

# **BLA COMMERCIAL LAW PROGRAMME**

## **WORKSHOP II**

### **DRAFTING AND NEGOTIATION OF A BANK LOAN AGREEMENT**

**AUGUST, 2009  
CAPETOWN**

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## Legal Issues in Loan Transactions

- I. A lawyer's approach to and role in a loan transaction depends greatly on the context within which the loan is being negotiated and closed and the type or types of loans that are to be made.
  - A. Loan transactions can be stand-alone transactions (i.e. to provide working capital to an ongoing business) or they can be an adjunct to some other transaction that is occurring and will be financed in whole or in part by the proceeds of the loans (e.g. a loan made to finance a corporate acquisition) .
  - B. There are two broadly defined categories of loans offered by banks and financing companies:
    - 1. Unsecured loans, often viewed as "cash flow loans" and
    - 2. Secured loans often viewed as "asset based loans".
  - C. Both unsecured loans and secured loans can consist of revolving loans, term loans or a combination.
    - 1. A revolving loan can be borrowed, repaid and reborrowed throughout the term of the financing arrangement.
    - 2. A term loan is borrowed in one disbursement, is repaid in accordance with an amortization schedule with a final payment due on termination of the financing arrangement and, once repaid in whole or in part, cannot be reborrowed.
  - D. If a loan is a cash flow loan, the lender expects to be repaid primarily from the projected positive cash flow of the borrower.
    - 1. There will be heavy emphasis on financial and other covenants to insure that the projections are actually met by the borrower.
    - 2. In general, the loan structure will raise fewer legal issues than will an asset based loan.
  - E. If a loan is an asset based loan, the lender will be making a loan to a company whose projected cash flow may not be sufficient to repay the loan and so the lender must insure that it has a good security interest in assets of the borrower with a liquidation value sufficient to repay the loans.
    - 1. Revolving advances will be tied to a formula based upon an agreed percentage less than 100% of the value of eligible accounts receivable

and inventory, so that the lender always has an equity cushion in a liquidation scenario.

2. Term advances will be based upon an agreed percentage less than 100% of appraised forced liquidation value of fixed assets, sometimes including real estate.
3. There will be heavy emphasis on due diligence concerning the assets and upon creation, perfection and priority of the lender's security interests.
4. In general, because the secured lender receives a significant advantage over unsecured lenders, trade creditors and equity investors in the business, the structuring of asset based loans raises many difficult legal issues.

F. A loan can also be a hybrid - a loan to a company with reasonably strong projected cash flows from which the lender expects it will get paid, but where the lender feels the need to have a secondary exit strategy by means of liquidation of collateral. Advances on such a hybrid may or may not be formula based.

II. Structure of Loan Agreements. The agreements that govern loan transactions can be simple (a promissory note stating that a specified amount of money was lent, what interest rate it bears, that the borrower promises to pay it back and when) or complex. Well drafted loan agreements governing commercial loan transactions, whether secured or unsecured, should include all of the following elements:

1. Agreement to lend
  - a. If the facility is a committed facility, the lender agrees that it will make loans in the amounts requested by borrower within the loan limits so long as no default has occurred.
  - b. If the facility is a discretionary facility, this section will state what the loan limits are and reserve to the lender the discretion to lend or not to lend on borrower's request within those limits.
2. Description of the credit facilities this section will describe:
  - a. the types (i. e. revolving or term) of loans to be made available under the agreement and
  - b. the loan limits, including the overall loan limits, any borrowing base formulas and any sublimits that will apply.

3. Pricing - this section will set forth:
  - a. the applicable interest rate or rates,
  - b. the fees payable to the lender in addition to the interest, such as closing fees, unused line fees and audit and appraisal fees and
  - c. the obligation of the borrower to reimburse the lender for its costs in booking, maintaining and enforcing its rights with respect to the loans.
4. Conditions precedent - this section lists the conditions that must be met before the lender will disburse the initial loans to be made under the agreement and, if subsequent advances are available to the borrower, before the lender will disburse each subsequent advance. At a minimum, this section will include as conditions precedent.
  - a. that all documentation is final and acceptable to the lender and
  - b. that no default exists at the time of the request or will be created by the disbursement being requested.
5. Loan Administration - this section will contain the mechanics of borrowing, including:
  - a. the time and manner of requesting and the method of advancing loans.
  - b. if there are alternative interest rates available to the borrower, the manner of selecting and fixing the applicable interest rate and
  - c. the method to be used by the lender in accounting for the loan and reporting that accounting to the borrower.
6. Term and Termination - this section will
  - a. state the term of the financing arrangement, including any renewal options that may be available,
  - b. provide for early termination by the lender after default,
  - c. state the circumstances, if any, under which the borrower can terminate the financing arrangement prior to the scheduled termination date and
  - d. state any termination fees that will be payable by the borrower upon early termination.

7. Representations and Warranties - this section includes statements by the borrower of all facts material to the lender in making its decision to lend to the borrower.
  - a. It accomplishes two purposes:
    - (i) it gives the lender a photograph of the business as of the date of the agreement and
    - (ii) it gives the lender the ability to terminate the financing arrangement if it turns out that the facts stated were inaccurate or misleading, thus placing the risk of misstatement or mistake on the borrower.
  - b. Unlike other commercial transactions in which none or only some of the representations and warranties survive the closing, all of the representations and warranties in a loan agreement survive and are "evergreen" putting the onus on the borrower to keep the lender updated as to any changes that may occur.
8. Covenants - this section contains:
  - a. affirmative covenants (i.e. things the borrower promises it will do) and negative covenants (i.e. things the borrower promises it will not do). These covenants generally mirror the representations and warranties and include reporting requirements, such as delivery of periodic financial statements designed to allow the lender to monitor compliance with the loan agreement and
  - b. financial covenants (i.e. financial goals the borrower promises to meet for specified fiscal periods).
9. Events of Default and Remedies on Default - this section states those events that will give the lender the right to terminate the financing arrangement, accelerate the maturity of the loans and exercise other remedies that may be specified in the agreement or by applicable law.
10. Miscellaneous Provisions - this section contains the boiler-plate provisions, and generally covers the same topics as are typically covered in other commercial transactions.

### III. Comparison of Unsecured and Secured Loan Agreements

- A. An unsecured loan agreement will generally follow the outline presented above.
- B. As compared to a secured loan agreement:

1. Its representations, warranties and covenants will concentrate on things material to the continued existence and overall health of the business, and will not be so concerned with things particular to the nature, location, ownership and disposition of specific assets.
  2. While it will not contain any grants of security interests in favor of the lender, it will likely contain a negative pledge.
  3. Its financial performance covenants will be more extensive and those covenants are likely to be "tight" (i. e. to require actual performance to match projected performance closely).
- C. A secured loan agreement will contain all of the elements of the outline presented above plus
1. granting clauses creating the security interests of the lender in the collateral that is to secure the loan and
  2. a collateral administration section dealing with the nuts and bolts of handling and monitoring the disposition of the collateral and the proceeds thereof. If accounts receivable of the borrower are to be paid directly to the lender through a lock-box arrangement, that will be provided for in the collateral administration section.
- D. As compared to an unsecured loan agreement:
1. Its representations, warranties and covenants will be more extensive and will deal with items critical to the creation and perfection of the security interests, such as the location and nature of the collateral, the state of title to the collateral and restrictions on the use and sale of the collateral by the borrower.
  2. It will contain fewer financial covenants, those that it does contain may be looser and, in a pure asset based loan, it may dispense with financial covenants altogether.
- E. As compared to an unsecured loan transaction, the lawyer's due diligence investigation of the borrower in a secured loan transaction will be significantly more extensive, as it will include investigation of all matters that might effect the security interests being taken by the lender either because of the type condition or location of or other facts concerning the collateral or because of the proposed structure of the transaction.
- IV. Legal issues unique to loan transactions. Unsecured loans do not raise any unusual legal or structural issues. In general, the lawyer's job is to document the business deal that has

been struck in an agreement or agreements that are enforceable under the laws of the relevant jurisdiction and that provide the lender with adequate legal remedies upon default. Because the lender's exit strategy depends upon the success of the business enterprise rather than the liquidation value of specific assets, the risks are primarily business and not legal risks. In a secured loan, the lender's exit strategy depends on its ability to foreclose upon, liquidate and retain possession of the proceeds of specific assets to the exclusion of (or at least ahead of) other creditors, both secured and unsecured, of the borrower. The lawyer's job is expanded beyond what it is in an unsecured loan context, because the lender's exit strategy will only work if all of the legal requirements for creating, perfecting and insuring the first priority of the lender's security interests have been meticulously followed within a loan structure that can withstand attack by other creditors under the bankruptcy laws or equitable principles designed to protect those creditors.

A. Creation, Perfection and Priority of Security Interests

1. Article 9 of the Uniform Commercial Code (the "UCC") provides the means to obtain a perfected security interest in most types of personal property.
  - a. A security interest is granted by means of a security agreement, which can be a separate agreement or part of a loan agreement.
  - b. A security interest becomes binding as between the grantor and grantee when it attaches, i.e. when:
    - (1) the grantee takes possession of the collateral or the borrower and grantee execute a security agreement;
    - (2) value is given by the grantee in exchange for the security interest; and
    - (3) the grantor has rights in the collateral.
  - c. A security interest becomes effective against third parties (most notably a bankruptcy trustee), when it is perfected. The general rule is that the first lender to perfect its security interest has priority over all other holders of security interests in the collateral, no matter when granted.
    - (1) Security interests governed by Article 9 of the UCC are perfected either by possession by the lender of the collateral or by filing of a UCC financing statement. depending on the type of collateral.

- (2) Where a security interest in property can be perfected by filing a UCC financing statement, Article 9 states where the filing must be made. The rules vary from state to state, but the most common requirements are:
  - (a) a central filing with the secretary of the State
  - (b) an additional local filing with the county recorder of deeds to perfect security interests in fixtures related to real estate located in that county and
  - (c) sometimes an additional filing at the county level with respect to all or certain categories of collateral, such as crops.
- (3) Perfection of security interests in certain types of collateral is not governed by Article 9 of the UCC. For example;
  - (a) Real estate governed by local real estate law
  - (b) Stock and other securities governed by Article 8 as well as Article 9 of the UCC
  - (c) Motor vehicles - governed by state law
  - (d) Airplanes, ships and locomotives - governed by federal law
  - (e) Intellectual property may be governed by Article 9 or by federal patent and trademark statutes (this is an unsettled question, and prudent practice is to perfect under each statute)

B. Structural Issues. If another creditor cannot successfully attack the security interests of a lender on the grounds that they were not properly created or perfected, he may nonetheless be able to have the grant of the security interest avoided as a preference or fraudulent transfer or to defeat its priority through equitable subordination.

1. A preference is a transfer of an interest (including a security interest) in property of an entity to or for the benefit of a creditor of the transferor on account of a preexisting debt owed to the transferee made while the transferor was insolvent and made within 90 days prior to the bankruptcy filing (or between 90 days and 1 year, if the transferee is an insider). The debtor is presumed to have been insolvent for 90 days prior to the bankruptcy filing, but that presumption is rebuttable. A preferential



transfer can be avoided by the transferor or its trustee in the bankruptcy of the transferor (§547 of the United States Bankruptcy Code (the "Code")). Generally, this risk is of concern to a lender only when it is taking additional collateral as security for a loan that is already outstanding, but it can come up in the initial stages of the loan if items necessary to create and perfect security interests are handled as post-closing matters.

2. A fraudulent conveyance is a transfer (including grant of a security interest) of property of an entity which is either an actual fraud, i.e. made with actual intent to hinder, delay or defraud creditors (which is very hard to prove) or a constructive fraud, i.e. a transfer of property in exchange for which the transferor received less than reasonably equivalent value if, at the time of the transfer, the transferor was insolvent, was engaged in or planning to engage in a business for which it had unreasonably small capital or intended to incur debts that would be beyond its ability to pay. A fraudulent conveyance is avoidable under the Code (§548) as well as under state law. While under the Code the statute of limitation for dividing a fraudulent conveyance is one year, the statute of limitations under the applicable state law may be as long as six years.
3. Equitable subordination is a legal principal under which a secured creditor who has engaged in unfair conduct to the detriment of other creditors may have its liens subordinated to the claims (whether secured or unsecured) of the creditors (and sometimes even equity holders) who were harmed by the conduct. For example, if a secured creditor has a pledge of all the stock of the borrower and is able to use that pledge to obtain control of management of the borrower, then proceeds to manage the borrower's business with the primary goal of getting itself paid no matter what that does to the borrower or the other creditors, it will be vulnerable to equitable subordination. This risk is a significant one for lenders who offer "one stop shopping", providing senior debt, mezzanine financing and equity to a borrower.

C. Issues raised by the presence of other lenders to the borrower

1. The rules of priority established by law among secured creditors can be varied by those creditors by contract. A lender coming into a transaction where another lender has already obtained a perfected security interest in some or all of the collateral gets a junior security interest in that collateral unless the preexisting lender agrees otherwise by executing a subordination agreement or an intercreditor agreement. The distinction between those two types of agreements is quite blurred, and the titles are often interchanged.

2. A subordination agreement is usually used when one lender's security interest, though perfected later, will be senior to the other lender's security interest in all or most of the collateral.
  - a. It establishes contractually the relative priority of the security interests,
  - b. it prohibits altogether or restricts payments to the junior lender and
  - c. it prohibits or restricts the right of the junior lender to foreclose on the collateral or exercise any other remedies it may have until the senior lender has been paid in full.
  
3. An intercreditor agreement is usually used when two or more lenders will have security interests in various categories of collateral and their relative priorities will be different with respect to each category. For example, a revolving credit working capital lender may have the first priority security interest in liquid assets, while a term lender may have the first priority in machinery and equipment and a mortgage lender a first priority in real estate. If each lender is to have a junior interest in the others' collateral, an agreement is needed to:
  - a. establish the relative priorities;
  - b. delineate the rights that each lender has to foreclose upon or exercise other remedies with respect to each category of collateral and
  - c. if appropriate, provide for restrictions on payments of junior indebtedness.

V. Effect on the lawyer's role of the context within which the loan is being documented

- A. If the loan transaction is a stand alone transaction such as the extension of a working capital loan to an existing business, the lawyer's focus will be on understanding the corporate structure of that business.
  1. If the loan is to be secured, due diligence with respect to the collateral is appropriate.
  2. If the corporate structure involves a parent corporation and one or more subsidiaries and each entity in the structure is to be a borrower and/or a guarantor of the indebtedness,

- a. the transaction must be analyzed with respect to each entity individually to identify any fraudulent conveyance problems and
  - b. care must be taken to insure that no borrower can transfer assets to subsidiaries or affiliates so as to remove them from the lender's collateral net. This can be accomplished through the use of secured guaranties.
- B. If the loan transaction is adjunct to another transaction (usually an acquisition), an additional layer of complexity is introduced. Now the lawyer must not only understand the existing business, but also the impact that the acquisition will have on that business. Some of the issues that must be addressed are:
1. Fraudulent conveyance. A stock acquisition that is financed with debt secured by the assets of the target company always involves a transfer by the target (the grant by it of the security interest) for which it receives no consideration, because the money borrowed on the security of the target's assets goes to the selling shareholders. A thorough analysis of the solvency of the target as of the closing of the transaction is required. An asset acquisition, assuming it is an arms length transaction, will not usually raise this issue.
  2. Title to assets. In a loan transaction to finance an asset acquisition, the lawyer must review the acquisition agreements carefully to make sure that they are effective to pass title to the assets to the buyer/borrower. The opinion of the seller's counsel delivered in connection with the acquisition will also address this issue, and the lawyer should insist that that opinion be addressed to the lender as well as the borrower.
  3. Indemnities. In a typical acquisition, certain liabilities and risks will be retained by the seller and the seller will indemnify the buyer against any losses it may incur based on the retained liabilities and risks. The lawyer for the lender should insist that those indemnities be collaterally assigned to the lender.
  4. Consideration. The loan documents will not be enforceable against the borrower unless the borrower receives the proceeds of the loans. However, the lender will want to disburse the initial loans directly to the seller to make sure the acquisition has been consummated. The lawyer for the lender must create a clear paper trail in which the borrower directs the lender to pay the seller and acknowledges that such payment constitutes a loan to the borrower.
  5. Timing. The acquisition must be consummated before the loan is disbursed or else the loan will be unsecured. This is so because the grantor of the security interest (the buyer/borrower) has no interest in the

collateral until the acquisition closes. However, the acquisition will not be closed until the seller receives payment for the assets being sold. The source of payment is the loan. Again, the lawyer for the lender must be careful that the transactions take effect simultaneously and that the last thing to happen is disbursement of the loans. If there will be a significant delay between the closing of the acquisition and the funding of the loans, the seller may take the buyer/borrower's promissory note as payment and the loan proceeds can then be used to payoff the note.

## VI. Ethical Concerns

1. Although a case still comes up now and again, it is now generally recognized that a lender does not have a fiduciary relationship with its borrowers. Cases in which a fiduciary duty is imposed on the lender usually involve egregious conduct on the part of the lender. The UCC imposes a general duty of good faith on contracting parties, but the case law is unsettled as to whether that duty, which is found in Article 1 of the UCC, applies to loan agreements. At least in the Seventh Circuit, the lawyer is safe in advising his lender clients that they may enforce their rights against their borrowers in accordance with the express terms of their agreements with those borrowers, regardless of whether the result is "fair" to the borrower (*Kahm & Nate's Shoes No.2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990)).
2. The ethical issue that arises most frequently for the lawyer to a lender is inherent in the compensation structure of the client. Most lending institutions compensate their business development officers ("BDO's") based on the number and size of the transactions they find and close. As a result, the BDO has an incentive to compromise more than may be appropriate to "get the deal". The lawyer and the BDO work closely together to close the loan and the primary relationship between the lawyer and the client may well be the relationship with the BDO. The lawyer, however, is responsible to and is representing the lending institution, not the BDO. While some institutions have a defined system for insuring that the deal gets documented in a manner consistent with the loan approval, many do not. When there is no such system the lawyer must be vigilant in protecting the client, even if that leads to tension with the BDO. The lawyer should strive to understand the limits of the BDO's authority in negotiations and should establish a channel of communication with the BDO's managers that can be used if the lawyer feels that the BDO is exceeding his authority to the detriment of the client.

## **COVENANTS: ISSUES TO CONSIDER IN NEGOTIATIONS**

Covenants constitute integral components of the credit agreements between borrowers and lenders. They allow lenders to monitor operating and financial performance, and to intervene as necessary when the borrower's performance doesn't meet expectations. And covenants become the post-closing criteria for judging credit performance.

### **General Covenants**

General Covenants are designed to ensure that timely and accurate information is communicated by the borrower. They may also require notification and/or approval for specific business activities outside the ordinary course of business. Some examples of general covenants are:

- Full disclosure: Typically requires providing financial statements on a monthly or quarterly basis in order to monitor operating results.
- Material adverse changes or "MAC" clauses: Significant, often subjective, issues affecting the borrower's ability to perform.
- Restrictions on additional lending: incremental financing indebtedness is not allowed without lender permission as further leverage may jeopardize current debt service requirements.
- Investments, acquisitions or disposals: Restrictions imposed on the borrower's ability to acquire, sell, lease, or otherwise use or dispose of assets during the term of the lending agreement in a manner other than as contemplated. This covenant is typically used to restrict dispositions of pledged assets without lender approval.
- Hiring a restructuring professional: Some agreements require the borrower to hire professionals who can assist with restructuring efforts when management's competence is in question.

### **Financial Covenants**

Financial covenants allow the lender to monitor performance through the establishment of absolute measurable thresholds. Most covenants monitor the borrower's ability to service its debt based upon operating results. Examples of financial measurements to be considered and evaluated are:

- Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA): A measurement to ensure that operating results are consistent with the borrower's expected operating performance. EBITDA covenants implicitly monitor operating elements of the income statement (including revenue, cost of goods

sold, and operating expenses) without focusing on typical noncash (depreciation and amortization) or non-operating income/expense (interest and income tax) items.

- Free Cash Flow: Typically defined as cash flow from operations, investing and financing activities. Free cash flow represents the borrower's available liquidity to meet its contemplated debt service, capital expenditure, and other cash needs.
- Capital expenditures: Restrictions are put in place to ensure that capital expenditures do not exceed agreed-upon amounts. These covenants ensure that liquidity is not sacrificed by over reaching investments in plant expansion, fixed-asset acquisitions, or other commitments that may negatively affect cash available for debt service.
- Current ratio (current assets/current liabilities): Assesses the borrower's capacity to meet short-term obligations. The current ratio indicates whether the borrower can generate sufficient working capital to fund operations.
- Quick ratio (cash and equivalents plus accounts receivables/current liabilities): This liquidity measurement assesses whether the borrower can pay its obligations promptly without causing any disruption in its business. The quick ratio is an indicator of short-term solvency that is available to meet creditor obligations.
- Times interest earned (EBITDA/interest expense): Ensures that operating income is sufficient to meet the cost of financing. The times-interest ratio allows lenders to ascertain whether the operating results are consistent with its debt obligations.
- Debtor equity - (total debt/shareholders' equity): Indicates the degree of the borrower's financial leverage and the borrower's ability to carry additional debt.
- Revenue covenants: A measurement of a borrower's financial prospects which allows for prompt action to be taken in light of changes in market conditions.
- Return on total assets using EBITDA - (EBITDA/operating assets): Indicates the rate of return being generated by the assets of the business.
- Debt service ratio - (net operating income/total debt service): An indication of a borrower's ability to pay its financing obligations.

Financing covenants typically involve negotiations between lender and borrower. The borrower creates financial projections that reflect its best estimate of business performance. The projections are then used as a foundation to establish financial covenants. In negotiating covenants, it is imperative that a buffer or cushion to the calculated amounts be agreed upon in order to allow for the inherent uncertainty that exists in the projections. Buffers may be calculated as either as a percentage of or as an absolute value deviation from the projected

amounts. The actual agreed-upon buffer amounts result from arduous negotiations and can often be deal breakers.

### **Lender's incentive at the negotiating table.**

Lenders usually prefer more frequent covenant measurement periods within a certain number of days after the reporting period, while borrowers prefer otherwise. Monthly versus quarterly or longer covenant calculation dates allow for timely monitoring and minimize delays between the diminishment of the borrower's performance and the recognition that there has been a violation of covenant compliance.

Lenders also want to create covenants that effectively monitor the significant risk elements of a borrower's financial statements. Depending upon the borrower's operational profile and the lenders' particular concerns, financial covenants may take into account elements of the income statement, balance sheet and cash-flow statement, as well as specific operating metrics.

In the current lending environment, many lenders are structuring tighter covenants into deals with shorter time horizons; the reduced time horizon gives the borrower less time to default on its covenants, minimizing the deal's overall recovery risk.

### **Borrower's incentive at the negotiating table**

Borrowers will negotiate covenants as tenaciously as the cost of borrowed funds. Structuring fair and equitable covenants that reflect future business prospects is critical. Unrealistic or excessively restrictive covenants create untenable situations where both parties likely end up asking themselves: "Why did we do this deal?" Caution must be taken by both parties to ensure that the desire to close doesn't result in a deal today and a default tomorrow.

Borrowers want to reduce the number of elements the financial covenants monitor. In their eyes, fewer are better. "Focus on the critical business risks and don't curtail our ability to run the business," is often heard by lenders. Negotiating to minimize the number of covenants is a borrower's starting point.

They also try to minimize the frequency of covenant compliance reporting. Preparation of a compliance certificate and supporting calculations takes time and effort, often requiring special analysis. Business seasonality issues are also critical factors when setting performance-measurement periods. The inherent volatility of expected financial performance must be thoroughly understood before the borrower approaches the negotiating table. This volatility often results in the measurement periods such as trailing three, six or even twelve months for certain covenants. In addition, interim period financial results are often based on monthly standard journal entries that can be adversely and significantly affected by year-end adjustments arising from a thorough analysis of accounts or implementation of accounting standards not contemplated by the covenants.

Reducing the number of variables in proposed covenants is advocated by many borrowers. For example, a financial covenant that monitors Total Liabilities/EBITDA is not as advantageous to

the borrower as an absolute-dollar threshold covenant for EBITDA. The former covenant explicitly monitors both the income statement (via Total Liabilities). Unforeseen liabilities may be recorded after the covenant is established that adversely affect the borrower's ability to comply with the covenant. By focusing the covenant on EBITDA exclusively, the balance-sheet monitoring mechanism is removed.

Revenue covenants have recently been introduced as a monitoring mechanism. Given the recent economic downturn in the U.S., some lenders suggest that revenue covenants more effectively reflect a borrower's financial prospects and allow for appropriate action to be promptly taken. Borrowers will attempt to avoid instituting revenue covenants, as they may have less ability to influence revenues than other income-statement items such as EBITDA. Cost-reduction initiatives, vendor contract renegotiations and other opportunities within the direct control of the borrower can compensate for reduced market opportunities and maintain minimum EBITDA requirements.

Composition of the covenants must ensure that a particular covenant makes sense relative to the industry. If a requirement is inappropriate for the borrower's industry, the lender must be informed. Borrowers should provide financial records and alternative suggestions that are applicable to the industry such as covenants used for competitors. Likewise, lenders should understand the industry and the key business drivers. Perhaps setting fewer, more focused, covenants that provide early indications of negative trends would be more appropriate.

Borrowers should evaluate proposed covenants using the past few years' financial data in order to determine whether covenant compliance was historically achievable. The lender needs to thoroughly understand the link between the historical actual results and the borrower's projected results in order to assess the appropriate covenant threshold. Significant events such as large fixed asset expenditures, acquisitions or accounting changes must be given consideration in order to ensure that covenants allow for the contemplated events but at the same time maintain sufficient control.

A covenant violation is an early indicator that the borrower's performance may be on a downward trend. Violations usually result in "technical default," whereby the lender can accelerate and demand repayment of the entire outstanding principal. Lenders, however, will often waive the violation and use the event of default to negotiate alternatives.

In order to improve their loan recovery prospects in the result of a default, lenders' options include:

- Waiving the default if compelling reasons exist regarding the causes for the default and the lenders are comfortable with the financial and operating prospects of the borrower.
- Renegotiating the covenants and other loan terms such as collateral, interest rate, maturity date, ineligibles and others in order to reflect the current market trends and industry considerations that the borrower is facing.



- Calling the loan in its entirety. At this juncture, the borrowers may be forced to seek an alternative lender or perhaps file for Chapter 11 protection. Chapter 11 may be a viable option for a lender and its borrower when the borrower is facing massive and unmanageable litigation claims; or may be a party to burdensome executory contracts which are impairing its ability to effectively compete. Additionally, the default may be so egregious that the lenders force the borrower into liquidation to maximize recoveries.

**AGGRESSIVE BANK, N.A.**  
**1111 Springfield Street**  
**Chicago, IL 66666**

February 15, 2009

Robert Beevers  
DEAN WINDOWS, INC.  
111 Victor Street  
Whistlestop, IL 66699

Re: \$1,500,000 Total Credit Facility (\$1,000,000 Revolving Credit \$300,000 Term Loan and \$200,000 Equipment Line of Credit)

Gentlemen:

We are pleased to extend to you a credit facilities subject to the following terms and conditions, such additional terms and conditions as we or our counsel may require and our review and acceptance of such additional facts and materials as we, in our sole discretion, deem necessary or advisable.

**I. Borrower:** Dean Windows, Inc. a(n) Illinois corporation.

**II. Revolving Credit Facility:**

- |     |                |  |
|-----|----------------|--|
| (a) | Amount         | \$1,000,000  |
| (b) | Interest Rate  | Our prime commercial rate from time to time in effect plus two and one-half percent (2.5%) per annum, payable monthly.   |
| (c) | Maturity       | All sums shall be due and payable on or before March 31, 2010.   |
| (d) | Borrowing Base | Borrowings under the revolving credit facility will be based on borrowing base certificates with advances on (i) eligible accounts receivable of up to eighty percent (80%) under ninety (90) days, subject to twenty-five percent |

(25%) cross aging and (ii) eligible inventory of up to twenty-five percent (25%) on the lower of cost or market value, and excluding work in process with a \$250,000 maximum advance on eligible inventory.

**III. Term Credit Facility:**

- (a) Amount \$300,000
- (b) Interest Rate Borrower's choice of (i) our prime commercial rate from time to time in effect plus two and one-half percent (2.5%) per annum; or (ii) three percent (3%) above the five (5) year treasury yield at the time of funding, fixed for the term of the loan.
- (c) Repayment Equal monthly installments of principal and interest based on a ten (10) year amortization schedule provided that all sums shall be due and payable five (5) years from disbursement.
- (d) Prepayment If a floating rate is chosen, there shall be no prepayment premium. If the fixed rate is chosen, a premium shall be payable upon prepayment. (5,4,3,2,1)
- (e) Funding Amount The initial funding amount will be based on eighty percent (80%) of the forced liquidation value of machinery and equipment as determined by an acceptable appraiser.

**IV. Equipment Line to Convert to Term Credit Facility:**

- (a) Amount \$200,000
- (b) Conversion This line must convert to a five (5) year term loan no later than September 30, 2009.
- (c) Interest Rate Our prime commercial rate from time to time in effect plus two and one-half percent (2.5%) per annum.  
  
Upon conversion, Borrower's choice of (i) our prime commercial rate from time to time in effect plus two and one-half percent (2.5%) per annum; or (ii) three percent (3%) above the five (5) year treasury yield at the time of funding, fixed for the term of the loan.

- (d) Repayment Interest only until September 30, 2009 or conversion, whichever comes first. After conversion, equal monthly installments of principal and interest based on a five (5) year amortization schedule provided that all sums shall be due and payable five (5) years from conversion.
- (e) Prepayment If a floating rate is chosen, after conversion, there shall be no prepayment premium. If the fixed rate is chosen, after conversion, a premium shall be payable upon prepayment. (5,4,3,2,1)
- (f) Funding Amounts Fundings must be in a minimum amount of \$30,000. We will fund up to eighty percent (80%) of the total invoice cost of capital improvements. Copies of invoices must be submitted to us prior to our advances being made.

**V. Generally:**

- (a) Structuring Fee \$10,000.00 due at closing.
- (b) Unused Line Fee 1% per annum on the difference between the average daily balance of the Revolving Credit Facility and the maximum amount of the Revolving Credit Facility divided by 12 and payable monthly.
- (c) Collateral
  - (i) A first lien and security interest in all Documents, Instruments, General Intangibles, Chattel Paper, Accounts and Goods, Inventory, Machinery and Equipment, Furniture and Fixtures, and all other assets of Borrower.
  - (ii) All financial instruments that may be owing from time to time by us to Borrower.
- (d) Guaranty All obligations of Borrower to us shall be unconditionally and irrevocably guaranteed by Robert Beevers, Jack Wheeler, Ted Carter, Bob Gates and Scott Cunningham.
- (e) Financial Statements
  - (i) Borrower shall furnish to us monthly financial statements, borrowing base certificates, accounts receivable agings, accounts payable agings and inventory listings, and a certificate from a responsible financial officer to the effect that such statements are true, correct and complete within fifteen (15) days of the close of each month.

(ii) Borrower shall cause to be delivered to us a report for each fiscal year, including a balance sheet, statement of operating results and retained earnings, statement of cash flows and notes to financial statements, prepared and reviewed by independent certified public accountants acceptable to us within ninety (90) days after the close of each fiscal year.

(iii) All financial statements to be furnished or delivered to us shall be prepared in accordance with generally accepted accounting principles consistently applied.

- (f) Collections Borrower shall maintain its demand deposit accounts with us and we shall receive all collections through a lockbox. Three (3) days shall be allowed for collection.
- (g) Tangible Net Worth A minimum Tangible Net Worth of not less than \$350,000 shall be maintained at December 31, 2009, and \$380,000 by February 28, 2010. The calculation of Tangible Net Worth shall include the value of Preferred Stock, Common Stock, Capital Surplus, other Equity Adjustments, Subordinated Debt, and Retained Earnings, but shall not include any value for Treasury Stock, Intangible Assets, Amount Due from Officers/Employees, Amounts Due from Stockholders and Prepaid Expenses.
- (h) Debt-to Tangible Net Worth Ratio A maximum ratio of Debt to Tangible Net Worth of 5.0 to 1 shall be maintained as of December 31, 2009, and 4.8 to 1 by February 28, 2010.
- (i) Officers Salaries The total per annum compensation of Robert Beevers and shall not exceed \$90,000 without our written consent.
- (j) Subordination All obligations of Borrower to stockholders and any other Person to whom Borrower is indebted (except trade debt) shall be subordinated to the obligations of Borrower to us, such subordination to be in form and substance satisfactory to us and our counsel. Subordinated obligations due to stockholders must be in a minimum of amount of \$50,000.00 at closing. No payments will be allowed.
- (k) Debt Except for Debt represented by the proposed credit facility, Subordinated Debt and such other Debt as may be permitted under the Debt-to-Tangible Net Worth Ratio,

Borrower will not permit to remain outstanding, issue, incur or assume any Debt.

- (l) Liens Except for liens or encumbrances created in our favor, Borrower will not be permitted to create or suffer to exist any lien or encumbrance upon any of its assets.
- (m) Dividends While the corporation maintains Subchapter "S" status, dividends are limited to the amount necessary to satisfy the stockholders' personal federal and state tax liability.
- (n) Field Audit This commitment shall be subject to and conditional upon a satisfactory field exam performed by our auditors prior to funding and semi-annually thereafter, at Borrower's expense, at the rate of \$750.00 per day.
- (o) Landlord's Waiver The Landlord of the premises occupied by Borrower shall execute a Landlord's Waiver satisfactory in form and substance to us and our counsel.
- (p) Clean-Up Period During the final quarter of Borrower's fiscal year, there shall be no borrowings for a period of thirty (30) consecutive days under the Revolving Credit Facility.
- (q) Management Change There shall be no change in the senior management of Borrower without our consent.

**VI. Miscellaneous:**

- (a) Documentation The credit facility will be evidenced by a credit agreement in form and substance satisfactory to us and our counsel in all respects containing, in addition to the terms and conditions contained herein, further and additional terms and conditions binding upon Borrower and calling for the execution and delivery of other documents and agreements, including notes, security agreements and guaranties, and providing a stipulated forum for resolution of disputes and a jury waiver.
- (b) Expenses Borrower shall pay all reasonable expenses incident hereto and to the credit facility contemplated hereby, including the fees and expenses of any counsel engaged by us, recording fees, appraisal expenses, audit fees, and document and search fees; compensation for such expenses shall be payable regardless of whether any advances are made to Borrower.

- (c) Acceptance;  
Expiration
- The terms and conditions hereof must be acceptable and agreed to by Borrower and the guarantors in the manner provided below, and an executed copy of this letter delivered to us and a \$5,000 good faith deposit paid to us on or before February 25, 2009, or we shall have no obligation hereunder.
- Upon your acceptance this commitment shall remain effective until March 31, 2009. Unless the credit facilities referred to above have been funded by March 31, 2009, this commitment shall expire and we shall have no further obligation hereunder.
- (d) Adverse Change
- If there has been or shall be any adverse change in either the business or financial condition of Borrower or any Subsidiary from that set forth in the consolidated financial statements dated as of December 31, 2008, or as set forth in any other materials delivered or in any representations made to us we shall have no obligation hereunder.
- (e) Non-Assignability
- This commitment is not assignable.

We are sincerely pleased to be able to offer this facility to you and we look forward to a long and mutually beneficial relationship.

Very truly yours,

AGGRESSIVE BANK, N.A.

By: \_\_\_\_\_  
Vice President

**ACCEPTED AND AGREED TO THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2009:**

DEAN WINDOWS, INC.

By: \_\_\_\_\_  
Robert Beevers, President

GUARANTORS:

\_\_\_\_\_  
Robert Beevers

\_\_\_\_\_  
Jack Wheeler

\_\_\_\_\_  
Ted Carter

\_\_\_\_\_  
Bob Gates

\_\_\_\_\_  
Scott Cunningham



**LOAN AND SECURITY AGREEMENT**

**BETWEEN**

---

**AND**

---

**DATED:** \_\_\_\_\_, 20\_\_

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## LOAN AND SECURITY AGREEMENT

THIS LOAN AND SECURITY AGREEMENT ("this Agreement") is made as of the day of \_\_\_\_\_, 20\_\_, by and between ("Lender") and \_\_\_\_\_, a(n) \_\_\_\_\_ corporation ("Borrower").

### WITNESSETH:

WHEREAS, Borrower desires to borrow funds and obtain other financial accommodation from Lender, and Lender is willing to make certain loans and provide other financial accommodation to Borrower upon the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the terms and conditions contained herein, and of any loans or extension of credit heretofore, now or hereafter made to or for the benefit of Borrower by Lender, the parties hereto hereby agree as follows:

#### 1. GENERAL DEFINITIONS

When used herein, the following terms shall have the following meanings:

1.1 "Accounts" shall mean any and all accounts, contract rights, instruments, documents, chattel paper, general intangibles (including, but not limited to choses in action, tax refunds, and insurance proceeds); any other obligations or indebtedness owed to Borrower from whatever source arising; all rights of Borrower to receive any payments in money or kind; all guaranties of the foregoing and security therefore; all of the right, title, and interest of Borrower in and with respect to the goods, services, or other property that gave rise to or that secure any of the foregoing and insurance policies and proceeds relating thereto, and all rights of Borrower as an unpaid seller of goods and services, including, but not limited to, the rights of stoppage in transit, replevin, reclamation, and resale; and all of the foregoing, whether now owned or existing or hereafter created or acquired.

1.2 "Account Debtor" shall mean any Person who is or who may become obligated to Borrower under, with respect to, or on account of an Account.

1.3 "Affiliates" shall mean any and all Persons which, in the sole and absolute judgment of Lender, directly or indirectly control, are controlled by or are under common control with the Borrower, and any and all persons from whom, in the sole and absolute judgment of Lender, Borrower has not or is not likely to exhibit independence of decision or action. For the purpose of this definition, "control" means the possession, directly or indirectly, of the power to direct or cause the direction of management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

1.4 "Ancillary Agreements" shall mean all Security Documents (as hereinafter defined) and all agreements, instruments and documents, including without limitation, notes, guaranties, mortgages, deeds of trust, chattel mortgages, pledges, powers of attorney, consents,

assignments, contracts, notices, security agreements, leases, financing statements, subordination agreements, trust account agreements and all other written matter whether heretofore, now, or hereafter executed by or on behalf of Borrower or any other Person and/or delivered to Lender or any Participant with respect to this Agreement.

1.5 "Borrowing Base Certificate" shall mean a report delivered to Lender by Borrower under this Agreement in the form annexed hereto as Exhibit "A."

1.6 "Business Day" shall mean any day other than a Saturday, Sunday or a legal holiday on which banks are authorized or required to be closed for the conduct of commercial banking business in Chicago, Illinois.

1.7 "Capital Lease" shall mean, as to any person or entity, a lease of any interest in any kind of property or asset, whether real, personal or mixed, or tangible or intangible, by such person or entity as lessee that is, or should be, in accordance with Financial Accounting Standards Board Statement No. 13, as amended from time to time, or, if such Statement is not then in effect, such statement of GAAP as may be applicable, recorded as a "capital lease" on the balance sheet of the Borrower prepared in accordance with GAAP.

1.8 "Charges" shall mean all national, federal, state, county, city, municipal, and/or other governmental (including, without limitation, the Pension Benefit Guaranty Corporation) taxes, levies, assessments, charges, liens, claims or encumbrances upon and/or relating to (i) the Collateral, (ii) the Liabilities, (iii) Borrower's employees, payroll, income and/or gross receipts, (iv) Borrower's ownership and/or use of any of its assets, or (v) any other aspect of Borrower's business.

1.9 "Code" shall mean the United States Bankruptcy Code, as now existing or hereafter amended.

1.10 "Collateral" shall mean all of the property and interests in property described in Section 5.1 of this Agreement and all other property and interests in property which shall, from time to time, secure the Liabilities.

1.11 "Collateral Availability" shall have the same meaning ascribed to it in Section 2.1 of this Agreement.

1.12 "Current Assets" shall mean the aggregate net book value of the current assets of Borrower as determined in accordance with generally accepted accounting principles, excluding any Accounts owing to Borrower from any Affiliate.

1.13 "Current Liabilities" shall mean the aggregate amount of all liabilities of Borrower which would be classified as current liabilities under generally accepted accounting principles.

1.14 "Default" shall mean the occurrence or existence of anyone or more of the events described in Section 10.1 of this Agreement.

1.15 "Eligible Accounts" shall mean those Accounts included in a Borrowing Base Certificate which, as of the date of such Borrowing Base Certificate and at all times thereafter, (i) satisfy the requirements for eligibility as described in Section 3.1 of this Agreement, (ii) do not violate the negative covenants and other provisions of this Agreement and do satisfy the affirmative covenants and other provisions of this Agreement and (iii) are deemed by Lender, in its sole and absolute credit judgment, to be Eligible Accounts.

1.16 "Event of Default" shall mean any event or condition which, upon occurrence or with the passage of time, or upon the giving of notice, or both, would constitute a Default.

1.17 "Financials" shall mean those financial statements of Borrower attached hereto as Exhibit C or delivered to Lender pursuant to Section 9.1 of this Agreement.

1.18 "GAAP" shall mean generally accepted accounting principles, using the accrual basis of accounting and consistently applied.

1.19 "General Intangibles" shall mean all choses in action, causes of action and all other intangible personal property of Borrower of every kind and nature (other than Accounts) now owned or hereafter acquired by Borrower, including, without limitation, corporate or other business records, deposit accounts, inventions, designs, patents, patent applications, trademarks, trade names, trade secrets, goodwill, copyrights, registrations, licenses, franchises, tax refund claims and any letters of credit, guarantee claims, security interests or other security held by or granted to Borrower to secure payment by an Account Debtor of any of Borrower's Accounts.

1.20 "Hazardous Materials" shall mean any hazardous, toxic or dangerous substance, materials and wastes, including, without limitation, hydrocarbons (including naturally occurring or man-made petroleum and hydrocarbons), flammable explosives, asbestos, urea formaldehyde insulation, radioactive materials, biological substances, polychlorinated biphenyls, pesticides, herbicides and any other kind and/or type of pollutants or contaminations (including, without limitation, materials which include hazardous constituents), sewage, sludge, industrial slag, solvents and/or any other similar substances, materials or wastes that are or become regulated under any Environmental Law (including without limitations, any that are or become classified as hazardous or toxic under any Environmental Law).

1.21 "Indebtedness" shall mean all of Borrower's liabilities, obligations and indebtedness to any Person of any and every kind and nature, whether primary, secondary, direct, indirect, absolute, contingent, fixed, or otherwise, heretofore, now or hereafter owing, due, or payable, however evidenced, created, incurred, acquired or owing and however arising, whether under written or oral agreement, by operation of law, or otherwise. Without in any way limiting the generality of the foregoing, Indebtedness specifically includes (i) the Liabilities, (ii) all obligations or liabilities of any Person that are secured by any lien, claim, encumbrance, or security interest upon property owned by Borrower, even though Borrower has not assumed or become liable for the payment thereof, (iii) all obligations or liabilities created or arising under any lease of real or personal property, or conditional sale or other title retention agreement with respect to property used and/or acquired by Borrower, even though the rights and remedies of the

lessor, seller and/or lender thereunder are limited to repossession of such property, (iv) all unfunded pension fund obligations and liabilities and (v) deferred taxes.

1.22 "Indemnified Party" and "Indemnified Parties" shall mean, respectively, each of the Lender and any parent corporations, affiliated corporations or subsidiaries of Lender, and each of their respective officers, directors, employees, attorneys and agents, and all of such parties and entities.

1.23 "Initial Term" shall have the meaning ascribed to it in Section 2.4 of this Agreement.

1.24 "Interest Charges" shall mean, for any period, the sum of: (a) all interest, charges and related expenses payable with respect to that fiscal period to a lender in connection with borrowed money or the deferred purchase price of assets that are treated as interest in accordance with GAAP, plus (b) the portion of rent payable with respect to that fiscal period under Capital Leases that should be treated as interest in accordance with GAAP.

1.25 "Inventory" shall mean any and all goods, merchandise, and other personal property now owned or hereafter acquired by Borrower that are held for sale or lease, or are furnished or to be furnished under any contract of service or are raw materials, work-in-process, supplies, or materials used or consumed in Borrower's business, and all products thereof, and all substitutions, replacements, additions, or accessions therefore and thereto; and including, but not limited to, the Inventory specifically described in Section 5.1, if any.

1.26 "Liabilities" shall mean all of Borrower's liabilities, obligations and indebtedness to Lender of any and every kind and nature, whether primary, secondary, direct, indirect, absolute, contingent, fixed, or otherwise, (including, without limitation, interest, charges, expenses, attorneys' fees and other sums chargeable to Borrower by Lender, future advances made to or for the benefit of Borrower and obligations of performance), whether arising under this Agreement, under any of the Ancillary Agreements or acquired by Lender from any other source, whether heretofore, now or hereafter owing, arising, due, or payable from Borrower to Lender, however evidenced, created, incurred, acquired or owing and however arising, whether under written or oral agreement, operation of law, or otherwise.

1.27 "Loan Account" shall have the meaning ascribed to it in Section 4.1 of this Agreement.

1.28 "Participant" shall mean any Person, now or at any time or times hereafter, participating with Lender in the loans made by Lender to Borrower pursuant to this Agreement and the Ancillary Agreements.

1.29 "Permitted Liens" shall mean, as applied to any Persons:

- (A) Any lien in favor of the Lender;
- (B) Liens on real estate for real estate taxes not yet delinquent;



(C) Liens for taxes (other than federal tax liens or any state tax lien having priority over the liens in favor of the Lender), assessments, judgments, governmental charges or levies or claims the non-payment of which is being diligently contested in good faith by appropriate proceedings and for which adequate reserves have been set aside on such Person's books, but only so long as no foreclosure, distraint, sale or similar proceedings have been commenced with respect thereto and remain unstayed or otherwise unbonded for a period of thirty (30) days after their commencement;

(D) Liens of carriers, warehousemen, mechanics, laborers and materialmen incurred in the ordinary course of business for sums not yet due or being diligently contested in good faith and for which reserves or appropriate provision, if any, as required by GAAP, shall have been made therefore;

(E) Liens incurred in the ordinary course of business in connection with worker's compensation and unemployment insurance;

(F) Encumbrances on property purchases or acquired by Borrower in favor of the Person or Persons providing the financing for the purchase or acquisition of such property (each a "Purchase Money Financier"); provided that: (i) such encumbrances extend only to the property the purchase or acquisition of which is financed by the relevant Purchase Money Financier; (ii) such encumbrances secure only the purchase price of the relevant property; (iii) such encumbrances are promptly released upon payment of the purchase price of the relevant property;

(G) Liens on leasehold improvements;

(H) Liens of record as of the date hereof as set forth on Exhibit I attached hereto; and

(I) Liens which arise in the ordinary course of business for sums not due or sums which the Borrower is contesting in good faith and by appropriate proceedings and with respect to which Borrower has provided for and is maintaining adequate reserves in accordance with GAAP, but which do not involve any deposits or advances or borrowed money or the deferred purchase price of property or services.

1.30 "Person" shall mean any individual, sole proprietorship, partnership, joint venture, trust, unincorporated organization, association, corporation, institution, entity, party, or government (whether national, federal, state, county, city, municipal or otherwise), including, without limitation, any instrumentality, division, agency, body or department thereof.

1.31 "Prime Rate" shall mean the rate of interest publicly announced from time to time by Lender as its "Prime Rate," without regard to whether such announced "Prime Rate" is the lowest rate of interest then offered by Lender to its borrowers.

1.32 "Regulatory Change" shall mean the introduction of, or any change in any applicable law, treaty, rule, regulation or guideline or in the interpretation or administration thereof by any governmental authority or any central bank or other fiscal, monetary or other authority having jurisdiction over Lender.

1.33 "Revolving Loan" shall have the meaning ascribed to it in Section 2.1 of this Agreement.

1.34 "Security Documents" shall mean this Agreement, other agreements, instruments, documents, financing statements, warehouse receipts, bills of lading, notices of assignment of accounts, schedules of accounts assigned, mortgages and other written matter necessary or requested by Lender to perfect and maintain perfected Lender's security interest in the Collateral.

1.35 "Special Collateral" shall have the meaning ascribed to it in Section 5.3 of this Agreement.

1.36 "Subordinated Debt" shall mean that portion of the Indebtedness of the Borrower which is subordinated to the Liabilities in a manner satisfactory to Lender, including, but not limited to, right and time of payment of principal and interest.

1.37 "Tangible Net Worth" shall mean, as of any particular date, the difference between (a) the Borrower's [consolidated] total assets as they would normally be shown on the balance sheet of the Borrower, but excluding therefrom all values attributable to goodwill, patents, copyrights, trademarks, licenses, prepaid expenses, capitalized leases or other General Intangibles (as defined in Section 1.16 of this Agreement) and loans and Accounts due from officers, employees, subsidiaries and Affiliates and (b) the Borrower's total liabilities and deferred charges as they would normally be shown on such balance sheet, including as liabilities all guarantees of the indebtedness of Affiliates.

1.38 "Subordinated Debt" shall mean that portion of the Indebtedness of the Borrower which is subordinated to the Liabilities in a manner satisfactory to Lender, including, but not limited to, right and time of payment of principal and interest.

1.39 "Unsubordinated Debt" means all Indebtedness of Borrower which is not Subordinated Debt.

1.40 Accounting Terms used in this Agreement which are not specifically defined shall have the meanings customarily given them in accordance with generally accepted accounting principles.

1.41 Other Terms. All other terms contained in this Agreement which are not otherwise defined in this Section 1 or in any other section of this Agreement shall, unless the context indicates otherwise, have the meanings provided for by the Uniform Commercial Code of the State of Illinois (the "Code") to the extent the same are used or defined therein.

## 2. LOANS: GENERAL TERMS

2.1 Total Facility. Lender shall, provided that a Default does not then exist or would not then be created thereby, make available for Borrower's use from time to time during the term of this Agreement, upon Borrower's request therefore certain loans and other financial accommodation not to exceed the aggregate principal amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) ("Total Facility"). The Total Facility shall be subject to all of the terms and conditions of this Agreement and the Ancillary Agreements and shall consist of a Revolving Line of Credit consisting of advances against Eligible Accounts and Eligible Inventory, in an aggregate principal amount not to exceed, at any time outstanding, the lesser of \_\_\_\_\_ (\$ \_\_\_\_\_) or the amount of Collateral Availability (the "Revolving Loan"). As used in this Agreement, "Collateral Availability" shall mean and, at any particular time and from time to time, be equal to the sum of:

(A) up to \_\_\_\_\_ percent (\_\_\_\_) of the net amount (after deduction of such reserves as Lender deems proper and necessary) of Eligible Accounts plus

(B) up to \_\_\_\_\_ percent (\_\_\_\_) of Eligible Inventory (determined on the basis of first-in, first out, lower of cost or market value, and net of such reserves as Lender deems proper and necessary); provided, however, that loans and advances based on Eligible Inventory of any type shall not at any time exceed \_\_\_\_\_ (\_\_\_\_) in aggregate principal amount outstanding.

The Revolving Loan shall be repayable as provided in Section 4.2 of this Agreement and shall be evidenced by a Revolving Credit Note in the form attached hereto as Exhibit D.

It is expressly understood and agreed by Borrower that nothing contained in this Agreement shall, at any time, require Lender to make loans or other extensions of credit to Borrower and the making and amount of such loans or other extensions of credit to Borrower under this Agreement shall at all times, be in Lender's sole and absolute discretion. Lender may, in the exercise of such discretion, at any time and from time to time, increase or decrease the advance percentage to be applied to Eligible Accounts which is contained in this Section 2.1 and, in the event such percentage is decreased, such decrease shall become effective immediately for the purpose of calculating the amount which Lender may be willing to advance, or allow to remain outstanding, against Eligible Accounts.

2.2 Advances to Constitute One Loan; Loan Purpose. All loans and advances by Lender to Borrower under this Agreement and the Ancillary Agreements (whether made as a Revolving Loan or otherwise), shall constitute one loan and all indebtedness and obligations of Borrower to Lender under this Agreement and the Ancillary Agreements shall constitute one general obligation secured by the Collateral.

2.3 Interest Rate. Borrower shall pay Lender interest on the outstanding principal balance of the Liabilities at a varying rate equal to \_\_\_\_\_ (\_\_\_\_%) per annum plus the Prime Rate. Interest shall be computed on the basis of a year of three hundred sixty (360) days and actual days elapsed and shall be payable as provided in Section 4.2 of this Agreement. Any

change in the Prime Rate shall be effective as of the effective date stated in the announcement by the Bank of such change. From and after the occurrence of a Default (as hereinafter defined) Borrower shall pay Lender interest on the outstanding principal balance of the Liabilities at a varying rate equal to \_\_\_\_\_ percent (\_\_\_\_ %) per annum plus the Prime Rate. In no contingency or event whatsoever shall the rate of interest paid by Borrower under this Agreement or any of the Ancillary Agreements exceed the maximum amount permissible under any law which a court of competent jurisdiction shall, in a final determination, deem applicable hereto. In the event that such a court determines that Lender has received interest hereunder in excess of the maximum rate permitted by any such law, (i) Lender shall apply the excess amount of interest paid by Borrower to any unpaid principal owed by Borrower to Lender or, if the amount of such excess exceeds the unpaid balance of such principal, Lender shall promptly refund such excess interest to Borrower, and (ii) the provisions hereof shall be deemed amended to provide for such permissible rate. All sums paid, or agreed to be paid, by Borrower which are, or hereafter may be construed to be, compensation for the use, forbearance or detention of money shall, to the extent permitted by applicable law, be amortized, prorated, spread and allocated throughout the full term of all such indebtedness until the indebtedness is paid in full.

2.4 Term of Agreement. This Agreement shall be in effect until \_\_\_\_\_ (\_\_\_\_) year(s) from the date hereof (the "Initial Term") unless the term is extended by the execution of an Extension Agreement by and between Lender and Borrower for an additional term (the "Renewal Term") or unless the term is terminated earlier as hereinafter provided. Either party shall have the right to terminate this Agreement at the end of the Initial Term or at the end of any Renewal Term by giving the other party sixty (60) days' prior notice of such termination. This Agreement may also be terminated by Lender upon the occurrence of a Default as provided in Section 10 of this Agreement. Upon the effective date of termination, all of the Liabilities shall become immediately due and payable without notice or demand. Notwithstanding any termination, until all of the Liabilities shall have been fully paid and satisfied, Borrower shall continue to pay interest to Lender as provided in Section 2.3 of this Agreement, Lender shall be entitled to retain its security interest in the Collateral, Borrower shall continue to remit collection of Accounts and proceeds of Collateral as provided in this Agreement, and Lender shall retain all of its rights and remedies under this Agreement.

2.5 Early Termination. Borrower may terminate the Total Facility in whole, but not in part, at any time prior to the end of the Initial Term by paying to the Lender upon such termination in addition to the then outstanding principal, accrued interest, and any other charges owing under the terms of this Agreement, plus as liquidated damages for Lender's loss of the benefit of its bargain, an amount equal to \_\_\_\_\_ percent (\_\_\_\_%) of the Total Facility if termination occurs during the period commencing on the date hereof and ending on the day before the first anniversary of the date hereof; \_\_\_\_\_ percent (\_\_\_\_%) of the Total Facility if termination occurs during the period commencing on the first anniversary of the date hereof and ending on the day before the second anniversary hereof.

2.6 Unused Line Fee. To compensate Lender for the cost of being prepared to make funds available to Borrower with respect to the Revolving Loan, Borrower shall pay to Lender at the end of each month of the Initial Term and any Renewal Term an unused line fee equal to the sum of the daily amounts, as calculated hereafter, for each day of such month: an amount which

is the difference between \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) and the principal amount of all outstanding advances under the Revolving Loan on such day, multiplied by \_\_\_\_\_ percent (\_\_\_\_%) and divided by three hundred sixty (360).

### 3. ELIGIBLE ACCOUNTS

3.1 Eligible Accounts. Upon Borrower's delivery to Lender of a Borrowing Base Certificate, Lender shall determine, in its sole and absolute discretion, which Accounts listed thereon are "Eligible Accounts." In making this determination, Lender will consider the following requirements:

(A) If the Account arises because of the sale of goods, such goods have been shipped or delivered on open account and on an absolute sale basis and not on consignment, on approval or on a sale-or-return basis or subject to any other repurchase or return agreement and no material part of such goods has been returned (other than returns described in Section 7.4 of this Agreement), repossessed, rejected, lost or damaged;

(B) The Account is not evidenced by chattel paper or an instrument of any kind;

(C) The Account Debtor obligated on such Account is not insolvent or the subject of any bankruptcy or insolvency proceeding of any kind and Lender is satisfied with the creditworthiness of such Account Debtor;

(D) If the Account is owing from an Account Debtor located outside the United States, such Account Debtor has furnished Borrower with an irrevocable letter of credit which has been issued or confirmed by a financial institution acceptable to Lender, is in form and substance acceptable to Lender, has been pledged to Lender, and is payable in United States dollars in an amount not less than the face value of the Account and there is FCIA (Foreign Credit Insurance Association) insurance in effect covering such account with Lender named as loss payee;

(E) The Account is a valid, legally enforceable obligation of the relevant Account Debtor and such Account Debtor has not asserted any offset, counterclaim or defense denying liability thereunder; provided, however, that if such offset, counterclaim or defense has been asserted, such Account shall be ineligible only to the extent of such asserted offset, counterclaim or defense;

(F) The Account is subject to and covered by Lender's perfected security interest and is not subject to any other lien, claim, encumbrance or security interest;

(G) The Account is evidenced by an invoice or other documentation in form acceptable to Lender;

(H) The Account has not remained unpaid for a period exceeding \_\_\_\_\_ ( ) days after the date of the related invoice or, if the Account is on dated billing, it is not more

than thirty (30) days past due, and not more than fifty percent (50%) of the balance of all Accounts owing from the Account Debtor obligated under such Account has remained unpaid for more than \_\_\_\_\_ ( ) days after the date of the invoice;

(I) The Account does not arise in connection with a sale to an Account Debtor who is located within a state which required the Borrower, as a precondition to commencing or maintaining an action in the courts of that state, either to (i) receive a certificate of authority to do business and be in good standing in such state, or (ii) file a notice of business activities or similar report with such state's taxing authority, unless (A) the Borrower has taken one of the actions described in clauses (i) or (ii), (B) the failure to take one of the actions described in either clause (i) or (ii) may be cured retroactively by the Borrower at its election, or (C) the Borrower has proven to the satisfaction of Lender that it is exempt from any such requirements under such state's laws;

(J) The Account is not owing from an employee, officer, agent, director, stockholder, subsidiary or Affiliate or from the United States of America or any department, agency or instrumentality thereof;

(K) The Account is not owing from an Account Debtor with respect to which Borrower is or may be liable for goods sold by such Account Debtor to the Borrower;

(L) The Account is one which is invoiced and sent to the Account Debtor concurrently with or not later than five (5) days after the shipment and delivery to and acceptance by said Account Debtor of the goods giving rise thereto;

(M) Each of the warranties and representations set forth in Section 8.2 of this Agreement has been reaffirmed with respect to such Account at the time the most recent Borrowing Base Certificate was delivered to Lender;

(N) The Account is one against which Lender is legally permitted to make loans and advances;

(O) The Account does not arise out of a contract or order which, by its terms, forbids or makes void or unenforceable the assignment by the Borrower to Lender of the Account arising with respect thereto and are not unassignable to Lender for any other reason;

(P) no proceedings or actions are pending or threatened against the Account Debtor which might result in any material adverse change in its financial condition or in its ability to pay any Account in full.

If the Account is owing from an Account Debtor representing more than \_\_\_\_\_ percent ( \_\_\_ %) of the total amount owing from all Account Debtors, such Account Debtor's maximum advance will be limited to \_\_\_\_\_ Dollars (\$ \_\_\_\_\_). In no event shall interest and service charges be considered part of an Eligible Account.

3.2 Eligible Inventory. Upon Borrower's delivery to Lender of a Borrowing Base Certificate, Lender shall determine, in its reasonable discretion, which Inventory listed thereon is "Eligible Inventory." In making this determination, Lender will consider the following requirements.

(A) The Inventory is in good condition, meets all standards imposed by any governmental agency, or department or division thereof, having regulatory authority over such goods, their use and/or sale and is either currently usable or currently saleable in the ordinary course of Borrower's business and is not otherwise unacceptable to Lender due to age, type, category and/or quantity;

(B) The Inventory is located at one of the locations listed on Exhibit E attached hereto, is subject to and covered by Lender's perfected security interest and is not subject to any other lien, claim, encumbrance or security interest;

(C) The Inventory has not been consigned to a customer of Borrower;

(D) Each of the warranties and representations set forth in Section 8.3 of this Agreement has been reaffirmed with respect thereto at the time the most recent Borrowing Base Certificate was delivered to Lender;

(E) The Inventory was not purchased by Borrower in or as part of a "bulk" transfer or sale of assets unless either (i) the Borrower has complied with all applicable bulk sales or bulk transfer laws or (ii) the Lender is adequately and satisfactorily indemnified with respect thereto and any indemnification of Borrower by the seller of such Inventory is satisfactorily assigned to Lender;

(F) The Inventory was not produced in violation of the Fair Labor Standards Act and is not subject to the so-called "hot goods" provisions contained in Title 29 U.S.C. 215(a); and

(G) The Inventory does not violate the negative covenants and satisfies the affirmative covenants of the Borrower contained in this Agreement.

Inventory which is Eligible Inventory shall cease to be Eligible Inventory whenever it ceases to meet anyone of the foregoing requirements.

#### 4. PAYMENTS

4.1 Borrower's Loan Account. Lender shall maintain a loan account ("Loan Account") on its books in which shall be recorded (i) all loans and advances made by Lender to Borrower pursuant to this Agreement, (ii) all payments made by Borrower on all such loans and advances and (iii) all other appropriate debits and credits as provided in this Agreement, including, without limitation, all fees, charges, expenses and interest. All entries in Borrower's Loan Account shall be made in accordance with Lender's customary accounting practices as in effect from time to time.

4.2 Payment Terms. All of the Liabilities shall be payable on demand to Lender at the address set forth in Section 11.10 of this Agreement. Absent demand interest shall be payable as billed or, at Lender's election, shall be payable out of the first collections received with respect to any proceeds of Collateral. Fees, costs, expenses and similar charges shall be payable as and when provided in this Agreement or the Ancillary Agreements. The principal balance of the Liabilities shall be payable as billed, or at Lender's election, shall be payable from collections received with respect to any proceeds of Collateral as such proceeds are received; provided, however, that if at any time the outstanding principal balance of the Liabilities exceeds the Collateral Availability, Borrower shall immediately pay to Lender such amount as is necessary to eliminate such excess.

4.3 Collection of Accounts and Payments. If requested by Lender, Borrower shall establish a lock box account in the Borrower's name with Lender by executing the Lock Box Agreement in the form attached hereto as Exhibit B, to which Borrower will immediately deposit all remittances in the identical form in which such payment was made, whether by cash or check. The Borrower hereby agrees that all payments made to such lock box or otherwise received by Lender, whether on the Accounts or as proceeds of other Collateral or otherwise will be the sole and exclusive property of Lender and, at Lender's sole discretion, may be applied on account of the Liabilities and, if Lender so elects to apply said payments to the Liabilities, after allowing \_\_\_\_\_ (\_\_\_\_) days for collection, Lender may credit (conditional upon final collection) all payments received through the lock box to Borrower's Loan Account. Borrower and any Affiliates, Subsidiaries, shareholders, directors, officers, employees, agents or those Persons acting for or in concert with Borrower shall, acting as Trustee for Lender, receive, as the sole and exclusive property of Lender, any monies, checks, notes, drafts or any other payments relating to and/or proceeds of Accounts or other Collateral which come into their possession or under their control and immediately upon receipt thereof, Borrower shall remit the same or cause the same to be remitted to Lender, at Lender's address set forth in Section 11.10 of this Agreement. Borrower agrees to pay to Lender any and all fees, costs and expenses which Lender incurs in connection with opening, operating and maintaining the lock box and depositing for collection by Lender any check or item of payment received and/or delivered to the Lender on account of the Liabilities and Borrower further agrees to reimburse Lender for any claims asserted by any party in connection with the lock box or any returned or uncollected checks received by Lender as proceeds of the Collateral.

4.4 Application of Payments and Collections. Borrower irrevocably waives the right to direct the application of payments and collections received by Lender from or on behalf of Borrower, and Borrower agrees that Lender shall have the continuing exclusive right to apply and reapply any and all such payments and collections against the Liabilities in such manner as Lender may deem appropriate, notwithstanding any entry by Lender upon any of its books and records. To the extent that Borrower makes a payment or payments to Lender or Lender receives any payment or proceeds of the Collateral for Borrower's benefit, which payment(s) or proceeds or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid to a trustee, receiver or any other party under any bankruptcy act, state or federal law, common law or equitable cause, then, to the extent of such payment or proceeds received, the Liabilities or part thereof intended to be satisfied shall be revived and



shall continue in full force and effect, as if such payments or proceeds had not been received by Lender.

4.5 Statements. All advances to Borrower, and all other debits and credits provided for in this Agreement, shall be evidenced by entries made by Lender in its internal data control systems showing the date and amount of each such debit or credit. Until such time as Lender shall have rendered to Borrower written statements of account as provided herein, the balance in Borrower's Loan Account, as set forth on Lender's most recent statement, shall be rebuttably presumptive evidence of the amounts due and owing to Lender by Borrower. Not less than ten (10) days after the final day of each calendar month, Lender shall render to Borrower a statement setting forth the balance of Borrower's Loan Account, including principal, interest, expenses and fees. Each such statement shall be subject to subsequent adjustment by Lender and Lender's right to reapply payments in accordance with Section 4.4 of this Agreement but shall, absent manifest errors or omissions, be presumed correct and conclusively binding upon Borrower and shall constitute an account stated unless, within thirty (30) days after receipt of any statement from Lender, Borrower shall deliver to Lender written objection thereto specifying the error or errors, if any, contained in such statement.

## 5. COLLATERAL: SECURITY INTEREST: GENERAL TERMS

5.1 Security Interest. Borrower does hereby, to secure the prompt payment to Lender of the Liabilities, howsoever created, arising or evidenced, and howsoever owned, held or acquired, whether now or hereafter existing, whether now due or to become due, whether direct or indirect, or absolute or contingent, and whether several, joint or joint and several (all of which liabilities and obligations are hereinafter called the "Liabilities"), pledge, assign, transfer and deliver to Lender and does hereby grant to Lender a continuing security interest in and to all property of Borrower of any kind or description, tangible or intangible, of whatever description, whether now existing or hereafter acquired, wherever now or hereafter located, including, but not limited to:

(A) All accounts, contract rights, instruments, documents, chattel paper, general intangibles (including, but not limited to choses in action, tax refunds, and insurance proceeds); any other obligations or indebtedness owed to Borrower from whatever source arising; all rights of Borrower to receive any payments in money or kind; all guaranties of the foregoing and security therefore; all of the right, title, and interest of Borrower in and with respect to the goods, services, or other property that gave rise to or that secure any of the foregoing and insurance policies and proceeds relating thereto, and all rights of Borrower as an unpaid seller of goods and services, including, but not limited to, the rights of stoppage in transit, replevin, reclamation, and resale; and all of the foregoing, whether now owned or existing or hereafter created or acquired (collectively referred to as "Receivables");

(B) All goods, merchandise, and other personal property now owned or hereafter acquired by Borrower that are held for sale or lease, or are furnished or to be furnished under any contract of service or are raw materials, work-in-process, supplies, or materials used or consumed in Borrower's business, and all products thereof, and all substitutions, replacements, additions, or accessions therefore and thereto; and including, but not limited to:

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(collectively referred to as "Inventory");

(C) All machinery and equipment and furniture and fixtures, now owned or hereafter acquired by Borrower and used or acquired for use in the business of Borrower together with all accessions thereto and all substitutions and replacements thereof and parts therefore; and including, but not limited to: \_\_\_\_\_

\_\_\_\_\_ (collectively referred to as "Equipment");

(D) All cash or non-cash proceeds of any of foregoing, including insurance proceeds;

(E) All ledger sheets, files, records, documents, and instruments (including, but not limited to computer programs, tapes, and related electronic data processing software) evidencing an interest in or related to the above;

(F) The beneficiary interest in Trust No. \_\_\_\_\_ dated \_\_\_\_\_, 19\_\_ of \_\_\_\_\_ Trustee;

(G) The following investment property (as defined in the UCC):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

(H) All chattel, paper, instruments, documents and general intangibles;

(I) \_\_\_\_\_

5.2 Disclosure of Security Interest. Borrower shall make appropriate entries upon its financial statements and books and records disclosing Lender's security interest in the Collateral.

5.3 Special Collateral. Immediately upon Borrower's receipt of any Collateral which is evidenced or secured by an agreement, letter of credit, instrument and/or document, including, without limitation, promissory notes, documents of title and warehouse receipts, (the "Special Collateral"), Borrower shall deliver the original thereof to Lender or to such agent of Lender as Lender shall designate, together with appropriate endorsements, the documents required to draw thereunder (as may be relevant to letters of credit) and/or other specific evidence (in form and substance acceptable to Lender) of assignment thereof to Lender.

5.4 Financing Statements. At Lender's request, Borrower shall execute and/or deliver to Lender, at any time or times hereafter, all Security Documents that Lender may reasonably request, in form and substance acceptable to Lender, and pay the costs of any recording or filing

of the same. Upon the occurrence of Default, Borrower hereby irrevocably makes, constitutes and appoints Lender (and all Persons designated by Lender for that purpose) as Borrower's true and lawful attorney (and agent-in-fact) to sign the name of Borrower on any of the Security Documents and to deliver any of the Security Documents to such Persons as Lender, in its sole discretion, may elect. Borrower agrees that a carbon, photographic, photostatic, or other reproduction of this Agreement or of a financing statement is sufficient as a financing statement.

5.5 Inspection. Lender (by any of its officers, employees and/or agents) shall have the right, at any time or times during Borrower's usual business hours, without prior notice, to inspect the Collateral, all records related thereto (and to make extracts from such records) and the premises upon which any of the Collateral is located, to discuss Borrower's affairs and finances with any Person and to verify the amount, quality, quantity, value and condition of, or any other matter relating to, the Collateral.

5.6 Perfection and Priority; Location of Collateral. Borrower's chief executive office, principal place of business and all other offices and locations of the Collateral and books and records related thereto (including, without limitation, computer programs, printouts and other computer materials and records concerning the Collateral) are set forth on Exhibit E attached hereto and made a part hereof Borrower shall not remove its books and records or the Collateral from any such locations and shall not open any new offices or relocate any of its books and records or the Collateral except that such removal, opening or relocation may be made to a place within the Continental United States of America with at least thirty (30) days' prior written notice thereof to Lender.

5.7 Lender's Payment of Claims Asserted Against Borrower. Lender may but shall not be obligated to, at any time or times hereafter, in its sole and absolute discretion, and without waiving any Default or waiving or releasing any obligation, liability or duty of Borrower under this Agreement or the Ancillary Agreements, pay, acquire and/or accept an assignment of any security interest, lien, claim or other encumbrance asserted by any Person against the Collateral. All sums paid by Lender under this Section 5.7, including all costs, fees and expenses, reasonable attorneys' and paralegals' fees, court costs, expenses and other charges relating thereto, shall be payable by Borrower to Lender on demand and shall be additional Liabilities secured by the Collateral.

## 6. COLLATERAL: ACCOUNTS

6.1 Verification of Accounts. Any of Lender's officers, employees or agents shall have the right, at any time or times hereafter, in Lender's name, the name of Company or in the name of a firm of independent certified public accountants acceptable to Lender, to verify the validity, amount or any other matter relating to any Accounts by mail, telephone, telegraph or otherwise.

6.2 Assignments, Records and Borrowing Base Certificate. Borrower shall keep accurate and complete records of its Accounts and, as frequently as Lender shall require, but not less frequently than \_\_\_\_\_, Borrower shall deliver to Lender a Borrowing Base Certificate and formal written assignments of all of its Accounts, together with copies of the

invoices related thereto if requested by Lender. Borrower shall also deliver to Lender, upon demand, the original copy of all documents, including, without limitation, repayment histories, present status reports and shipment reports, relating to the Accounts included in any Borrowing Base Certificate and such other matters and information relating to the status of then existing Accounts as Lender shall reasonably request.

6.3 Notice Regarding Disputed. Borrower shall give Lender prompt written notice of any Accounts in excess of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) which are in dispute between any Account Debtor and Borrower. Each Borrowing Base Certificate shall identify all disputed Accounts and disclose with respect thereto, in reasonable detail, the reason for the dispute, all claims related thereto and the amount in controversy.

## 7. COLLATERAL: INVENTORY

7.1 Sale of Inventory. Until an Event of Default occurs, Borrower may sell Inventory in the ordinary course of its business (which does not include a transfer in partial or total satisfaction of Indebtedness).

7.2 Safekeeping of Inventory; Inventory Covenants. Lender shall not be responsible for (i) the safekeeping of the Inventory; (ii) any loss or damage thereto or destruction thereof occurring or arising in any manner or fashion from any cause; (iii) any diminution in the value of Inventory or (iv) any act or default of any carrier, warehouseman, bailee or forwarding agency or any other Person in any way dealing with or handling the Inventory. All risk of loss, damage, distribution or diminution in value of the Inventory shall be borne by Borrower.

7.3 Records and Schedules of Inventory. Borrower shall keep correct and accurate daily records on a first-in, first-out basis, itemizing and describing the kind, type, quality and quantity of Inventory, Borrower's cost therefore and selling price thereof, and the daily withdrawals therefrom and additions thereto and Inventory then on consignment, and shall, at the request of Lender, furnish to Lender, daily copies of the working papers related thereto and, on a \_\_\_\_\_ basis, a current Borrowing Base Certificate, based on the FIFO cost assumption. A physical count of the Inventory shall be conducted no less often than annually and a report based on such count of Inventory shall promptly thereafter be provided to Lender together with such supporting information including, without limitation invoices relating to Borrower's purchase of goods listed in said report, as Lender shall, in its sole and absolute discretion, request.

7.4 Returned and Repossessed Inventory. If at any time prior to the occurrence of an Event of Default, any Account Debtor returns any Inventory to Borrower in excess of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), Borrower shall promptly determine the reason for such return and, if Borrower accepts such return, issue a credit memorandum (with a copy to be sent to Lender if Lender has so requested) in the appropriate amount to such Account Debtor. After the occurrence of an Event of Default, Borrower shall hold all returned Inventory in trust for Lender, shall segregate all returned Inventory from all other property of Borrower or in Borrower's possession and shall conspicuously label said returned Inventory as the property of

Lender. Borrower shall, in all cases, immediately notify Lender of the return of any Inventory, specifying the reason for such return and the location and condition of the returned Inventory.

## 8. WARRANTIES AND REPRESENTATIONS

8.1 General Warranties and Representations. Borrower warrants and represents that:

(A) Borrower is a corporation duly organized and validly existing and in good standing under the laws of the state of its incorporation, as represented at the beginning of this Agreement, and is qualified or licensed to do business in all other countries, states and provinces in which the laws thereof require Borrower to be so qualified and/or licensed;

(B) Borrower has not used, during the five (5) year period preceding the date of this Agreement, and does not intend to use any other corporate or fictitious name, except as disclosed in Exhibit F attached hereto and made a part hereof;

(C) Borrower has the right and power and is duly authorized and empowered to enter into, execute, deliver and perform this Agreement and the Ancillary Agreements executed concurrently herewith;

(D) The execution, delivery and performance by Borrower of this Agreement and the Ancillary Agreements shall not, by their execution or performance, the lapse of time, the giving of notice or otherwise, constitute a violation of any applicable law, rule or regulation or a breach of any provision contained in Borrower's Articles of Incorporation or By-Laws or contained in any agreement, instrument, indenture or other document to which Borrower is now a party or by which it is bound;

(E) Borrower's use of the proceeds of any advances and readvances made by Lender to Borrower pursuant to this Agreement are, and will continue to be, legal and proper corporate uses (duly authorized by its Board of Directors, if necessary pursuant to applicable corporate law, rule or regulation) and such uses are consistent with all applicable laws and statutes, as in effect as of the date hereof;

(F) Borrower has, and is current and in good standing with respect to, all governmental approvals, permits, certificates, inspections, consents and franchises necessary to conduct or to continue to conduct its present or intended business as heretofore conducted by it or in a manner similar to that of the previous owner of the business or of other Persons engaged in the same or similar businesses and to own or lease and operate its properties as now owned or leased and operated by it or by the previous owner of those properties:

(G) None of said approvals, permits, certificates, consents or franchises contain any term, provision, condition or limitation more burdensome than such as are generally applicable to Persons engaged in the same or similar business as Borrower;

(H) Borrower now has capital sufficient to carry on its business and transactions and all businesses and transactions in which it is about to engage and is now solvent

and able to pay its debts as they mature and Borrower now owns property the fair saleable value of which is greater than the amount required to pay Borrower's debts;

(I) Except as disclosed on Exhibit G attached hereto and made a part hereof and in the Financials, Borrower has no litigation pending and no Indebtedness (except for trade payables arising in the ordinary course of its business since the dates reflected in the Financials) and has not guaranteed the obligations of any other Person;

(J) Borrower is not a party to any contract or agreement or subject to any charge, corporate restriction, judgment, decree or order materially and adversely affecting its business, property, assets, operations or condition, financial or other, and is not a party to any labor dispute; there are no strikes or walkouts relating to any labor contracts and no such contract is scheduled to expire during the Initial Term, except as disclosed on Exhibit H attached hereto;

(K) Borrower has good, indefeasible and merchantable title to and ownership of the Collateral, free and clear of all liens, claims, security interests and other encumbrances except those of Lender and those, if any, described on Exhibit I attached hereto;

(L) The nature and transaction of Borrower's business and operations and the use of its properties and assets, including, but not limited to, the Collateral or any real estate owned or occupied by Borrower, do not and during the term of this Agreement, shall not violate or conflict with any applicable law, statute, ordinance, rule, regulation or order of any kind or nature, including, without limitation, the provisions of the Fair Labor Standards Act or any zoning, land use, building, noise abatement, occupational health and safety or other laws, any building permit or any condition, grant, easement, covenant, condition or restriction, whether recorded or not;

(M) Borrower represents, warrants and agrees with Lender that (i) Borrower has not generated, used, stored, treated, transported, manufactured, handled, produced or disposed of any Hazardous Materials, on or off any of the premises of Borrower (whether or not owned by it) in any manner which at any time violates any Environmental Law or any license, permit, certificate, approval or similar authorization thereunder, (ii) the operations of Borrower comply in all material respects with all Environmental Laws and all licenses, permits certificates, approvals and similar authorizations thereunder, (iii) there has been no investigation, proceeding, complaint, order, directive, claim, citation or notice by any governmental authority or any other person or entity, nor is any pending or, to the best of the Borrower's knowledge, threatened, and Borrower shall immediately notify Lender upon becoming aware of any such investigation, proceeding, complaint, order, directive, claim, citation or notice, and shall take prompt and appropriate actions to respond thereto, with respect to any non-compliance with, or violation of, the requirements of any Environmental Law by Borrower or the release, spill or discharge, threatened or actual, of any Hazardous Material or the generation, use, storage, treatment, transportation, manufacture, handling, production or disposal of any Hazardous Material or any other environmental, health or safety matter, which affects Borrower or its business, operations or assets or any properties at which Borrower has transported, stored or disposed of any Hazardous Materials, (iv) Borrower has no material liability, contingent or otherwise, in connection with a release, spill or discharge, threatened or actual, of any Hazardous Materials or

the generation, use, storage, treatment, transportation, manufacture, handling, production or disposal of any Hazardous Material; and (v) without limiting the generality of the foregoing, Borrower shall, following determination by Lender that there is non-compliance, or any condition which requires any action by or on behalf of Borrower in order to avoid any non-compliance, with any Environmental Law, at Borrower's sole expense, cause an independent environmental engineer acceptable to Lender to conduct such test of the relevant site as is appropriate, and prepare and deliver a report setting forth the result of such tests, a proposed plan for remediation and an estimate of the costs thereof. For purposes hereof the term "Environmental Laws" shall mean all federal, state, district, local and foreign laws, rules, regulations, ordinances, and consent decrees relating to health, safety, hazardous substances, pollution and environmental matters, as now or at any time hereafter in effect, applicable to Borrower's business or facilities owned or operated by Borrower, including laws relating to emissions, discharges, releases or threatened releases of pollutants, contamination, chemicals, or hazardous, toxic or dangerous substances, materials or wastes in the environment (including, without limitation, ambient air, surface water, land surface or subsurface strata) or otherwise relating to the generation, manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Hazardous Materials;

(N) Borrower is not in default under any indenture, loan agreement, mortgage, lease, trust deed, deed of trust or other similar agreement relating to the borrowing of monies to which it is a party or by which it is bound;

(O) The Financials fairly present the assets, liabilities and financial condition and results of operations of Borrower and such other Persons described therein as of the dates thereof; there are no omissions or other facts or circumstances which are or may be material and there has been no material adverse change in the assets, liabilities or financial or other condition of Borrower since the date of the Financials; there exist no equity or long term investments in or outstanding advances to any Person not reflected in the Financials; there are no actions or proceedings which are pending or, to the best of Borrower's knowledge, threatened against Borrower or any other Person which might result in any material adverse change in Borrower's financial condition or materially and adversely affect Borrower's operations, its assets or the Collateral;

(P) Borrower has promptly paid and discharged all obligations and liabilities arising under the Employee Retirement Income Security Act of 1974 ("ERISA") of a character which if unpaid or unperformed might result in the imposition of a lien against any of its properties or assets;

(Q) Borrower has filed all federal, state and local tax returns (including, but not limited to, income and payroll tax returns) and other reports, or has been included in consolidated returns or reports filed by an Affiliate, which Borrower is required by law, rule or regulation to file and all Charges that are due and payable have been paid;

(R) The loans, including interest rate, fees and charges as contemplated hereby, (i) are business loans within the purview of 815 ILCS 205/4(1)(c), as amended from time to time, (ii) are an exempted transaction under the Truth In Lending Act, 12 U.S.C. 1601 et seq.,

as amended from time to time, and (iii) do not, and when disbursed shall not, violate the provisions of the Illinois usury laws, any consumer credit laws or the usury laws of any state which may have jurisdiction over this transaction, Borrower or any property securing the loans;

(S) No portion of the proceeds of the loans shall be used by the Borrower, or any affiliates of Borrower, either directly or indirectly, for the purpose of purchasing or carrying any margin stock, within the meaning of Regulation U as adopted by the Board of Governors of the Federal Reserve System;

(T) Borrower acknowledges and agrees that the relationship hereby created with Lender is and has been conducted on an open and arm's length basis in which no fiduciary relationship exists and that Borrower has not relied and is not relying on any such fiduciary relationship in executing this Agreement and in consummating the loans; and

(U) No condition, circumstance, event, agreement, document, instrument, restriction, litigation or proceeding (or threatened litigation or proceeding or basis therefore) exists which could adversely affect the validity or priority of the liens and security interests granted to Lender hereunder or under the Ancillary Agreements which could materially adversely affect the ability of the Borrower to perform its obligations to Lender hereunder or under the Ancillary Agreements, which would constitute a default hereunder or under any of the Ancillary Agreements or which would constitute such a default with the giving of notice or lapse of time or both.

8.2 Account Warranties and Representations. Borrower warrants and represents that Lender may rely, in determining which Accounts listed on any Borrowing Base Certificate are Eligible Accounts, without independent investigation on all statements or representations made by Borrower on or with respect to any such Borrowing Base Certificate and, unless otherwise indicated in writing by Borrower, that:

(A) Such Accounts are genuine, are in all respects what they purport to be, are not evidenced by a judgment and, if evidenced by any instrument, agreement, contract or documents, are evidenced by only one executed original instrument, agreement, contract, or document, which has been endorsed and delivered to Lender;

(B) Such Accounts represent undisputed, bona fide transactions completed in accordance with the terms and provisions contained in any documents related thereto;

(C) Except for credits issued to any Account Debtor in the ordinary course of Borrower's business for Inventory returned pursuant to Section 7.4 of this Agreement, the amounts shown on the Borrowing Base Certificate, and all invoices and statements delivered to Lender with respect to any Account, are actually and absolutely owing to Borrower and are not contingent for any reason;

(D) To the best of Borrower's knowledge, except as may be disclosed on such Borrowing Base Certificate, there are no setoffs, counterclaims or disputes existing or asserted with respect to any Accounts included on a Borrowing Base Certificate, and Borrower has not



made any agreement with any Account Debtor for any deduction from such Account, except for discounts or allowances allowed by Borrower in the ordinary course of its business for prompt payment, all of which discounts or allowances are reflected in the calculation of the invoice related to such Account;

(E) To the best of Borrower's knowledge, there are no facts, events or occurrences which in any way impair the validity or enforcement of any of the Accounts or tend to reduce the amount payable thereunder from the amount of the invoice shown on any Borrowing Base Certificate, and on all contracts, invoices and statements delivered to Lender with respect thereto;

(F) To the best of Borrower's knowledge, all Account Debtors are solvent and had the capacity to contract at the time any contract or other document giving rise to the Account was executed;

(G) The goods, the sale of which gave rise to the Accounts are not, and were not at the time of the sale thereof, subject to any lien, claim, security interest or other encumbrance, except those of Lender, those removed or terminated prior to the date hereof and those subordinate to Lender's security interest;

(H) Borrower has no knowledge of any fact or circumstance which would impair the validity or collectability of any of the Accounts;

(I) To the best of Borrower's knowledge, there are no proceedings or actions which are threatened or pending against any Account Debtor which might result in any material adverse change in its financial or other condition; and

(J) The Accounts have not been pledged to any other Person.

8.3 Inventory Warranties and Representations. Borrower warrants and represents that Lender may rely, without independent investigation on all statements or representations made by Borrower on or with respect to any such Borrowing Base Certificate and, unless otherwise indicated in writing by Borrower, that:

(A) All Inventory is located on premises listed on Exhibit E or is Inventory which is in transit and is so identified on the relevant Borrowing Base Certificate;

(B) No Inventory is subject to any lien, claim, security interest or other encumbrance whatsoever, except for the security interest of Lender hereunder, or a lien, claim, security interest or other encumbrance subordinated to the security interest of Lender hereunder in a manner satisfactory to Lender in form and substance; and

(C) Except as specified on Exhibit E, no Inventory is now, and shall not at any time or times hereafter be, stored with a bailee, warehouseman or similar party without Lender's prior written consent and, if Lender gives such consent, Borrower will concurrently therewith

cause any such bailee, warehouseman or similar party to issue and deliver to Lender, in form and substance acceptable to Lender, warehouse receipts therefore in Lender's name.

8.4 Automatic Warranty and Reaffirmation of Warranties and Representations. Each request for an advance made by Borrower pursuant to this Agreement or the Ancillary Agreements shall constitute (i) an automatic warranty and representation by Borrower to Lender that there does not then exist a Default or an Event of Default and (ii) a reaffirmation as of the date of said request of all of the representations and warranties of Borrower contained in this Agreement or the Ancillary Agreements.

8.5 Survival of Warranties and Representations. Borrower covenants, warrants and represents to Lender that all representations and warranties of Borrower contained in this Agreement and the Ancillary Agreements shall be true at the time of Borrower's execution of this Agreement and the Ancillary Agreements, and shall survive the execution, delivery and acceptance thereof by the parties thereto and the closing of the transactions described therein or related thereto. Borrower and Lender expressly agree that any misrepresentation or breach of any representation or warranty whatsoever contained in this Agreement or the Ancillary Agreements shall be deemed material.

8.6 No Misstatement. This Agreement and all financial statements, schedules, certificates, confirmations, agreements, contracts, and other materials submitted to Lender in connection with or in furtherance of this Agreement by or on behalf of Borrower fully and fairly state the matters with which they purport to deal, and neither misstate any material fact nor, separately or in the aggregate, fail to state any material fact necessary to make the statements made not misleading.

## 9. COVENANTS AND CONTINUING AGREEMENTS

9.1 Affirmative Covenants. Borrower covenants that it shall:

(A) At all times hereafter during the Initial Term or any Renewal Term, maintain (i) a ratio of Indebtedness to Tangible Net Worth of not more than \_\_\_\_\_; (ii) a ratio of Current Assets to Current Liabilities of not less than; \_\_\_\_\_ : \_\_\_\_\_ (iii) Tangible Net Worth at least equal to \_\_\_\_\_ Dollars (\$ \_\_\_\_\_); (iv) income from continuing operations before extraordinary items of not less than \_\_\_\_\_ Dollars (\$ \_\_\_\_\_); and (v) net cash flow (meaning net profits after taxes plus depreciation and all other non-cash charges as defined by GAAP) of not less than one hundred twenty-five percent (125%) of the current maturities of long term debt (meaning indebtedness due more than twelve (12) months following the applicable determination date for these purposes as defined by GAAP);

(B) Pay to Lender, on demand, any and all fees, costs or expenses which Lender or any Participant pays to a bank or other similar institution arising out of or in connection with (i) the forwarding to Borrower or any other Person on behalf of Borrower, by Lender or any Participant, of proceeds of loans made by Lender to Borrower pursuant to this Agreement and (ii) the depositing for collection, by Lender or any Participant, of any check or

item of payment received and/or delivered to Lender or any Participant on account of the Liabilities;

(C) Borrower shall at all times insure and keep insured in insurance companies acceptable to Lender, all insurable property owned by it which is of a character usually insured by companies similarly situated and operating like properties, against loss or damage from fire and such other hazards or risks as are customarily insured against by companies similarly situated and operating like properties; and shall similarly insure employers', public and professional liability risks. Prior to the date of the funding of the loans, Borrower shall deliver to Lender, a certificate setting forth in summary form the nature and extent of the insurance maintained by Borrower pursuant hereto. All such policies of insurance must be satisfactory to Lender in relation to the amount and term of the Liabilities and type and value of the Collateral and assets of Borrower, shall identify Lender as lender's loss payee or mortgagee and as an additional insured. In the event Borrower either fails to provide Lender with evidence of the insurance coverage required hereby or at any time hereafter shall fail to obtain or maintain any of the policies of insurance required above, or to pay any premium in whole or in part relating thereto, then Lender without waiving or releasing any obligation or default by Borrower hereunder, may at any time (but shall be under no obligation to so act), obtain and maintain such policies of insurance and pay such premium and take any other action with respect thereto, which Lender deems advisable. This insurance coverage (i) may, but need not, protect Borrower's interest in the such property, including, but not limited to the Collateral, and (ii) may not pay any claim made by, or against, Borrower in connection with such property, including, but not limited to the Collateral. Borrower may later cancel any such insurance purchased by Lender, but only after providing Lender with evidence that Borrower has obtained the insurance coverage required hereby. The cost of such insurance obtained by Lender, through and including the effective date such insurance coverage is canceled or expires, shall be payable on demand by Borrower to Lender together with interest at the Default Rate on such amounts until repaid and any other charges by Lender in connection with the placement of such insurance. The costs of such insurance, which may be greater than the cost of insurance which Borrower may be able to obtain on its own, together with interest thereon at the Default Rate and any other charges by Lender in connection with the placement of such insurance may be added to the total Liabilities due and owing.

(D) Promptly upon Borrower's learning thereof, inform Lender, in writing, of (i) any material delay in Borrower's performance of any of its obligations to any Account Debtor and of any assertion of any claims, offsets, defenses or counterclaims by any Account Debtor and of any allowances or credits granted (including all credits issued for returned or repossessed Inventory) and/or other monies advanced by Borrower to any Account Debtor and (ii) all material adverse information relating to the financial or other condition of any Account Debtor;

(E) Keep books of account and prepare financial statements and furnish to Lender the following (all of the foregoing and the following to be kept and prepared in accordance with generally accepted accounting principles applied on a basis consistent with the Financials, unless Borrower's independent certified public accountants concur in any changes therein and such changes are disclosed to Lender and are consistent with then generally accepted accounting principles): (i) as soon as available, but not later than one hundred twenty (120) days

after the close of each fiscal year of Borrower, audited, reviewed or compiled (as determined by Lender) financial statements of Borrower (including a balance sheet and profit and loss statement with supporting footnotes) as at the end of such year and for the year then ended. If Lender directs Borrower to provide audited financial statements, they shall be examined by a firm of independent certified public accountants selected by Borrower and acceptable to Lender and containing the unqualified opinion of such independent certified public accountants with respect to the financial statements and a certificate of the aforesaid independent certified public accountants addressed to Borrower acknowledging their understanding that Lender is relying upon the said financial statements; (ii) as soon as available, but not later than forty-five (45) days after the end of each quarter hereafter, an unaudited financial statement of Borrower as at the end of the portion of Borrower's fiscal year then elapsed, certified by Borrower's principal financial officer as prepared in accordance with generally accepted accounting principles and fairly presenting the financial position and results of operations of Borrower for such period; (iii) if requested by Lender and as soon as available (but not later than sixty (60) days before the beginning of each fiscal year) a cash flow projection for such fiscal year, together with appropriate supporting documentation reasonably acceptable to Lender; and (iv) such other data and information (financial and other) as Lender, from time to time, may reasonably request, bearing upon or related to the Collateral, Borrower's financial condition and/or results of operations, including, but not limited to, (A) A monthly Borrowing Base Certificate and, in addition, a Borrowing Base Certificate at the time of each advance requested by Borrower under the Revolving Line of Credit each of which shall include full information concerning sales, returns, allowances and cash receipts and (B) within ten (10) days after the end of each month (x) an aged trial balance of all of Borrower's Accounts existing as of the date of each Borrowing Base Certificate, specifying for each Account Debtor obligated on the Accounts, such Account Debtor's name, address and outstanding balance and the aging of such outstanding balance and (y) if applicable, a detailed listing of all of Borrower's Inventory as of the date of each Borrowing Base Certificate not describing the kind, type, quality, quantity, location and the lower of cost (computed on the basis of a first-in, first-out cost flow assumption) or market value of such Inventory, all of which shall be valued in accordance with generally accepted accounting standards consistently applied and (z) an aged trial balance of all of Borrower's vendors existing as of the date of each Borrowing Base Certificate, specifying for each vendor, such vendor's name, address and outstanding balance and the aging of such outstanding balance.

(F) Notify Lender in writing, promptly upon, but in no event later than three (3) business days after Borrower's learning thereof, that any Eligible Account in excess of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) has become ineligible and the reason(s) for such ineligibility;

(G) Notify Lender in writing, promptly upon Borrower's learning of any litigation affecting Borrower, whether or not the claim is considered by Borrower to be covered by insurance, and of the institution of any suit or administrative proceeding which may materially and adversely affect the operations, financial condition or business of Borrower or Lender's security interest in the Collateral;

(H) Maintain product liability insurance in an amount customary for the business conducted by Borrower;

(I) Provide insurance guaranteeing the collectability of specific Accounts if required to do so by Lender;

(J) Borrower shall at all times preserve and maintain its corporate existence, rights, franchises and privileges, and shall at all times continue as a going concern in the business which the Borrower is presently conducting;

(K) Borrower shall at all times promptly pay and discharge all ERISA obligations and liabilities of character which if unpaid or unperformed might result in the imposition of a lien against any of its properties or assets and will promptly notify Lender of (i) the occurrence of any reportable event (as defined in ERISA) which might result in the termination by the Pension Benefit Guaranty Corporation ("PBGC") of any employee benefit plan (the "Plan") covering any officers or employees of Borrower, any benefits of which are, or are required to be, guaranteed by PBGC, (ii) receipt of any notice from PBGC of its intention to seek termination of the Plan or appointment of a trustee therefore, and (iii) its intention to terminate or withdraw from the Plan. Borrower shall not terminate any such Plan or withdraw therefrom unless it shall be in compliance with all of the terms and conditions of this Agreement after giving effect to any liability to PBGC resulting from such termination or withdrawal; and

(L) Upon demand by Lender, Borrower shall reimburse Lender for Lender's additional costs and/or reductions in the amount of principal or interest received or receivable by Lender if at any time after the date of this Agreement any law, treaty or regulation or any change in any law, treaty or regulation or the interpretation thereof by any governmental authority charged with the administration thereof or any central bank or other fiscal, monetary or other authority having jurisdiction over Lender or the loans, whether or not having the force of law, shall impose, modify or deem applicable any reserve (except reserve requirements taken into account in calculating the interest rate) and/or special deposit requirement against or in respect of assets held by or deposits in or for the account of the loans by Lender or impose on Lender any other condition with respect to this Agreement or the loans, the result of which is to either increase the cost to Lender of making or maintaining the loans or to reduce the amount of principal or interest received or receivable by Lender with respect to such loans. Said additional costs and/or reductions will be those which directly result from the imposition of such requirement or condition on the making or maintaining of such loans. All loans shall be deemed to be match funded for the purposes of Lender's determination in the previous sentence. Notwithstanding the foregoing, Borrower shall not be required to pay any such additional costs which could be avoided by Lender with the exercise of reasonable conduct and diligence.

9.2 Negative Covenants. Borrower covenants that it shall not:

(A) Merge or consolidate with or acquire any Person;

(B) Other than in the ordinary course of its business, make any investment in the securities of any Person;

(C) Declare or pay dividends upon any of Borrower's Stock, (except dividends necessary to satisfy the federal and state income tax liability of the stockholders of Borrower which are payable as a result of Borrower's election to be taxed as a Subchapter S corporation under the applicable provisions of Section 1362 of the Tax Reform Act of 1986, as amended) or make any distribution of Borrower's property or assets or make any loans, advances and/or extensions of credit to any Person, including, without limitation, any Affiliate, officer or employee of Borrower; provided that Borrower may issue stock dividends upon its Stock so long as the same is in accordance with all applicable laws;

(D) Make any loans or other advances of money (other than salary) to officers, directors, stockholders or Affiliates of Borrower, in excess of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) or permit the annual salary and all other direct and indirect remuneration to its officers to exceed \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) per annum individually or \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) per annum in the aggregate, provided, however, that a \_\_\_\_\_ percent (\_\_\_%) increase shall be allowed each year;

(E) Redeem, retire, purchase or otherwise acquire, directly or indirectly, any of Borrower's Stock (except as set forth on Exhibit J attached hereto and made a part hereof), or make any material change in Borrower's capital structure or in any of its business objectives, purposes and operations which might in any way adversely affect the repayment of the Liabilities;

(F) Enter into, or be a party to, any transaction with any Affiliate or stockholder of Borrower, except in the ordinary course of and pursuant to the reasonable requirements of Borrower's business and upon fair and reasonable terms which are fully disclosed to Lender and are no less favorable to Borrower than would obtain in a comparable arm's length transaction with a Person not an Affiliate or stockholder of Borrower;

(G) Enter into any transaction which materially and adversely affects the Collateral or Borrower's ability to repay the Indebtedness or permit or agree to any extension, compromise or settlement or make any change or modification of any kind or nature with respect to any Account, including any of the terms relating thereto, except for credits given for Inventory returned pursuant to Section 7.4 of this Agreement;

(H) Guarantee or otherwise, in any way, become liable with respect to the obligations or liabilities of any Person except (i) its Affiliates' obligations to Lender and (ii) by endorsement of instruments or items of payment for deposit to the general account of Borrower or for delivery to Lender on account of the Liabilities;

(I) Make deposits to or withdrawals from any of its deposit accounts for the benefit of any Affiliate;

(J) Except as otherwise expressly permitted herein or in the Ancillary Agreements, assign, sell, lease or otherwise dispose of or transfer, whether by sale, merger, consolidation, liquidation, dissolution, or otherwise, any of Borrower's assets;

(K) Incur any Indebtedness for borrowed money (other than the Liabilities) from any institutional lender, including banks or commercial finance companies;

(L) Make capital expenditures in any fiscal year which, in the aggregate, exceed \_\_\_\_\_ Dollars (\$ \_\_\_\_\_);

(M) Permit any Accounts owing to Borrower from any Affiliate to be payable on terms which would not allow Borrower to demand payment upon the occurrence of a default and permit the aggregate amount of all Accounts owing from its Affiliates at any time to exceed \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) unless a Default has occurred in which case Borrower shall permit no Accounts to be owing from its Affiliates;

(N) Change its name, business structure or identity, or add any new fictitious name;

(O) Change or relocate its chief executive office or principal place of business;

(P) Either directly or indirectly, create, assume, incur or suffer or permit to exist any mortgage, pledge, encumbrance, security interest, assignment, lien or charge of any kind or character upon any asset of Borrower, whether owned at the date hereof or hereafter acquired except Permitted Liens;

(Q) Either directly or indirectly, issue or distribute any additional capital stock or other securities of Borrower; and

(R) Make any payments (including, but not limited to, prepayments) on Subordinated Debt.

9.3 Contesting Charges. Notwithstanding anything to the contrary herein, Borrower may dispute any Charges without prior payment thereof even if such non-payment may cause a lien to attach to Borrower's assets, provided that Borrower shall give Lender notice of such dispute and shall be diligently contesting the same in good faith, with due diligence and by an appropriate proceeding and there is no danger of a loss or forfeiture of Collateral and provided further that, if the same are in excess of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) in the aggregate at any time or times hereafter, Borrower shall give Lender such additional Collateral and assurances as Lender, in its sole discretion, deems necessary under the circumstances.

9.4 Payment of Charges. Subject to the provisions of Section 9.3 of this Agreement, Borrower shall pay promptly when due all of the Charges. In the event Borrower, at any time or times hereafter, shall fail to pay the Charges or to promptly obtain the satisfaction of such Charges, Borrower shall so advise Lender thereof in writing and Lender may, without waiving or releasing any obligation or liability of Borrower hereunder or any Default, in its sole and absolute discretion, at any time or times thereafter, make such payment or any part thereof, (but shall not be obligated so to do) or obtain such satisfaction and take any other action with respect thereto which Lender deems advisable. All sums so paid by Lender and any expenses, including reasonable attorneys' fees, court costs, expenses and other charges relating thereto, shall be

payable, upon demand, by Borrower to Lender and shall be additional Liabilities hereunder secured by the Collateral.

9.5 Insurance: Payment of Premiums. All policies of insurance on the Collateral or otherwise required hereunder shall be in form and with insurers recognized as adequate by prudent business persons and all such policies shall be in such amounts as may be satisfactory to Lender. Borrower shall deliver to Lender the original (or certified copy) of each policy of insurance and evidence of payment of all premiums therefore. Such policies of insurance shall contain an endorsement, in form and substance acceptable to Lender, showing loss payable to Lender. Such endorsement shall provide that the insurance companies will give Lender at least thirty (30) days' prior notice before any such policy shall be altered or canceled and that no act or default of Borrower or any other person shall affect the right of Lender to recover under such policy in case of loss or damage. Borrower hereby directs all insurers under such policies to pay all proceeds payable thereunder directly to Lender. Borrower irrevocably makes, constitutes and appoints Lender (and all officers, employees or agents designated by Lender) as Borrower's true and lawful attorney (and agent-in-fact) for the purpose of making, settling and adjusting claims under such policies (provided that Lender shall consult with Borrower and make such reasonable accommodations as Borrower shall request prior to finally making, settling or adjusting claims under such policies), endorsing the name of Borrower in writing or by stamp on any check, draft, instrument or other item of payment for the proceeds of such policies and for making all determinations and decisions with respect to such policies. If Borrower shall fail to obtain or maintain any of the policies required by this Section 9.5 or to pay any premium relating thereto, then Lender, without waiving or releasing any obligation or default by Borrower hereunder, may (but shall be under no obligation to do so) obtain and maintain such policies of insurance and pay such premium and take any other action with respect thereto which Lender deems advisable. All sums so disbursed by Lender, including reasonable attorneys' fees, court costs, expenses and other charges relating thereto, shall be payable, on demand, by Borrower to Lender and shall be additional Liabilities hereunder secured by the Collateral.

9.6 Survival of Obligations Upon Termination of Agreement. Except as otherwise expressly provided for in this Agreement and in the Ancillary Agreements, no termination or cancellation (regardless of cause or procedure) of this Agreement or the Ancillary Agreements shall in any way affect or impair the powers, obligations, duties, rights, and liabilities of Borrower or Lender in any way or respect relating to any transaction or event occurring prior to such termination or cancellation, the Collateral, or any of the undertakings, agreements, covenants, warranties and representations of Borrower or Lender contained in this Agreement or the Ancillary Agreements. All such undertakings, agreements, covenants, warranties and representations shall survive such termination or cancellation.

## 10. DEFAULT: RIGHTS AND REMEDIES ON DEFAULT

10.1 Default. The occurrence of anyone or more of the following events shall constitute a Default:

(A) Borrower fails to pay the Liabilities when due and payable or declared due and payable or is in default in the payment of any of the Indebtedness;



(B) Borrower or any Affiliate or guarantor of the Liabilities fails or neglects to perform, keep or observe any other term, provision, condition or covenant contained in this Agreement or in the Ancillary Agreements, which is required to be performed, kept or observed by Borrower or such Affiliate or guarantor and the same is not cured to Lender's satisfaction within ten (10) days after Lender gives Borrower notice identifying such Default;

(C) A default shall occur under any agreement, document or instrument, other than this Agreement or any of the Ancillary Agreements, now or hereafter existing, to which Borrower is a party, but only if that default has a material effect upon the operation of the Borrower's business or a material effect upon any of the covenants, representations or warranties contained in this Agreement or the Ancillary Agreements;

(D) Any statement, warranty, representation, report, financial statement, or certificate made or delivered by Borrower, or any of its officers, employees or agents, to Lender is not true and correct in any material respect;

(E) There shall occur any material uninsured damage to or loss, theft, or destruction of any of the Collateral;

(F) The Collateral or any of Borrower's other assets are attached, seized, levied upon or subjected to a writ or distress warrant, or come within the possession of any receiver, trustee, custodian or assignee for the benefit of creditors and the same is not cured within thirty (30) days thereafter; an application is made by any Person other than Borrower for the appointment of a receiver, trustee, or custodian for the Collateral or any of Borrower's other assets and the same is not dismissed within thirty (30) days after the application therefore;

(G) An application is made by Borrower for the appointment of a receiver, trustee or custodian for the Collateral or any of Borrower's other assets; a petition under any section or chapter of the Bankruptcy Code or any similar law or regulation is filed by or against Borrower or any guarantor of the Liabilities and is not dismissed within thirty (30) days after filing; Borrower makes an assignment for the benefit of its creditors or any case or proceeding is filed by or against Borrower for its dissolution, liquidation, or termination; Borrower ceases to conduct its business as now conducted or is enjoined, restrained or in any way prevented by court order from conducting all or any material part of its business affairs;

(H) Except as permitted in Section 9.3 of this Agreement, a notice of lien, levy or assessment is filed of record with respect to all or any substantial portion of Borrower's assets by the United States, or any department, agency or instrumentality thereof, or by any state, county, municipal or other governmental agency, including, without limitation, the Pension Benefit Guaranty Corporation, or any taxes or debts owing to any of the foregoing becomes a lien or encumbrance upon the Collateral or any of Borrower's other assets and such lien or encumbrance is not released within thirty (30) days after its creation;

(I) Judgment is rendered against Borrower in excess of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) and Borrower fails either to commence appropriate proceedings to appeal

such judgment within the applicable appeal period or, after such appeal is filed, Borrower fails to diligently prosecute such appeal or such appeal is denied;

(J) Borrower becomes insolvent or fails generally to pay its debts as they become due;

(K) Borrower fails within fifteen (15) days after the occurrence of the respective event, to furnish Lender with appropriate notice of the occurrence of any of the following events: (i) the happening of a Reportable Event with respect to any profit sharing or pension plan governed by ERISA (such notice shall contain the statement of the chief financial officer of Borrower setting forth details as to such Reportable Event and the action which Borrower proposes to take with respect thereto and a copy of the notice of such Reportable Event to the Pension Benefit Guaranty Corporation), (ii) the termination of any such plan, (iii) the appointment of a trustee by an appropriate United States District Court to administer any such plan, or (iv) the institution of any proceedings by the Pension Benefit Guaranty Corporation to terminate any such plan or to appoint a trustee to administer any such plan. Borrower fails to: (v) furnish to Lender a copy of each report which is filed by Borrower with respect to each such profit sharing or pension plan promptly after the filing thereof with the Secretary of Labor or the Pension Benefit Guaranty Corporation; (vi) notify Lender promptly upon receipt by Borrower of any notice of the institution of any proceeding or other actions which may result in the termination of such plans; or (vii) acquire and maintain, when available, the contingent employer liability coverage insurance provided for under Section 4023 of ERISA in an amount satisfactory to Lender;

(L) Any guarantor of Borrower's Liabilities or any owner of a material financial interest in Borrower who is a natural person shall die or be declared legally incompetent;

(M) Any guaranty or other agreement executed by a guarantor of any of Borrower's Liabilities or by any owner of a material financial interest in Borrower shall be terminated, curtailed or restricted in scope without Lender's consent;

(N) Any sale, conveyance, assignment or other transfer, directly or indirectly, of any ownership interest of the Borrower, which results in any change in the identity of the individuals or entities previously in control of Borrower or the grant of a security interest in any ownership interest of any individual or entity, directly or indirectly controlling Borrower, which could result in a change of the identity of the individuals or entities previously in control of Borrower. For purposes hereof, the terms "control" or "controlling" shall mean the possession of the power to direct, or cause the direction of, the management and policies of Borrower by contract or voting of securities; or

(O) The entry of any judgment, decree, levy, attachment, garnishment or other process, or the filing of any lien against, any of the Collateral or any collateral under a separate security agreement securing any of the Liabilities, or the loss, theft, destruction, seizure or forfeiture, or the occurrence of any deterioration or impairment of any of the Collateral or any of the collateral under any security agreement securing any of the Liabilities or any decline or

depreciation in the value or market price thereof (whether actual or reasonably anticipated), which causes the Collateral, in the sole opinion of Lender acting in good faith, to become unsatisfactory as to value or character, or which causes Lender to reasonably believe that it is insecure and that the likelihood for repayment of the Liabilities is or will soon be impaired, time being of the essence. The cause of such deterioration, impairment, decline or depreciation shall include, but is not limited to, the failure by the Borrower to do any act deemed necessary by Lender to preserve and maintain the value and collectability of the Collateral.

10.2 Acceleration of the Liabilities. Upon and after the occurrence of a Default, all of the Liabilities may, at the option of Lender and without demand, notice, or legal process of any kind, be declared, and immediately shall become, due and payable.

10.3 Remedies. Upon and after the occurrence of a Default, Lender shall have the following rights and remedies:

(A) All of the rights and remedies of a secured party under the Illinois Uniform Commercial Code or other applicable law, all of which rights and remedies shall be cumulative, and none exclusive, to the extent permitted by law, in addition to any other rights and remedies contained in this Agreement and in all of the Ancillary Agreements;

(B) The right to (i) peacefully enter upon the premises of Borrower or any other place or places where the Collateral is located and kept, without any obligation to pay rent to Borrower (if Borrower owns the place or places where the Collateral is kept), through self-help and without judicial process or first obtaining a final judgment or giving Borrower notice and opportunity for a hearing on the validity of Lender's claim, and remove the Collateral from such premises and places to the premises of Lender or any agent of Lender, for such time as Lender may require to collect or liquidate the Collateral, and/or (ii) require Borrower to deliver the Collateral to Lender at a place to be designated by Lender;

(C) The right to (i) open Borrower's mail and collect any and all amounts due to Borrower from Account Debtors, (ii) notify Account Debtors that the Accounts have been assigned to Lender and that Lender has a security interest therein and (iii) direct such Account Debtors to make all payments due from them to Borrower upon the Accounts, including the Special Collateral, directly to Lender or to a lock box designated by Lender. Lender shall promptly furnish Borrower with a copy of any such notice sent, and Borrower hereby agrees that any such notice, in Lender's sole and absolute discretion may be sent on Lender's stationery, in which event, at Lender's request Borrower shall co-sign such notice with Lender;

(D) The right to sell or to otherwise dispose of all or any Collateral in its then condition, or after any further manufacturing or processing thereof (if applicable), at public or private sale or sales, with such notice as provided in Section 10.4 of this Agreement, in lots or in bulk, for cash or on credit, all as Lender, in its sole and absolute discretion, may deem advisable. At any such sale or sales of the Collateral, the Collateral need not be in view of those present and attending the sale, nor at the same location at which the sale is being conducted. Lender shall have the right to conduct such sales on Borrower's premises or elsewhere and shall have the right to use Borrower's premises without charge for such sales for such time or times as Lender may

see fit. Lender is hereby granted a license or other right to use, without charge, Borrower's labels, patents, copyrights, rights of use of any name, trade secrets, trade names, trademarks and advertising matter, or any property of a similar nature, as it pertains to the Collateral, in advertising for sale and selling any Collateral and Borrower's rights under all licenses and all franchise agreements shall inure to Lender's benefit. Lender may purchase all or any part of the Collateral at public or, if permitted by law, private sale and, in lieu of actual payment of such purchase price, may set off the amount of such price against the Liabilities. The proceeds realized from the sale of any Collateral shall be applied first to the reasonable costs, expenses and attorneys' and paralegal fees and expenses incurred by Lender for collection and for acquisition, completion, protection, removal, storage, sale and delivery of the Collateral; second to interest due upon any of the Liabilities; and third to the principal of the Liabilities. If any deficiency shall arise, Borrower shall remain liable to Lender therefore.

10.4 Notice. Any notice required to be given by Lender of a sale, lease, other disposition of the Collateral or any other intended action by Lender, which is deposited in the United States mail, postage prepaid and duly addressed to Borrower, at the address set forth in Section 11.10 of this Agreement, ten (10) days prior to such proposed action, shall constitute commercially reasonable and fair notice thereof to Borrower.

## 11. MISCELLANEOUS

11.1 Appointment of Lender as Borrower's Lawful Attorney. Borrower, irrevocably designates, makes, constitutes and appoints Lender (and all persons designated by Lender) as Borrower's true and lawful attorney (and agent-in-fact) and Lender, or Lender's agent, may, without notice to Borrower:

(A) At any time hereafter, endorse by writing or stamp Borrower's name on any checks, notes, drafts or any other payment relating to and/or proceeds of the Collateral which come into the possession of Lender or under Lender's control and deposit the same to the account of Lender for application to the Liabilities;

(B) At any time after the occurrence of a Default, in Borrower's or Lender's name: (i) demand payment of the Accounts; (ii) enforce payment of the Accounts, by legal proceedings or otherwise; (iii) exercise all of Borrower's rights and remedies with respect to the collection of the Accounts and Special Collateral; (iv) settle, adjust, compromise, extend or renew the Accounts; (v) settle, adjust or compromise any legal proceedings brought to collect the Accounts; (vi) if permitted by applicable law, sell or assign the Accounts and Special Collateral upon such terms, for such amounts and at such time or times as Lender deems advisable; (vii) discharge and release the Accounts and Special Collateral; (viii) take control, in any manner, of any item of payment or proceeds referred to in Section 4.3 of this Agreement; (ix) prepare, file and sign Borrower's name on any Proof of Claim in Bankruptcy or similar document against any Account Debtor; (x) prepare, file and sign Borrower's name on any notice of lien, assignment or satisfaction of lien or similar document in connection with the Accounts and Special Collateral; (xi) do all acts and things necessary, in Lender's sole discretion, to fulfill Borrower's obligations under this Agreement; (xii) endorse by writing or stamp the name of Borrower upon any chattel paper, document, instrument, invoice, freight bill, bill of lading or similar document or

agreement relating to the Accounts, Inventory and Special Collateral; and (xiii) use the information recorded on or contained in any data processing equipment and computer hardware and software relating to the Accounts, Inventory and Special Collateral to which Borrower has access; and

(C) Notify the post office authorities to change the address for delivery of Borrower's mail to an address designated by Lender and receive, open and dispose of all mail addressed to Borrower.

11.2 Modification of Agreement Sale of Interest. This Agreement and the Ancillary Agreements may not be modified, altered or amended, except by an agreement in writing signed by Borrower and Lender. Borrower may not sell, assign or transfer this Agreement, or the Ancillary Agreements or any portion thereof, including, without limitation, Borrower's right, title, interest, remedies, powers, and/or duties hereunder or thereunder. Borrower hereby consents to Lender's participation, sale, assignment, transfer or other disposition, at any time or times hereafter, of this Agreement, or the Ancillary Agreements, or of any portion hereof or thereof, including, without limitation, Lender's right, title, interest, remedies, powers, and/or duties hereunder or thereunder.

11.3 Attorneys' Fees and Expenses; Lender's Out-of-Pocket Expenses. If, at any time or times, whether prior or subsequent to the date hereof, and regardless of the existence of a Default or an Event of Default, Lender employs counsel for advice or other representation or incurs legal and/or other costs and expenses in connection with:

(A) The preparation, negotiation and execution of this Agreement, all Ancillary Agreements, any amendment of or modification of this Agreement or the Ancillary Agreements or any sale or attempted sale of any interest herein to a Participant; or

(B) Any litigation, contest, dispute, suit, proceeding or action (whether instituted by Lender, Borrower or any other Person) in any way relating to the Collateral, this Agreement, the Ancillary Agreements or Borrower's affairs;

(C) Any attempt to enforce any rights of Lender or any Participant against Borrower or any other Person which may be obligated to Lender by virtue of this Agreement or the Ancillary Agreements, including, without limitation, the Account Debtors; and/or

(D) Any attempt to inspect, verify, protect, collect, sell, liquidate or otherwise dispose of the Collateral; then, in any of the foregoing events, the reasonable attorneys' fees arising from such services and all reasonably incurred expenses, costs, charges and other fees of such counsel or of Lender in any way or respect arising in connection with or relating to any of the events or actions described in this Section 11.3 shall be payable, on demand, by Borrower to Lender and shall be additional Liabilities hereunder secured by the Collateral. Without limiting the generality of the foregoing, such expenses, costs, charges and fees may include paralegals' fees, costs and expenses; accountants' fees, costs and expenses; court costs, fees and expenses; photocopying and duplicating expenses; court reporter fees, costs and expenses; long distance telephone charges; air express charges; telegram charges; secretarial over-time charges; and

expenses for travel, lodging and food paid or incurred in connection with the performance of such legal services.

11.4 Waiver by Lender. Lender's failure, at any time or times hereafter, to require strict performance by Borrower of any provision of this Agreement shall not constitute a waiver, or affect or diminish any right of Lender thereafter to demand strict compliance and performance therewith. Any suspension or waiver by Lender of a Default by Borrower under this Agreement or the Ancillary Agreements shall not suspend, constitute a waiver of or affect any other Default by Borrower under this Agreement or Ancillary Agreements, whether the same is prior or subsequent thereto and whether of the same or of a different type. None of the undertakings, agreements, warranties and covenants of Borrower contained in this Agreement or the Ancillary Agreements and no Default by the Borrower under this Agreement or the Ancillary Agreements shall be deemed to have been suspended or waived by Lender, unless such suspension or waiver is by an instrument in writing signed by an officer of Lender and directed to Borrower specifying such suspension or waiver.

11.5 Severability. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

11.6 Parties; Entire Agreement. This Agreement and the Ancillary Agreements shall be binding upon and inure to the benefit of the successors and assigns of Borrower and Lender. Borrower's successors and assigns shall include, without limitation, a trustee, receiver or debtor-in-possession of or for Borrower. Nothing contained in this Section 11.6 shall be deemed to modify Section 11.2 of this Agreement. This Agreement is the complete statement of the agreement by and between Borrower and the Lender and supersedes all prior negotiations, understandings and representations between them with respect to the subject matter of this Agreement.

11.7 Conflict of Terms. The provisions of the Ancillary Agreements are incorporated in this Agreement by this reference thereto. Except as otherwise provided in this Agreement and except as otherwise provided in the Ancillary Agreements by specific reference to the applicable provision of this Agreement, if any provision contained in this Agreement is in conflict with, or inconsistent with, any provision in the Ancillary Agreements, the provision contained in this Agreement shall govern and control.

11.8 Waivers by Borrower. Except as otherwise provided for in this Agreement, Borrower waives (i) presentment, demand and protest, notice of protest, notice of presentment, default, nonpayment, maturity, release, compromise, settlement, extension or renewal of any or all commercial paper, accounts, contract rights, documents, instruments, chattel paper and guaranties at any time held by Lender on which Borrower may in any way be liable and hereby ratifies and confirms whatever Lender may do in this regard; (ii) all rights to notice and a hearing prior to Lender's taking possession or control of, or to Lender's replevy, attachment or levy upon, the Collateral or any bond or security which might be required by any court prior to allowing

Lender to exercise any of Lender's remedies; and (iii) the benefit of all valuation, appraisal, extension and exemption laws. Borrower acknowledges that it has been advised by counsel of its choice with respect to this Agreement and the transactions evidenced by this Agreement.

11.9 Governing Law; Forum; Service of Process. This Agreement shall be interpreted, and the rights and liabilities of the parties hereto determined, in accordance with the internal laws (as opposed to conflicts of law provision) of the State of Illinois, and, as part of the consideration for new value this day received, Borrower hereby consents to the jurisdiction of any state or federal court located within \_\_\_\_\_ County, Illinois and waives personal service of any and all process upon Borrower, and consents that all such service of process be made by messenger or registered mail directed to Borrower at the address stated in Section 11.10(b) of this Agreement and service so made shall be deemed to be completed upon the earlier of actual receipt or three (3) days after the same shall have been posted to Borrower's address by Borrower's agent as set forth below. Borrower waives trial by jury and waives any objection which the Borrower may have based on improper venue or forum non conveniens to the conduct of any proceeding instituted hereunder and consents to the granting of such legal or equitable relief as is deemed appropriate by the court. Nothing contained in this Section 11.9 shall affect the right of Lender to serve legal process in any other manner permitted by law or affect the right of Lender to bring any action or proceeding against Borrower or its property in the courts of any other jurisdiction.

11.10 Notice. Except as otherwise provided herein, any notice required hereunder shall be in writing and shall be deemed to have been validly served, given or delivered upon deposit in the United States mails, with proper postage prepaid, certified or registered mail, addressed to the party to be notified as follows:

(A) If to Lender, at

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_

(B) If to Borrower, at

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

or to such other address as each party may designate for itself by like notice.

11.11 Section Titles. The section titles and Table of Contents contained in this Agreement are and shall be without substantive meaning or content of any kind whatsoever and are not a part of the agreement between the parties hereto.

11.12 Closing Fee. Borrower shall pay Lender a closing fee for the financial accommodation extended pursuant to this Agreement and the Ancillary Agreements of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

11.13 Field Audits; Audit Fees. Lender will conduct quarterly field audits and Borrower will reimburse Lender for the cost thereof at a per diem rate of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

11.14 Confidentiality. Borrower and Lender hereby agree and acknowledge that any and all information relating to Borrower which is (i) furnished by Borrower to Lender (or to any affiliate of Lender), and (ii) non-public, confidential or proprietary in nature, shall be kept confidential by Lender or such affiliate in accordance with applicable law, provided, however, that such information and other credit information relating to Borrower may be distributed by Lender or such affiliate to the Lender's or such affiliate's directors, officers, employees, attorneys, affiliates, auditors and regulators, and upon the order of a court or other governmental agency having jurisdiction over Lender or such affiliate, to any other party. Borrower and Lender further agree that this provision shall survive the termination of this Agreement.

11.15 Counterparts. This Agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same instrument.

11.16 Facsimile Signatures. Lender is hereby authorized to rely upon and accept as an original any document or other communication which is sent to Lender by facsimile, telegraphic or other electronic transmission (each, a "Communication") which Lender in good faith believes has been signed by Borrower and has been delivered to Lender by a properly authorized representative of Borrower, whether or not that is in fact the case. Notwithstanding the foregoing, Lender shall not be obligated to accept any such Communication as an original and may in any instance require that an original document be submitted to Lender in lieu of, or in addition to, any such Communication.



11.17 Time of Essence. Time is of the essence in making payments of all amounts due Lender under this Agreement and in the performance and observance by the Borrower of each covenant, agreement, provision and term of this Agreement.

11.18 Indemnification. Borrower agrees to defend (with counsel satisfactory to Lender), protect, indemnify and hold harmless each Indemnified Party from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, claims, costs, expenses and distributions of any kind or nature (including, without limitation, the disbursements and the reasonable fees of counsel for each Indemnified Party thereto, which shall also include, without limitation, attorneys' fees and time charges of attorneys who may be employees of Lender, any parent corporation or affiliated corporation of Lender), which may be imposed on, incurred by, or asserted against, any Indemnified Party (whether direct, indirect or consequential and whether based on any federal, state or local laws or regulations, including, without limitation, securities, Environmental Laws and commercial laws and regulations, under common law or in equity, or based on contract or otherwise) in any manner relating to or arising out of this Agreement or any of the loan documents, or any act, event or transaction related or attendant thereto, the preparation, execution and delivery of this Agreement and the loan documents, including, but not limited to, the making or issuance and management of the loans, the use or intended use of the proceeds of the loans, the enforcement of the Lender's rights and remedies under this Agreement, the loan documents, any other instruments and documents delivered hereunder, or under any other agreement between the Borrower and Lender; provided, however, that Borrower shall not have any obligations hereunder to any Indemnified Party with respects to matters caused by or resulting from the willful misconduct or gross negligence of such Indemnified Party. To the extent that the undertaking to indemnify set forth in the preceding sentence may be unenforceable because it violates any law or public policy, Borrower shall satisfy such undertaking to the maximum extent permitted by applicable law. Any liability, obligation, loss, damage, penalty, cost or expense covered by this indemnity shall be paid to each Indemnified Party in demand, and, failing prompt payment, shall, together with interest thereon at the Default Rate from the date incurred by each Indemnified Party until paid by the Borrower, be added to the Liabilities of the Borrower and be secured by the Collateral. The provisions here shall survive the satisfaction and payment of the other Liabilities and the termination of this Agreement.

11.19 Construction. As used herein, all provisions shall include the masculine, feminine, neuter, singular and plural thereof, wherever the context and facts require such construction and in particular the word "Borrower" shall be so construed.

11.20 JURY WAIVER. BORROWER HEREBY IRREVOCABLY WAIVES ANY RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT, COUNTERCLAIM OR PROCEEDING (I) TO ENFORCE OR DEFEND ANY RIGHTS UNDER OR IN CONNECTION WITH THIS AGREEMENT, THE ANCILLARY AGREEMENTS, OR ANY AMENDMENT, INSTRUMENT, DOCUMENT OR AGREEMENT DELIVERED OR WHICH MAY IN THE FUTURE BE DELIVERED IN CONNECTION HERewith OR THEREWITH, OR (II) ARISING FROM ANY DISPUTE OR CONTROVERSY IN CONNECTION WITH OR RELATED TO THIS AGREEMENT, THE OTHER AGREEMENTS, OR ANY SUCH AMENDMENT, INSTRUMENT, DOCUMENT OR AGREEMENT, AND AGREES THAT

ANY SUCH ACTION, SUIT, COUNTERCLAIM OR PROCEEDING SHALL BE TRIED BEFORE A COURT AND NOT BEFORE A JURY.

IN WITNESS WHEREOF, this Agreement has been duly executed as of the day and year specified at the beginning hereof.

\_\_\_\_\_

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

\_\_\_\_\_

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

EXHIBIT A

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

BORROWING BASE CERTIFICATE (Ref. 1.5)

EXHIBIT B

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

LOCK BOX AGREEMENT (Ref 4.3)

EXHIBIT C

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

FINANCIAL STATEMENTS (Ref. 1.17)

EXHIBIT D

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

REVOLVING CREDIT NOTE (Ref. 2.1)

EXHIBIT E

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

CHIEF EXECUTIVE OFFICE AND LOCATIONS  
OF COLLATERAL Ref 5.6, 8.3(C))

1. CHIEF EXECUTIVE OFFICE

2. LOCATIONS OF COLLATERAL

EXHIBIT F

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

OTHER CORPORATE OR FICTITIOUS NAMES USED

(Ref. 8.1 (B))



EXHIBIT G

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_\_

PENDING LITIGATION, OTHER INDEBTEDNESS:  
GUARANTIES (Ref 8.1(I))

EXHIBIT H

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

JUDGMENTS; ORDERS; LABOR DISPUTES;  
LABOR PROBLEMS AND AGREEMENT  
(Ref. 8.1 (J))

EXHIBIT I

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

OTHER LIENS, CLAIMS, SECURITY INTERESTS  
AND ENCUMBRANCES (Ref. 8.1 (K))

EXHIBIT J

TO

LOAN AND SECURITY AGREEMENT

DATED: \_\_\_\_\_, 20\_\_\_\_

STOCK PURCHASE OR REDEMPTION AGREEMENT  
(Ref. 9.2 (E))