for a loan or loans in an amount sufficient to pay the Indebtedness in full. Within thirty (30) days of the date of the execution of this Agreement, the Debtor shall have made at least two such applications, and the Debtor shall have diligently pursued such applications, together with a third application made during the Forbearance Period, in good faith. The Debtor shall provide Lessor/Security Party with copies of all such applications and shall provide Lessor/Secured Party with a written report delivered to Lessor/Secured Party on or before the tenth (10<sup>th</sup>) day of each month during the Forbearance Period, summarizing the Debtor's good faith efforts to refinance the Indebtedness during the immediately preceding calendar month.

(g) Debtors covenant and agree to indemnify and hold Lessor/Secured Party harmless for any loss, costs, claim, controversy, suit, cause of action, and other exposure or expense which Lessor/Secured Party may sustain as a result of any action brought against the Lessor/Secured Party under Sections 544(b), 547, 548 or 549 of the United States Bankruptcy Code, as amended, on the grounds that any consideration exchanged by the Lessor/Secured Party with Debtors was not "reasonably of equivalent value", within the contemplation of Section 548 of the United States Bankruptcy Code, as amended, or Section 544(b) of the United States Bankruptcy Code, as amended, or not "fair consideration" under any applicable State Fraudulent Conveyance Statute or a preference, by an insider or otherwise.

(h.) Debtors covenant and agree that, in the event that any Debtor files a Petition for Relief with any Bankruptcy Court, or is subjected to any Petition under the Bankruptcy Code which results in any Order for Relief under the Bankruptcy Code, and the Debtor in that proceeding wishes to use Cash Collateral as defined in the Bankruptcy Code and/or this Agreement, then this Agreement shall without modification be deemed to be a



Stipulation between Lessor/Secured Party and such Debtor as applicable, for a Cash Collateral Order pursuant to Section 363 of the Bankruptcy Code. Debtors and Lessor/Secured Party agree that they shall cooperate in and shall not in any way resist having this Agreement become and be fully incorporated in, without change or modification, a Cash Collateral Order immediately entered, subject to Court approval, by a Bankruptcy Court under Section 363 of the Bankruptcy Code and/or this Agreement, and that Cash Collateral shall only be used as provided in this Agreement. Such Order shall permit the use of Cash Collateral only until the end of the 120 day exclusive period under Section 1121(b) of the Bankruptcy Code, and no longer, and shall incorporate all of the other terms provided by this Agreement. Debtors also agree and acknowledge that the Collateral and proceeds of Collateral are and shall be deemed to be in any such proceeding "Cash Collateral" as that term is defined in Section 363 of the Bankruptcy Code.

(i.) All accounts receivable are Cash Collateral, and to the extent they are used and consumed after filing or entry of any Cash Collateral Order, Debtors specifically agree that they are collateral for a secured claim under Section 506 of the Bankruptcy Code in the amount so used. To the extent the collateral securing Lessor/Secured Parties claim in the Bankruptcy proceeding is thereafter deemed or proves to be insufficient to pay Lessor/Secured Parties claim in full, Lessor/Secured Parties secured claim shall be deemed to have been inadequately protected by the provisions of the Cash Collateral Order, and Lessor/Secured Party shall therefore have an administrative expense claim in the proceeding with super priority over any and all administrative expenses of any kind specified in Sections 503(b) and 507(b) of the Bankruptcy Code, which super priority shall be equal to the priority provided under the provisions of Section 364(c)(1) of the Bankruptcy Code over all other costs and administrative expenses incurred in the case of the kind specified in, or ordered pursuant to, Sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b) or 726 of the Bankruptcy Code and shall at all times be senior to the rights of Debtors or any successor trustee in the resulting Bankruptcy proceeding or any subsequent proceeding under the Bankruptcy Code except that such administrative expense claim shall be subordinate to professional fees and reimbursement of expenses that may be awarded to professionals retained by Debtors pursuant to Sections 330 and/or 331 of the Bankruptcy Code and fees of the United States Trustee.

(j.) Debtors agree that if any Debtor is a Debtor in a Chapter 11 proceeding under the Bankruptcy Code, and the Bankruptcy Court enters a Cash Collateral Order, then, subject to Court approval, that Order shall provide that if such Debtor does not file a Plan within the 120 day exclusive period provided by Section 1121(b) of the Bankruptcy Code, Lender shall, without the necessity of any additional notice to the Debtor or to other Creditors, any hearing or any further Order of the Court, have immediate relief from the stay under Bankruptcy Code Section 362 to recover and collect all Collateral and to take any other action permitted under the Note, Mortgage, Guaranty, this Agreement and applicable non-bankruptcy law, including but not limited to, selling the Collateral.

(k) If any Debtor is a Debtor in a case under the Bankruptcy Code and if it is determined that any of the rights granted under this Agreement or under the Loan Agreement are security interests or liens, they shall be deemed perfected and fully enforceable without the necessity of the filing of any documents or the commencement of proceedings otherwise required under non-bankruptcy law for the perfection or enforcement of



security interests, with such perfection and enforcement being binding upon such Debtor, and any subsequently appointed trustee, either in Chapter 11 or under any other Chapter of the Bankruptcy Code, and upon other Creditors of such Debtor who have or who may after the date of this Agreement extend secured or unsecured credit to such Debtor.

(1.) Debtors hereby consent to Relief from the Automatic Stay of the United States Bankruptcy Code in the event of any Bankruptcy filing under any State or Federal Bankruptcy Act or State Court Action for Receivership and further agree not to contest any application for an Order by Consent for Relief from the Automatic Stay to take possession and act as deemed applicable to collect the outstanding Indebtedness and enforce the rights of Lessor/Secured Party against Debtors. In the event that Lessor/Secured Party are not granted Relief from the Automatic Stay by a Consent Order pursuant to the provisions of this Paragraph, Debtors agree that Lessor/Secured Party shall be entitled to collect interest at the rate as provided in this Agreement on arrearages, in addition to any interest which may already be included in the Loan/Lease Documents, for the life of a Plan which proposes to cure any default or pay any arrearages through the Plan Payments.

### **3. Rights and Remedies Cumulative**

The foregoing remedies are cumulative, and any or all thereof may be exercised instead of or in addition to each other or any other remedies under this Agreement, any Exhibit to this Agreement, the Loan/Lease Documents and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into, or any remedies at law, in equity, or under statute.

### **4. Rights and Remedies Not Waived**

Neither the failure nor any delay on the part of Lessor/Secured Party to exercise any right, power or privilege under this Agreement, any Exhibit to this Agreement, the Loan/Lease Documents and/or any other agreement between Debtor, any affiliate, any subsidiary and/or any Guarantor and Lessor/Secured Party whether now in existence or hereinafter entered into shall operate as a waiver, nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise of that or any other right, power or privilege. LESSOR/SECURED PARTY SHALL NOT BE DEEMED TO HAVE WAIVED ANY OF ITS RIGHTS UNDER THIS AGREEMENT, ANY EXHIBIT TO THIS AGREEMENT, ANY LOAN/LEASE DOCUMENT, AND/OR ANY OTHER AGREEMENT BETWEEN DEBTOR, ANY AFFILIATE, ANY SUBSIDIARY AND/OR ANY GUARANTOR AND LESSOR/SECURED PARTY WHETHER NOW IN EXISTENCE OR HEREINAFTER ENTERED INTO UNLESS SUCH WAIVER IS EXPRESSED IN WRITING AND SIGNED BY LESSOR/SECURED PARTY. A waiver on any one occasion shall not be construed as a bar to or waiver of any right or remedy on any future occasion.

5. [Effective on the execution hereof, the Debtor and Guarantors hereby waive any defenses, offsets or counterclaims to the enforcement of the Note and Guarantees and to any other Lease/Loan/Lease Document/Loan/Lease Documents.]

all such notices and communications shall be deemed to have been received: (i) on the date delivered, if by personal delivery; (ii) on the date telecommunicated, if sent by confirmed telex, telecopier or other telegraphic method before 4:00 p.m. and the next Business Day if sent after 4:00 p.m. in the location of the recipient; (iii) three (3) business days following its deposit in the United States Mail, if sent by first class, registered or certified mail United States Mail; and (iv) the next Business Day following its deposit with an overnight courier. Rejection, or other refusal



to accept or inability to deliver because of changed address or telecopier number for which no notice has been received, shall also constitute receipt.

2. Payments required at closing shall be made payable to Lessor/Secured Party by certified check upon immediately available funds. All other payments required hereunder shall be in the form of a check made payable to Lessor/Secured Party and shall be sent by overnight mail.

#### **ARTICLE VIII: RELEASE**

The Debtor and each Guarantor (the "Releasors"), for good and valuable consideration, hereby remise, release and forever discharge Lessor/Secured Party and each of Lessor/Secured Party's successors, affiliates, representatives, agents, attorneys, assigns, present, future and former officers, directors and employees from any and all claims, losses, liabilities, demands and causes of action of any kind whatsoever, if any, whether absolute or contingent, known or unknown, matured or unmatured that Releasors or any Releasor, may now have or ever had through the date of this Agreement, in whatever capacity, against Lessor/Secured Party.

#### **[ARTICLE IX – ARBITRATION]**

#### **[[[OPTIONAL]]]**

Upon demand of Lessor/Secured Party or any other Party, whether made before or after institution of any judicial proceeding, any claim or controversy between the Parties hereto arising out of or relating to this Agreement or the Loan/Lease Documents, and/or any other agreement between Lessor/Secured Party and/or the Debtor and/or the Guarantors shall be resolved by binding arbitration conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA") and the Federal Arbitration Act. Disputes may include, without limitation, tort claims, counterclaims, a dispute as to whether a matter is subject to arbitration, claims brought as class actions, or claims arising from documents executed in the future. A judgment upon the award may be entered in any court having jurisdiction.

#### **ARTICLE X – AFFIDAVITS OF CONFESSION OF JUDGMENT**

Simultaneously with the execution and delivery of this Agreement, Debtor and each Guarantor shall each execute an Affidavit of Confession of Judgment, in the forms attached hereto as Exhibit "N" in the amount of \$XXX,XXX.XX, representing the accelerated amounts due under the Loan/Lease Documents. The Confessions of Judgment delivered by Debtor shall be held in escrow by Lessor/Secured Party's attorneys. Lessor/Secured Party agrees not to enter, execute or otherwise enforce the Confession of Judgment by Debtor until and unless Debtor defaults under any of its obligations due under this Agreement or the Loan/Lease Documents and fails to cure same within five (5) days after receiving written notice from Lessor/Secured Party. The Confession of Judgment delivered by Guarantor 1 and Guarantor 2 shall be filed with the court immediately, but no action shall be taken against it until and unless Debtor and/or Guarantor 1 and/or Guarantor 2 defaults under any of the obligations due under this Agreement or the Loan/Lease Documents and fails to cure same within five (5) days after receiving written notice from Lessor/Secured Party. This Agreement shall have no effect until the Confessions of



Judgment are executed by the Debtor, Guarantor 1 and Guarantor 2 and delivered to Lessor/Secured Party.

#### **ARTICLE XI – STIPULATION AND ORDER OF REPLEVIN**

Simultaneously with the execution and delivery of this Agreement, the Debtor shall execute and cause their respective attorneys to execute a Stipulation For Issuance of Writ of Replevin for the Equipment, in the form attached hereto as Exhibit "O." Lessor/Secured Party agrees not to enter, execute or otherwise enforce the Stipulation For Issuance of Writ of Replevin until and unless the Debtor defaults under this Agreement or the Loan/Lease Documents and fails to cure same within five (5) days after receiving written notice from Lessor/Secured Party. This Agreement shall have no effect until the Stipulation For Issuance of Writ of Replevin is executed by the Debtor, Guarantor 1, and Guarantor 2 and delivered to Lessor/Secured Party.

#### **ARTICLE XII – GOVERNING LAW AND JURISDICTION**

1. The Agreement and the rights and obligations of the Parties hereunder shall be governed by and construed in accordance with the laws of the State of [STATE].

2. Any legal action or proceeding against the Debtor and/or each Guarantor with respect to the Agreement to which they are a party may be brought in such of the courts of competent jurisdiction of the State of [STATE] in the City of [CITY] or in the United States District Court for the [DESCRIBE COURT] as Lessor/Secured Party or its respective successors and permitted assigns, as the case may be, may elect, and by execution and delivery of the Agreement to which it is a party, the Debtor and each Guarantor irrevocably submit to the non-exclusive jurisdiction of such courts, and the appellate courts therefrom, for purposes of legal actions and proceedings under the Agreement.

3. Governing Law. This Agreement and all disputes or controversies arising out of or relating to this Agreement or the transactions contemplated hereby shall be governed by, and construed in accordance with the internal laws of the State of New York, without regard to the laws of any other jurisdiction that might be applied because of the conflicts of laws principles of the State of New York other than Section 5-1401 of the New York General Obligations Law.]

4. [Submission to Jurisdiction. Each of the parties irrevocably agrees that any legal action or proceeding arising out of or relating to this Agreement and the transactions contemplated hereby or for recognition and enforcement of any judgment in respect hereof brought by the other party or its successors or assigns may be brought and determined in any New York State or federal court sitting in the Borough of Manhattan in the City of New York, and each of the parties hereby irrevocably submits to the exclusive jurisdiction of the aforesaid courts for itself and with respect to its property, generally and unconditionally and agrees not to commence any action, suit or proceeding relating thereto except in such courts. Each of the parties further agrees to accept service of process in any manner permitted by such courts. Each of the parties hereby irrevocably and unconditionally waives, and agrees not to assert, by way of motion or as a defense, counterclaim or otherwise, in any action or proceeding arising out of or relating to this Agreement or the transaction contemplated hereby, (a) any claim that it is not personally subject to the jurisdiction of the above-named courts for any reason other than the failure lawfully to serve process, (b) that it or its property is exempt or immune from jurisdiction

of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise) and (c) to the fullest extent permitted by law, that (i) the suit, action or proceeding in any such court is brought in an inconvenient forum, (ii) the venue of such suit, action or proceeding is improper or (iii) this Agreement, or the subject matter hereof, may not be enforced in or by such courts.]

### **ARTICLE XIII - MISCELLANEOUS**

1. Except as expressly modified herein, each of the terms and conditions of the Loan/Lease Documents shall remain unaltered, in full force and affect in accordance with their original terms and binding upon Debtor and each of the Guarantors.

2. This Agreement shall be binding upon and shall inure to the benefit of all the Parties hereto and their respective administrators, successors and permitted assigns. No other person or entity shall be entitled to claim any right or benefit hereunder, including, without limitation, the status of a third-party beneficiary of this Agreement. Neither the Debtor nor any Guarantor may assign its rights or delegate its duties hereunder without Lessor/Secured Parties prior written approval. Without Debtor's consent, Lessor/Secured Party may assign its rights or delegate its duties hereunder. Debtors acknowledge that Lessor/Secured Party may securitize or participate interests in all or any part of the obligations to such banks, insurance companies, pension funds, trusts or other institutional lenders or entities, parties or investors as may be selected by Lessor/Secured Party in its or their sole and absolute discretion and on terms and conditions satisfactory to Lessor/Secured Party in its sole and absolute discretion. In the event that Lessor/Secured Party seeks to sell, assign, securitize or participate interests in all or any part of the obligations, then Debtors hereby authorize Lessor/Secured Party to release all or any of part of any financial or credit information provided by Debtors to Lessor/Secured Party to any such banks, insurance companies, pension funds, trusts or other institutional lenders or entities, parties or investors without notice to Debtors. Debtors agree to cooperate in all respects with Lessor/Secured Party in connection with the sale, assignment, securitization or participation of interests in all or any part of the obligations and shall execute and deliver such estoppel, certificates, instruments and documents as may be requested by Lessor/Secured Party. Lessor/Secured Party shall notify Debtor of any such assignment.

3. All Exhibits referenced herein and attached hereto are incorporated herein by reference.

4. This Agreement is the entire Agreement between the parties related to the subject matter hereof, supersedes and replaces all prior negotiations and proposed Agreements, written or oral, relating thereto.

5. No waiver, amendment, release, or modification of this Agreement shall be established by conduct, custom, or course of dealing, but solely by an instrument in writing duly executed by the Parties. In the event this Agreement is amended or modified Debtor shall pay a fee for each amendment or modification of \$[ ] together with the legal fees incurred to document such amendment or modification.

6. The Debtors shall take any and all acts and execute any and all documents reasonably requested by Lessor/Secured Party to effectuate the terms of this Agreement.



7. The invalidity or unenforceability of any one or more phrases, sentences, clauses, or section contained in this Agreement shall not affect the validity or enforceability of the remaining portions of this Agreement, or any part thereof.

8. The Debtor and each Guarantor expressly waive any right they may have to claim or recover from Lessor/Secured Party any special, exemplary, punitive or consequential damages or any damages, of whatever nature, other than actual damages.

9. With respect to any Employee Benefit Plan maintained by Borrowers, no Prohibited Transaction or Reportable Event (as defined in Title IV of the Employee Retirement Income Security Act of 1974, as amended) has occurred and is continuing; any such Employee Benefit Plan is not subject to thirty (30) days notice to the Pension Benefit Guaranty Corporation, and Borrowers will comply with the provisions of the Employee Retirement Income Security Act of 1974, as amended and the Internal Revenue Service Code of 1986, as amended.

10. Borrowers represent and warrant that all Collateral is in compliance with all of the applicable requirements of the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 et. Seq. (as currently in effect and as may be amended from time to time), including but not limited to those regulations promulgated by the Architectural and Transportation Barrier Compliance Board of 36 CFR 1191 et. Seq., and by the Department of Justice at 28 CFR 36 et. Seq.

11. The relationship by and among the Debtors and Lessor/Secured Party is that of debtor for the former and creditor for Lessor/Secured Party. Nothing contained in this Agreement will be deemed to create a partnership or joint venture by and among Debtors and Lessor/Secured Party or to cause Lessor/Secured Party to be liable or responsible in any way for the actions, liabilities, debts, or obligations of Debtors.

12. [OUTSIDE OF CALIFORNIA] **DEBTOR AND EACH GUARANTOR UNCONDITIONALLY WAIVES THEIR RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, THE LOAN/LEASE DOCUMENTS, ANY EXHIBIT TO THIS AGREEMENT, ANY RELATED DOCUMENTS, ANY DEALINGS BETWEEN LESSOR/SECURED PARTY AND DEBTOR OR ANY GUARANTOR RELATING TO THE SUBJECT MATTER OF THIS TRANSACTION OR ANY RELATED TRANSACTIONS, AND/OR THE RELATIONSHIP THAT IS BEING ESTABLISHED BETWEEN LESSOR/SECURED PARTY AND DEBTOR AND EACH GUARANTOR. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT. THIS WAIVER IS IRREVOCABLE. THIS WAIVER MAY NOT BE MODIFIED EITHER ORALLY OR IN WRITING. THE WAIVER ALSO SHALL APPLY TO ANY SUBSEQUENT AMENDMENTS, RENEWALS, SUPPLEMENTS OR MODIFICATIONS TO THIS AGREEMENT, ANY, ANY RELATED DOCUMENTS, OR TO ANY OTHER DOCUMENTS OR AGREEMENTS RELATING TO THIS TRANSACTION OR ANY RELATED TRANSACTION. THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.**

13. [IN CALIFORNIA] **DISPUTES. ALL CLAIMS, CAUSES OF ACTION OR OTHER DISPUTES CONCERNING THE LOAN/LEASE DOCUMENTS (EACH A "CLAIM"), INCLUDING ANY AND ALL QUESTIONS OF LAW OR FACT RELATING THERETO, SHALL, AT THE WRITTEN REQUEST OF ANY PARTY, BE**



DETERMINED BY JUDICIAL REFERENCE PURSUANT TO THE CALIFORNIA CODE OF CIVIL PROCEDURE ("REFERENCE"). THE PARTIES SHALL SELECT A SINGLE NEUTRAL REFEREE, WHO SHALL BE A RETIRED STATE OR FEDERAL JUDGE. IN THE EVENT THAT THE PARTIES CANNOT AGREE UPON A REFEREE, THE REFEREE SHALL BE APPOINTED BY THE COURT. THE REFEREE SHALL REPORT A STATEMENT OF DECISION TO THE COURT. NOTHING IN THIS PARAGRAPH SHALL LIMIT THE RIGHT OF ANY PARTY AT ANY TIME TO EXERCISE SELF-HELP REMEDIES, FORECLOSE AGAINST COLLATERAL OR OBTAIN PROVISIONAL REMEDIES. THE PARTIES SHALL BEAR THE FEES AND EXPENSES OF THE REFEREE EQUALLY UNLESS THE REFEREE ORDERS OTHERWISE. THE REFEREE SHALL ALSO DETERMINE ALL ISSUES RELATING TO THE APPLICABILITY, INTERPRETATION, AND ENFORCEABILITY OF THIS PARAGRAPH. THE PARTIES ACKNOWLEDGE THAT THE CLAIMS WILL NOT BE ADJUDICATED BY A JURY.

OR

IF ANY ACTION OR PROCEEDING IS FILED IN A COURT OF THE STATE OF CALIFORNIA BY OR AGAINST ANY PARTY HERETO IN CONNECTION WITH ANY OF THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, ANY OTHER LOAN/LEASE DOCUMENT OR ANY TRANSACTION CONTEMPLATED HEREBY OR THEREBY, THE PARTIES HERETO HEREBY AGREE THAT (A) THE COURT SHALL, AND IS HEREBY DIRECTED TO, MAKE A GENERAL REFERENCE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 638 ("SECTION 638") TO A REFEREE OR REFEREES TO HEAR AND DETERMINE ALL OF THE ISSUES IN SUCH ACTION OR PROCEEDING (WHETHER OF FACT OR OF LAW) AND TO REPORT A STATEMENT OF DECISION, PROVIDED THAT AT THE OPTION OF LENDER, ANY SUCH ISSUES PERTAINING TO A "PROVISIONAL REMEDY" AS DEFINED IN CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1281.8 SHALL BE HEARD AND DETERMINED BY THE COURT, AND (B) BORROWER AND EACH CREDIT PARTY EXECUTING THIS AGREEMENT SHALL BE SOLELY RESPONSIBLE TO PAY ALL FEES AND EXPENSES OF ANY REFEREE APPOINTED IN SUCH ACTION OR PROCEEDING. THE PARTIES HERETO INTEND THAT THIS PARAGRAPH CREATE A REFERENCE AGREEMENT WITHIN THE MEANING OF SECTION 638.]

14. Debtor and each Guarantor agree to pay all reasonable attorneys' fees and other costs incurred by Lessor/Secured Party in connection with the enforcement, assertion, defense or preservation of Lessor/Secured Party's rights and remedies under the Loan/Lease Documents, this Agreement, and/or any Exhibit to this Agreement, or if prohibited by law, such lesser sum as may be permitted. Debtor and each Guarantor further agree that such fees and costs shall constitute and be added to the Loan/Lease Balance.

15. The captions and headings of this agreement have been inserted solely for convenience and are not to be considered in matters of its interpretation.

16. At any time and from time to time, upon Lessor/Secured Party's request and at the expense of Debtor and each Guarantor, Debtor and each Guarantor will promptly (and in no event within more than 10 days) execute and deliver any and all further instruments and



documents and take such further action as Lessor/Secured Party may deem reasonable to effect the purposes of this Agreement, any Exhibit to this Agreement and/or any of the Loan/Lease Documents. In addition, upon request of Lessor/Secured Party from time to time, and at the sole cost and expense of Debtor and each Guarantor, Debtor and each Guarantor will promptly (and in no event within more than 10 days) correct any defect which may be discovered in any Exhibit to this Agreement, this Agreement or any of the Loan/Lease Documents, and after the execution of same, Debtor and each Guarantor will make, execute and deliver to Lessor/Secured Party and, where appropriate, will cause to be recorded and/or filed and from time to time thereafter re-recorded and/or re-filed at such time and in such offices and places as are deemed desirable by Lessor/Secured Party any and all financing statements, instruments of further assurance, certificates and other documents as may, in the reasonable opinion of Lessor/Secured Party, be necessary or desirable by Lessor/Secured Party in order to effectuate, complete or perfect, or to continue and preserve: (i) the obligation of Debtor and each Guarantor under this Agreement, any Exhibit to this Agreement or any Loan/Lease Document, and (ii) the lien or security interest of Lessor/Secured Party on any of the Equipment, Real Property, Insurance Policies, Accounts Receivable and/or the Additional Collateral. Upon any failure by Debtor or any Guarantor to comply with this Section, Lessor/Secured Party may make, execute, record, file, re-record and/or re-file any and all mortgages, instruments, certificates and documents for and in the name of Debtor or any Guarantor as appropriate, and Debtor and each Guarantor hereby irrevocably appoint Lessor/Secured Party the agent and attorney-in-fact of Debtor and each Guarantor to do so.

17. All representations and warranties made hereunder, in any Exhibit to this Agreement, the Loan/Lease Documents or in any document, certificate or statement delivered pursuant hereto or thereto or in connection herewith or therewith shall survive the execution and delivery of this Agreement, any Exhibit to this Agreement, and the Loan/Lease Documents.

18. Each of the parties hereto acknowledge that they have been represented by their own counsel throughout the negotiations and at the execution of this Agreement and therefore none of the parties hereto shall, while this Agreement is effective or after its termination, claim or assert that any provisions of this Agreement should be construed against the drafter of this Agreement.

THE PROVISIONS OF THIS AGREEMENT HAVE BEEN FULLY NEGOTIATED BY THE PARTIES HERETO, EACH OF WHOM HAVE BEEN REPRESENTED BY ATTORNEYS OF THEIR RESPECTIVE CHOICES.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the Parties have duly executed this Agreement,  
effective as of the date first above written.

**SECURED PARTY/LESSOR:**

**[NAME] CORPORATION**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**DEBTOR:**

**DEBTOR CORPORATION**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**GUARANTOR 1:**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**GUARANTOR 2:**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_