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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549**

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**FORM 10-Q**

**QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the quarterly period ended January 31, 2003 or

**TRANSITION REPORT PURSUANT TO SECTION 13 OR 15 (d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from \_\_\_\_\_ to \_\_\_\_\_

Commission File Number 001-14505

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**KORN/FERRY INTERNATIONAL**

(Exact name of registrant as specified in its charter)

Delaware

(State of other jurisdiction of incorporation or organization)

95-2623879

(I.R.S. Employer Identification Number)

1800 Century Park East, Suite 900, Los Angeles, California 90067

(Address of principal executive offices) (Zip code)

(310) 552-1834

(Registrant's telephone number, including area code)

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Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months, and (2) has been subject to such filing requirements for the past 90 days.

Yes  No

The number of shares outstanding of our common stock as of March 13, 2003 was 37,538,107.

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**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
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PART I. FINANCIAL INFORMATION

Item 1. Financial Statements

KORN/FERRY INTERNATIONAL AND SUBSIDIARIES  
CONSOLIDATED BALANCE SHEETS  
(in thousands, except per share amounts)

	As of January 31, 2003	As of April 30, 2002
(unaudited)		
<b>ASSETS</b>		
Cash and cash equivalents	\$ 68,403	\$ 66,128
Receivables due from clients, net of allowance for doubtful accounts of \$7,475 and \$7,767	48,368	54,960
Income tax and other receivables	12,908	30,140
Deferred income taxes	10,521	10,336
Prepaid expenses	10,427	10,331
	<u>150,627</u>	<u>171,895</u>
Total current assets	150,627	171,895
Property and equipment, net	29,328	40,248
Cash surrender value of company owned life insurance policies, net of loans	51,340	53,048
Deferred income taxes	21,463	21,794
Goodwill	93,117	85,346
Other intangibles, net of accumulated amortization of \$5,067 and \$4,103	267	396
Deferred financing costs, investments and other	7,617	4,847
	<u>353,759</u>	<u>377,574</u>
Total assets	\$ 353,759	\$ 377,574
<b>LIABILITIES AND SHAREHOLDERS' EQUITY</b>		
Notes payable and current maturities of long-term debt	\$ 5,099	\$ 12,818
Borrowings under credit facility		39,000
Accounts payable	6,165	8,319
Compensation and benefits	33,056	48,774
Other accrued liabilities	30,073	37,374
	<u>74,393</u>	<u>146,285</u>
Total current liabilities	74,393	146,285
Deferred compensation and other retirement plans	48,692	44,806
Long-term debt	40,645	1,634
Other	14,672	5,552
	<u>178,402</u>	<u>198,277</u>
Total liabilities	178,402	198,277
7.5% Convertible mandatorily redeemable preferred stock, net of unamortized discount and issuance costs, redemption value \$10,100	9,391	
Shareholders' equity		
Common stock: \$0.01 par value, 150,000 shares authorized, 38,642 and 38,587 shares issued 37,516 and 37,869 shares outstanding	301,839	301,488
Retained deficit	(124,623)	(102,853)
Unearned restricted stock compensation	(1,881)	(2,988)
Accumulated other comprehensive loss	(7,863)	(14,101)
	<u>167,472</u>	<u>181,546</u>
Shareholders' equity	167,472	181,546
Less: Notes receivable from shareholders	(1,506)	(2,249)
	<u>165,966</u>	<u>179,297</u>
Total shareholders' equity	165,966	179,297
Total liabilities and shareholders' equity	\$ 353,759	\$ 377,574

The accompanying notes are an integral part of these consolidated financial statements.

**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**CONSOLIDATED STATEMENTS OF OPERATIONS**  
(in thousands, except per share amounts)

	Three Months Ended January 31,		Nine Months Ended January 31,	
	2003	2002	2003	2002
	(unaudited)			
Fee revenue	\$ 75,536	\$ 86,698	\$ 239,058	\$ 291,493
Reimbursed out-of-pocket engagement expenses	5,127	6,078	17,051	22,158
Revenue	80,663	92,776	256,109	313,651
Compensation and benefits	54,549	63,356	169,637	209,684
General and administrative expenses	16,697	23,387	55,294	81,810
Out-of-pocket engagement expenses	5,234	5,374	17,051	19,807
Depreciation and amortization	4,000	4,141	12,292	13,100
Asset impairment and restructuring charges			16,281	84,267
Operating income (loss)	183	(3,482)	(14,446)	(95,017)
Interest and other income, net	187	292	1,670	1,814
Interest expense	2,804	2,233	7,957	5,942
Loss before provision for (benefit from) income taxes and equity in earnings of unconsolidated subsidiaries	(2,434)	(5,423)	(20,733)	(99,145)
Provision for (benefit from) income taxes	479	2,094	1,537	(12,942)
Equity in earnings of unconsolidated subsidiaries	354	264	1,111	1,224
Net loss	(2,559)	(7,253)	(21,159)	(84,979)
Accretion on redeemable convertible preferred stock	(245)		(611)	
Net loss attributed to common shareholders	\$ (2,804)	\$ (7,253)	\$ (21,770)	\$ (84,979)
Basic loss per common share	\$ (0.07)	\$ (0.19)	\$ (0.58)	\$ (2.26)
Basic weighted average common shares outstanding	37,546	37,536	37,631	37,538
Diluted loss per common share	\$ (0.07)	\$ (0.19)	\$ (0.58)	\$ (2.26)
Diluted weighted average common shares outstanding	37,546	37,536	37,631	37,538

The accompanying notes are an integral part of these consolidated financial statements.

**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**CONSOLIDATED STATEMENTS OF CASH FLOWS**  
(in thousands)

	Nine Months Ended January 31,	
	2003	2002
	(unaudited)	
<b>Cash from operating activities:</b>		
Net loss	\$ (21,159)	\$ (84,979)
<b>Adjustments to reconcile net loss to net cash (used in) provided by operating activities:</b>		
Depreciation	11,328	12,561
Amortization of intangible assets	964	539
Amortization of note payable discount	244	367
Interest, dividends and amortization on convertible debt and preferred stock	2,190	
Loss (gain) on disposition of property and equipment	(2)	75
Unrealized loss on marketable securities and other assets	610	846
Provision for doubtful accounts	4,513	9,347
Cash surrender value gains and benefits in excess of premiums paid	(189)	(306)
Deferred income tax provision (benefit)	331	(5,130)
Tax benefit from exercise of stock options		188
Asset impairment charge	1,113	53,651
Restructuring charge	1,554	2,014
Restricted stock compensation	974	609
<b>Change in other assets and liabilities, net of acquisitions:</b>		
Deferred compensation	3,886	2,242
Receivables	19,372	2,013
Prepaid expenses	(96)	(2,104)
Investment in unconsolidated subsidiaries	(454)	(1,300)
Income taxes	370	521
Accounts payable and accrued liabilities	(25,592)	(71,587)
Other	8,776	1,851
	<u>8,733</u>	<u>(78,582)</u>
<b>Cash from investing activities:</b>		
Purchase of property and equipment	(658)	(8,332)
Sale of marketable securities		15,852
Business acquisitions, net of cash acquired		(513)
Premiums on life insurance, net of benefits received	(6,362)	(9,308)
	<u>(7,020)</u>	<u>(2,301)</u>
<b>Cash from financing activities:</b>		
Issuance of convertible debt, preferred stock and warrants, net	45,628	
Net (repayments) borrowings on previous credit facility	(39,000)	48,000
Payment of shareholder acquisition notes	(9,528)	(8,270)
Net borrowings under life insurance policies	8,198	10,451
Purchase of common stock and payment on related notes	(1,298)	(532)
Issuance of common stock and receipts on shareholders' notes	743	2,862
	<u>4,743</u>	<u>52,511</u>
Effect of exchange rate changes on cash flows	(4,181)	(4,417)
Net increase (decrease) in cash and cash equivalents	2,275	(32,789)
Cash and cash equivalents at beginning of the period	66,128	85,661
Cash and cash equivalents at end of the period	<u>\$ 68,403</u>	<u>\$ 52,872</u>

The accompanying notes are an integral part of these consolidated financial statements.

**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS**  
**(unaudited)**  
**(in thousands, except per share amounts)**

**1. Summary of Significant Accounting Policies**

*Basis of Presentation*

The consolidated financial statements for the three and nine months ended January 31, 2003 and 2002 include the accounts of Korn/Ferry International (“KFY”), all of its wholly and majority owned domestic and international subsidiaries (collectively, the “Company”). The consolidated financial statements are unaudited but include all adjustments, consisting of normal recurring accruals and any other adjustments, which management considers necessary for a fair presentation of the results for these periods. These financial statements have been prepared consistently with the accounting policies described in the Company’s Annual Report on Form 10-K for the fiscal year ended April 30, 2002 (“Annual Report”) and should be read together with the Annual Report.

In fiscal 2002, the Company determined that its investment in subsidiaries in Mexico should be accounted for using the equity method of accounting under accounting principles generally accepted in the United States (“GAAP”). Previously, the Company consolidated the accounts of its subsidiaries in Mexico, in which KFY believes it has effective control but owns less than 50% of the shareholder voting interest. While the Company believes that this presentation reflected the way in which these subsidiaries are managed and operate, the legal structure of these entities requires the use of the equity method of accounting under GAAP. This legal structure was established in 1977, which at that time, limited foreign investment. Accordingly, the accompanying consolidated financial statements for fiscal 2002 have been restated to comply with GAAP and reflect the operations of the Mexico subsidiaries under the equity method of accounting. The restatement to properly apply the equity method of accounting for the Mexico subsidiaries had no impact on net income, EPS or cash flow but did reduce previously reported revenue and expenses.

Effective May 1, 2002, the Company adopted Emerging Issues Task Force Issue No. 01-14 (“EITF No. 01-14”), “Income Statement Characterization of Reimbursements Received for ‘Out-of-Pocket’ Expenses Incurred.” EITF No. 01-14 requires the classification of reimbursements received for “out-of-pocket” expenses as revenue and the related expenses incurred as expense in the statement of operations. Historically, the Company followed this practice for “out-of-pocket” expenses incurred by the Company and its consultants. Candidate “out-of-pocket” expenses, primarily travel, however, were netted in revenue as a reduction in the amounts billed to clients. The Company is the primary obligor and at risk for client reimbursement of candidate “out-of-pocket” expenses and accordingly, prior period results reflect the reclassification of candidate “out-of-pocket” expenses previously netted in revenue to expense. Although revenue and expense increased as a result of the reclassification, there was no impact on operating income, net income, EPS or cash flow.

*Critical Accounting Policies and Use of Estimates*

The preparation of financial statements in conformity with accounting principles generally accepted in the United States requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenue and expenses during the reporting periods. As a result, actual results could differ from these estimates. The most significant areas that require management judgment are revenue recognition, deferred compensation and deferred income taxes.

*Reclassifications*

Certain prior year amounts have been reclassified to conform with the current year presentation.

*New Accounting Pronouncements*

In May 2002, the Company adopted Statement of Financial Accounting Standards (“SFAS”) No. 144, “Accounting for the Impairment or Disposal of Long-Lived Assets”. This statement replaces SFAS No. 121, “Accounting for the Impairment of Long-Lived Assets and for Long-Lived assets to be Disposed Of”. The adoption of SFAS No. 144 did not have an impact on the Company’s financial position or results of operations.

**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (continued)**  
(in thousands, except per share amounts)

In July 2002, the Financial Accounting Standards Board ("FASB") issued SFAS No. 146, "Accounting for Costs Associated with Exit or Disposal Activities." This statement requires that a liability for costs associated with an exit or disposal activity, including certain restructuring costs, be recognized and measured initially at fair value when the liability is incurred. Previously, these liabilities were recognized at the date an entity committed to a plan and measurement at fair value was not required. This statement is effective prospectively for exit and disposal activities initiated after December 31, 2002. The adoption of this statement did not have a significant impact on the Company's financial position or results of operations.

**2. Basic and Diluted Earnings (Loss) Per Share**

Basic earnings (loss) per common share ("basic EPS") was computed by dividing net loss attributed to common shareholders by the weighted average number of common shares outstanding during the period. Diluted earnings (loss) per common and common equivalent share ("diluted EPS") reflects the potential dilution that would occur if the outstanding options or other contracts to issue common stock were exercised or converted and was computed by dividing the net loss attributed to common shareholders by the weighted average number of shares of common stock outstanding and dilutive common equivalent shares outstanding. The following is a reconciliation of the numerator (loss) and denominator (shares in thousands) used in the computation of basic and diluted EPS:

	Three Months Ended January 31,					
	2003			2002		
	Loss	Weighted Average Shares	Per Share Amount	Loss	Weighted Average Shares	Per Share Amount
<b>Basic EPS</b>						
Net loss	\$ (2,559)			\$ (7,253)		
Accretion on redeemable convertible preferred stock	(245)					
Net loss attributed to common shareholders	\$ (2,804)	37,546	\$ (0.07)	\$ (7,253)	37,536	\$ (0.19)
<b>Effect of dilutive securities</b>						
Convertible debt						
Convertible preferred stock						
Stock options						
Warrants						
Restricted stock						
Shareholder common stock purchase commitments						
<b>Diluted EPS</b>						
Net loss attributed to common shareholders plus assumed conversions	\$ (2,804)	37,546	\$ (0.07)	\$ (7,253)	37,536	\$ (0.19)

**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (continued)**  
(in thousands, except per share amounts)

	Nine Months Ended January 31,					
	2003			2002		
	Loss	Weighted Average Shares	Per Share Amount	Loss	Weighted Average Shares	Per Share Amount
<b>Basic EPS</b>						
Net loss	\$ (21,159)			\$ (84,979)		
Accretion on redeemable convertible preferred stock	(611)					
Net loss attributed to common shareholders	\$ (21,770)	37,631	\$ (0.58)	\$ (84,979)	37,538	\$ (2.26)
<b>Effect of dilutive securities</b>						
Convertible debt						
Convertible preferred stock						
Stock options						
Warrants						
Restricted stock						
Shareholder common stock purchase commitments						
<b>Diluted EPS</b>						
Net loss attributed to common shareholders plus assumed conversions	\$ (21,770)	37,631	\$ (0.58)	\$ (84,979)	37,538	\$ (2.26)

Assumed exercises or conversions have been excluded in computing the diluted earnings per share when there is a net loss for the period because their inclusion would reduce the loss per share or be anti-dilutive. If the assumed exercises or conversions had been used, the fully diluted shares outstanding for the three months and nine months ended January 31, 2003 would have been 37,699 and 37,773, respectively.

**3. Comprehensive Income (Loss)**

Comprehensive income (loss) is comprised of net income (loss) and all changes to shareholders' equity, except those changes resulting from investments by owners (changes in paid in capital) and distributions to owners (dividends).

Total comprehensive income (loss) is as follows:

	Three Months Ended January 31,		Nine Months Ended January 31,	
	2003	2002	2003	2002
	Net loss	\$ (2,559)	\$ (7,253)	\$ (21,159)
Foreign currency translation adjustment	3,860	(2,707)	6,238	(4,224)
Reclassification adjustment for losses realized in net income (loss), net of tax benefit of \$2,145				2,962
Comprehensive income (loss)	\$ 1,301	\$ (9,960)	\$ (14,921)	\$ (86,241)

Due to certain restructuring activities taken by the Company, as discussed in Note 4, the extended decline in the stock market and other factors, the Company believed that the loss in value related to certain equity securities was no longer temporary in nature and reclassified the loss of \$2,962, net of a tax benefit of \$2,145, included in other comprehensive income (loss) at April 30, 2001 to net income (loss) in the three months ended July 31, 2001 resulting in a pretax charge of \$5,107. In addition, the Company recognized a holding loss on these securities of \$1,157 arising in the three months ended July 31, 2001. The total pretax charge related to the recognized loss on this investment of \$6,264 was included in the asset impairment charge for the three months ended July 31, 2001.



**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (continued)**  
(in thousands, except per share amounts)

In the three and nine months ended January 31, 2003, the Company recognized unrealized holding losses related to this investment of \$259 and \$640, respectively, included in other income.

**4. Asset Impairment and Restructuring Charges**

Based on deteriorating economic conditions encountered in the first quarter of fiscal 2002, the Company developed a series of business realignment initiatives announced in August 2001. The immediate goals of these initiatives were to reduce losses, preserve top employees and maintain high standards of client service. These initiatives resulted in a total charge of \$109,484 against earnings in fiscal 2002 and 2003. These charges reflect costs associated with a reduction in the work force of nearly 40%, or over 1,100 employees; consolidation of many back-office functions for Futurestep and executive recruitment; wind down of JobDirect operations and write-down of related assets and goodwill.

In the three months ending January 31, 2003, revisions were made to costs associated with certain previously recorded restructuring charges as follows: a reduction of \$893 related to facilities in North America, an increase of \$893 related to facilities in Europe and an increase of \$1,578 related to Futurestep facilities. In addition, the Company recognized a \$1,578 gain primarily related to a litigation settlement of a former subsidiary.

The following table summarizes the restructuring and asset impairment charges for the nine months ended January 31, 2003:

	Asset Impairment	Restructuring		Total
	Other	Severance	Facilities	
<b>Executive recruitment</b>				
North America	\$ 109	\$ 2,313	\$ 3,329	\$ 5,751
Europe		809	4,534	5,343
Asia/Pacific		312		312
Total executive recruitment	\$ 109	\$ 3,434	\$ 7,863	\$ 11,406
<b>Futurestep</b>	689	761	3,925	5,375
<b>Corporate</b>	(1,578)	1,078		(500)
<b>Total</b>	\$ (780)	\$ 5,273	\$ 11,788	\$ 16,281

In the nine months ended January 31, 2003, a continued decline in economic conditions contributed to our restructuring charge of \$16,281. Of the \$16,281, \$5,273 related to severance and benefits for terminated employees, \$11,788 related to facilities and impairment of related leasehold improvements and \$798 related to the write-off of facility related assets. The Company recognized a \$1,578 gain primarily related to a litigation settlement of a former subsidiary.

**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (continued)**  
(in thousands, except per share amounts)

The facilities restructuring charge in executive recruitment in the nine months ended January 31, 2003 of \$7,863 primarily related to lease termination costs, net of estimated sublease income, for excess space in eight executive recruitment offices due to the reduction in workforce, and includes \$1,042 related to unamortized leasehold improvements and \$109 related to the write-off of facility related assets. The facilities restructuring charge in Futurestep in the nine months ended January 31, 2003 of \$3,925 primarily related to eight Futurestep offices that were closed as employees were co-located with executive recruitment in Europe and Asia/Pacific, and includes \$340 related to unamortized leasehold improvements and \$689 related to the write-off of facility related assets. The total restructuring charge for severance in the nine months ended January 31, 2003 of \$5,273 includes severance for approximately 130 employees.

Included in accrued and other liabilities at January 31, 2003 is \$1,463 of severance costs and \$16,158 of facilities costs. The severance accrual includes amounts paid monthly and are expected to be paid in full by February 2004. The facilities accrual primarily relates to lease payments, net of estimated sublease income that will be paid over the next eight years. During the three months ended January 31, 2003, the Company paid \$2,119 of accrued severance costs and \$1,330 of accrued facilities costs. During the nine months ended January 31, 2003, the Company paid \$5,817 of accrued severance costs and \$4,123 of accrued facilities costs.

Operating results for the nine months ended January 31, 2002 include asset impairment and restructuring charges related to the following business segments:

	Nine Months ended January 31, 2002				
	Asset Impairment		Restructuring		
	Goodwill	Other	Severance	Facilities	Total
<b>Executive recruitment</b>					
North America	\$ 13,975	\$ 711	\$ 7,897	\$ 5,490	\$ 28,073
Europe			3,488	865	4,353
Asia/Pacific		15	1,761	70	1,846
Total executive recruitment	\$ 13,975	\$ 726	\$ 13,146	\$ 6,425	\$ 34,272
<b>Futurestep</b>		8,958	1,681	6,144	16,783
<b>JobDirect</b>	28,951	1,369	843	1,173	32,336
<b>Corporate</b>			876		876
<b>Total</b>	\$ 42,926	\$ 11,053	\$ 16,546	\$ 13,742	\$ 84,267

The goodwill impairment charge recognized in the nine months ended January 31, 2002 was based on an analysis of future undiscounted cash flows that indicated that goodwill was impaired. The charge represents the excess of the carrying value over fair value, based on a discounted cash flow method. The other asset impairment charge is primarily related to property and equipment and other investments. The severance restructuring charge resulted from actions approved by senior management in response to a decline in revenue in fiscal 2002. The facilities restructuring charge is comprised primarily of lease termination costs, net of estimated sublease income, for excess space and includes \$2,013 related to the write-off of unamortized leasehold improvements.

#### 5. Mandatorily Redeemable Convertible Securities

In June 2002, the Company issued 7.5% Convertible Subordinated Notes in an aggregate principal amount of \$40.0 million, 10,000 shares of 7.5% Convertible Series A Preferred Stock at an aggregate purchase price of \$10.0 million and warrants to purchase 272,727 shares of its Common Stock at an exercise price of \$12.00. The warrants were recorded at fair value resulting in discounts on the Notes and Preferred Stock (together "the securities") of \$1.2 million and \$0.3 million, respectively, that are amortized over the life of the securities.

The securities may be redeemed at the option of the purchasers after June 13, 2008, the sixth anniversary of the closing date, at a price equal to 101% of the issuance price plus all accrued interest and dividends. The securities are mandatorily redeemable if outstanding on June 13, 2010, at a price equal to 101% of the issuance price plus accrued interest and dividends. From the third to the sixth year, the securities are subject to optional redemption by the Company provided certain minimum price targets for our common stock are achieved.

**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS(continued)**  
(in thousands, except per share amounts)

Interest and dividends are payable semi-annually with 1% payable in cash and 6.5% payable in additional Notes and Preferred Stock for the first two year period from the date of issuance. Thereafter, interest and dividends are payable in either additional securities or cash at the option of the Company. The Company also incurred issuance costs of \$4.3 million that have been deferred and are being amortized over the life of the securities as interest expense with respect to \$3.4 million allocated to the Notes and \$0.9 million allocated to the Preferred Stock as a charge against capital. The \$0.9 million charge allocated to the Preferred Stock is being accreted to dividends over the life of the Preferred Stock.

**6. Business Segments**

The Company operates in two global business segments in the retained recruitment industry, executive recruitment and Futurestep. These segments are distinguished primarily by the candidates' level of compensation and the method used to identify candidates. The executive recruitment business segment is managed by geographic regional leaders. Futurestep's worldwide operations are managed by the President of Futurestep. The geographic regional leaders and the President of Futurestep report directly to the Chief Executive Officer of the Company.

A summary of the Company's results of operations by business segment are as follows:

	Three months ended January 31,		Nine months ended January 31,	
	2003	2002	2003	2002
<b>Fee revenue:</b>				
<b>Executive recruitment:</b>				
North America	\$ 39,126	\$ 46,156	\$ 123,601	\$ 147,096
Europe	18,654	20,952	59,975	73,537
Asia/Pacific	8,562	8,655	25,409	29,201
South America	1,829	2,210	5,487	7,880
<b>Total executive recruitment</b>	<b>68,171</b>	<b>77,973</b>	<b>214,472</b>	<b>257,714</b>
<b>Futurestep</b>	<b>7,365</b>	<b>8,742</b>	<b>24,586</b>	<b>32,393</b>
<b>JobDirect</b>		(17)		1,386
<b>Total fee revenue</b>	<b>75,536</b>	<b>86,698</b>	<b>239,058</b>	<b>291,493</b>
Reimbursed out-of-pocket engagement expenses	5,127	6,078	17,051	22,158
<b>Total revenue</b>	<b>\$ 80,663</b>	<b>\$ 92,776</b>	<b>\$ 256,109</b>	<b>\$ 313,651</b>

	Three months ended January 31,		Nine months ended January 31,	
	2003	2002	2003	2002
<b>Operating income (loss) before asset impairment and restructuring charges</b>				
<b>Executive recruitment:</b>				
North America	\$ 4,945	\$ 10,284	\$ 19,103	\$ 26,793
Europe	2,550	(2,057)	5,269	78
Asia/Pacific	941	941	1,376	2,161
South America	(46)	(852)	(995)	(1,460)
<b>Total executive recruitment</b>	<b>8,390</b>	<b>8,316</b>	<b>24,753</b>	<b>27,572</b>
<b>Futurestep</b>	<b>(1,312)</b>	<b>(3,075)</b>	<b>(4,041)</b>	<b>(10,871)</b>
<b>JobDirect</b>		(888)		(5,840)
<b>Corporate (1)</b>	<b>(6,895)</b>	<b>(7,835)</b>	<b>(18,877)</b>	<b>(21,611)</b>
<b>Subtotal operating income (loss) before asset impairment and restructuring charges</b>	<b>183</b>	<b>(3,482)</b>	<b>1,835</b>	<b>(10,750)</b>
<b>Asset impairment and restructuring charges (Note 4)</b>			<b>(16,281)</b>	<b>(84,267)</b>
<b>Total operating income (loss)</b>	<b>\$ 183</b>	<b>\$ (3,482)</b>	<b>\$ (14,446)</b>	<b>\$ (95,017)</b>

(1) In the current fiscal year, the Company has presented its segment operating results to reflect the business segments without allocations of corporate overhead. Accordingly, prior year operating results have been reclassified to reflect segment operating results on the same basis.

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**KORN/FERRY INTERNATIONAL AND SUBSIDIARIES**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (continued)**  
**(in thousands, except per share amounts)**

**7. Subsequent Event**

The Company obtained a \$30 million Senior Secured Revolving Credit Facility (the "Facility") in February 2003. The total amount available for borrowing by the Company is limited based on certain accounts receivable balances. The Facility is secured by substantially all of the Company's assets including certain accounts receivable balances and guarantees by and pledges of the capital stock of significant subsidiaries. The Company is required to meet certain financial condition covenants on a quarterly basis.

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## Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations

### Forward-looking Statements

*This quarterly report on Form 10-Q may contain certain statements that we believe are, or may be considered to be, "forward-looking" statements, within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. These forward-looking statements generally can be identified by use of statements that include phrases such as "believe", "expect", "anticipate", "intend", "plan", "foresee", "may", "will", "estimates", "potential", "continue" or other similar words or phrases. Similarly, statements that describe our objectives, plans or goals also are forward-looking statements. All of these forward-looking statements are subject to risks and uncertainties that could cause our actual results to differ materially from those contemplated by the relevant forward-looking statement. The principal risk factors that could cause actual performance and future actions to differ materially from the forward-looking statements include, but are not limited to, dependence on attracting and retaining qualified and experienced consultants, portability of client relationships, local political or economic developments in or affecting countries where we have operations, ability to manage growth, restrictions imposed by off-limits agreements, competition, risks related to the growth and results of Futurestep, reliance on information processing systems, and employment liability risk. Readers are urged to consider these factors carefully in evaluating the forward-looking statements. The forward-looking statements included in this Form 10-Q are made only as of the date of this report and we undertake no obligation to publicly update these forward-looking statements to reflect subsequent events or circumstances.*

*The following presentation of management's discussion and analysis of our financial condition and results of operations should be read together with our consolidated financial statements included in this Form 10-Q.*

### Overview

We are the world's leading recruitment firm with the broadest global presence in the recruitment industry. Our services include executive recruitment, middle-management recruitment (through Futurestep), strategic management assessment and executive coaching. Our clients are many of the world's largest and most prestigious public and private companies, middle-market and emerging growth companies as well as government and not-for-profit organizations. As of April 30, 2002, over half of the executive recruitment searches we performed in fiscal 2002 were for board level, chief executive and other senior executive positions and our 3,908 clients included approximately 35% of the Fortune 500 companies. We have established strong client loyalty; more than 81% of the executive recruitment assignments we performed in fiscal 2002 were on behalf of clients for whom we had conducted multiple assignments over the last three fiscal years. As of January 31, 2003, we had 410 executive recruitment consultants and 75 Futurestep consultants based in 70 offices across 36 countries.

Based on deteriorating economic conditions encountered in the first quarter of fiscal 2002, we began developing a series of realignment initiatives to address our cost structure and to reposition the enterprise to gain market share and take full advantage of the eventual economic recovery. Our immediate goals were to reduce losses, preserve our top employees and maintain our high standards of client service. In August 2001, we announced these business realignment initiatives designed to reduce expenses in response to the current economic environment and to reposition our company to take advantage of the increase in the demand for recruitment services when the economy improves.

The total charge of \$93.1 million in fiscal 2002 related to these initiatives resulted in charges against earnings in the first, second and fourth quarters in the amount of \$49.4 million, \$34.8 million and \$8.9 million, respectively. These charges reflect costs associated with a decision to reduce the workforce by approximately 30%, or over 750 employees; consolidate all back-office functions for Futurestep and executive recruitment; exit the college recruitment market and write-down related assets and goodwill.

In the nine months ended January 31, 2003, a continued decline in economic conditions contributed to our restructuring charge of \$16.3 million. Of the \$16.3 million, \$5.3 million related to severance and benefits for terminated employees, \$11.8 million related to facilities and \$0.8 million related to the write-off of related assets. In addition, we recognized a \$1.6 million gain related to a litigation settlement of a former subsidiary.

The following table summarizes the restructuring charge for the nine months ended January 31, 2003:

	Severance	Facilities and Other	Total
Executive recruitment			
North America	\$ 2,313	\$ 3,438	\$ 5,751
Europe	809	4,534	5,343
Asia/Pacific	312		312
Futurestep	761	4,614	5,375
Corporate	1,078	(1,578)	(500)
<b>Total</b>	<b>\$ 5,273</b>	<b>\$ 11,008</b>	<b>\$ 16,281</b>

In fiscal 2002, we changed our method of accounting for our ownership interests in our Mexico subsidiaries, which have been part of Kom/Ferry since 1977. Previously, based on our effective economic and management control of these subsidiaries, we had consolidated their operating results with a deduction for the other shareholders' interest after tax. We now present our economic interests in the after tax operating results of the Mexico subsidiaries as a single line item, "equity in earnings of unconsolidated subsidiaries," in our consolidated financial statements. This presentation reflects our less than 50% voting interest in the common stock of these entities. There was no impact on operating income, net income, EPS or cash flow as a result of this change; however, revenue and expenses were reduced.

In November 2001, the Financial Accounting Standards Board ("FASB") issued Topic No. D-13, "Income Statement Characterization of Reimbursements Received for 'Out-of-Pocket' Expenses Incurred" that requires presentation of reimbursements received for "out-of-pocket" expenses as revenue and the related expenses as expense in the statement of operations. This topic issued as Emerging Issues Task Force Issue No. 01-14 (EITF No. 01-14), is effective for reporting periods beginning after December 15, 2001 and requires prior period results to be reclassified to conform to the new presentation. We implemented this guidance effective May 1, 2002. Accordingly, prior year results reflect the reclassification of "out-of-pocket" expenses, primarily candidate travel expenses, previously reported as a reduction in revenue, to expense. There was no impact on operating income, net income, EPS or cash flow as a result of the reclassification.

In the current year, we have presented our segment operating results to reflect our business segments without allocations of corporate overhead. This presentation represents how management internally evaluates the operating performance of our business segments and gives a more meaningful picture of our business units' performance. Accordingly, prior year results have been reclassified to reflect segment operating results on the same basis.

#### Critical Accounting Policies

The following discussion and analysis of our financial condition and operating results are based on our consolidated financial statements. Preparation of this Form 10-Q requires us to make estimates and assumptions that affect the reported amount of assets and liabilities, disclosure of contingent assets and liabilities at the date of our financial statements, and the reported amounts of revenue and expenses during the reporting period. Actual results may differ from those estimates and assumptions. In preparing our financial statements and accounting for the underlying transactions and balances, we apply our accounting policies as disclosed in our Notes to Consolidated Financial Statements. We consider our policies related to revenue recognition, deferred compensation and deferred income taxes as critical to an understanding of our financial statements because their application places the most

significant demands on management's judgment. Specific risks for these critical accounting policies are described in our Fiscal 2002 Annual Report on Form 10-K.

## Results of Operations

The following table summarizes the results of our operations for the three and nine months ended January 31, 2003 and 2002 as a percentage of fee revenue:

	Three months ended January 31,		Nine months ended January 31,	
	2003	2002	2003*	2002*
Fee revenue	100%	100%	100%	100%
Total revenue	107	107	107	108
Compensation and benefits	72	73	71	72
General and administrative expenses	22	27	23	28
Out-of-pocket engagement expenses	7	6	7	7
Depreciation and amortization	5	5	5	5
Restructuring charges and asset impairment	0	0	7	29
Operating loss	0	(4)	(6)	(33)
Net loss	(3)	(8)	(9)	(29)

\*Operating loss, excluding restructuring and asset impairment charges, as a percentage of fee revenue for the nine months ended January 31, 2003 and 2002, respectively was 1% and (4%), respectively. On the same basis, net loss as a percentage of fee revenue was for the nine months ended January 31, 2003 and 2002 was (2%) and (4%).

The continued weakness in the global economy resulted in decreases in fee revenue in all of our business lines and geographic regions compared to the same periods last year.

The following tables summarize the results of our operations by business segment. The operating margin is calculated based on fee revenue.

Fee revenue	Three Months Ended January 31,				Nine Months Ended January 31,			
	2003		2002		2003		2002	
	Dollars	%	Dollars	%	Dollars	%	Dollars	%
<b>Executive recruitment:</b>								
North America	\$ 39,126	52%	\$ 46,156	53%	\$ 123,601	52%	\$ 147,096	51%
Europe	18,654	25	20,952	24	59,975	25	73,537	25
Asia/Pacific	8,562	11	8,655	10	25,409	11	29,201	10
South America	1,829	2	2,210	3	5,487	2	7,880	3
<b>Total executive recruitment</b>	<b>\$ 68,171</b>	<b>90%</b>	<b>\$ 77,973</b>	<b>90%</b>	<b>\$ 214,472</b>	<b>90%</b>	<b>\$ 257,714</b>	<b>89%</b>
<b>Futurestep</b>	<b>7,365</b>	<b>10</b>	<b>8,742</b>	<b>10</b>	<b>24,586</b>	<b>10</b>	<b>32,393</b>	<b>11</b>
<b>JobDirect</b>			<b>(17)</b>				<b>1,386</b>	
<b>Total fee revenue</b>	<b>\$ 75,536</b>	<b>100%</b>	<b>\$ 86,698</b>	<b>100%</b>	<b>\$ 239,058</b>	<b>100%</b>	<b>\$ 291,493</b>	<b>100%</b>
Reimbursed expenses	5,127		6,078		17,051		22,158	
<b>Total revenue</b>	<b>\$ 80,663</b>		<b>\$ 92,776</b>		<b>\$ 256,109</b>		<b>\$ 313,651</b>	

Operating income (loss)	Three Months Ended January 31,				Nine Months Ended January 31,			
	2003		2002		2003		2002	
	Dollars	%	Dollars	%	Dollars	%	Dollars	%
<b>Executive recruitment:</b>								
North America	\$ 5,838	15%	\$ 10,284	22%	\$ 13,352	11%	\$ (1,281)	(1)%
Europe	1,657	9	(2,057)	(10)	(74)	0	(4,275)	(6)
Asia/Pacific	941	11	941	11	1,064	4	315	1
South America	(46)	(3)	(852)	(39)	(995)	(18)	(1,460)	(19)
<b>Total executive recruitment</b>	<b>\$ 8,390</b>	<b>12%</b>	<b>\$ 8,316</b>	<b>11%</b>	<b>\$ 13,347</b>	<b>6%</b>	<b>\$ (6,701)</b>	<b>(3)%</b>
<b>Futurestep</b>	<b>(2,890)</b>	<b>(39)</b>	<b>(3,075)</b>	<b>(35)</b>	<b>(9,416)</b>	<b>(38)</b>	<b>(27,654)</b>	<b>(85)</b>
<b>JobDirect</b>			<b>(888)</b>				<b>(38,176)</b>	

Corporate (a)	(5,317)	(7,835)	(18,377)	(22,486)	
<b>Total operating income (loss)</b>	\$ 183	0%\$ (3,482)	(4)%\$ (14,446)	(6)%\$ (95,017)	(33)%



	Three Months Ended January 31,				Nine Months Ended January 31,			
	2003		2002		2003		2002	
	Dollars	%	Dollars	%	Dollars	%	Dollars	%
<b>Adjusted operating income (loss)</b>								
<b>(b)</b>								
<b>Executive recruitment:</b>								
North America	\$ 4,945	13%	\$ 10,284	22%	\$ 19,103	15%	\$ 26,793	18%
Europe	2,550	14	(2,057)	(10)	5,269	9	78	0
Asia/Pacific	941	11	941	11	1,376	5	2,161	7
South America	(46)	(3)	(852)	(39)	(995)	(18)	(1,460)	(19)
<b>Total executive recruitment income</b>	<b>\$ 8,390</b>	<b>12%</b>	<b>\$ 8,316</b>	<b>11%</b>	<b>\$ 24,753</b>	<b>12%</b>	<b>\$ 27,572</b>	<b>11%</b>
<b>Futurestep</b>	<b>(1,312)</b>	<b>(18)</b>	<b>(3,075)</b>	<b>(35)</b>	<b>(4,041)</b>	<b>(16)</b>	<b>(10,871)</b>	<b>(34)</b>
<b>JobDirect</b>			<b>(888)</b>				<b>(5,840)</b>	
Corporate (a)	(6,895)		(7,835)		(18,877)		(21,611)	
<b>Total adjusted operating income (loss)</b>	<b>\$ 183</b>	<b>0%</b>	<b>\$ (3,482)</b>	<b>(4)%</b>	<b>\$ 1,835</b>	<b>1%</b>	<b>\$ (10,750)</b>	<b>(4)%</b>

(a) In the current year, we have presented the segment operating results to reflect our business segments without allocations of corporate overhead. Accordingly, we have reclassified prior year operating results to reflect our segment operating results on the same basis.

(b) Adjusted operating income (loss) excludes restructuring and asset impairment charges of \$16.3 million and \$84.3 million for the nine months ended January 31, 2003 and 2002, respectively, as follows: \$5.8 million and \$28.1 million in North America, \$5.3 million and \$4.4 million in Europe, \$0.3 million and \$1.8 million in Asia/Pacific, \$5.4 million and \$16.8 million in Futurestep, \$0 and \$32.3 million in JobDirect and \$(0.5) million and \$0.9 million in Corporate, respectively.

#### Three Months Ended January 31, 2003 Compared to Three Months Ended January 31, 2002

*Fee Revenue.* Fee revenue decreased \$11.2 million, or 13%, to \$75.5 million for the three months ended January 31, 2003 compared to \$86.7 million for the three months ended January 31, 2002. The decrease in fee revenue was primarily a result of lower number of engagements, which affected all business lines. The decrease in the number of engagements reflects the reduced level of hiring activity in the current economic environment.

*Executive Recruitment* - All geographic regions reported lower fee revenue in the three months ended January 31, 2003 compared to the same period last year. North America experienced a decline in fee revenue of \$7.0 million, or 15%, to \$39.1 million in the current quarter primarily due to a decrease in the number of engagements. Europe reported fee revenue of \$18.7 million, a decline of \$2.3 million, or 11%, compared to the same period last year primarily driven by a decrease in the number of engagements while average fees slightly increased. Asia/Pacific fee revenue slightly declined \$0.1 million, or 1%, to \$8.6 million compared to the same period last year. South America reported fee revenue of \$1.8 million, a slight decline of \$0.4 million, or 17%, compared to the same period last year primarily driven by a decrease in average fees while the number of engagements remained constant.

*Futurestep* - Fee revenue decreased \$1.4 million, or 16%, to \$7.4 million in the three months ended January 31, 2003 as compared to \$8.7 million in the three months ended January 31, 2002. Of the \$1.4 million decrease in fee revenue, Europe represented \$2.0 million, or 32%, of the decline off set by an increase in Asia/Pacific fee revenue of \$0.6 million, or 72%. North America fee revenue remained constant in the current quarter compared to the same period last year. The decline in Europe is primarily attributed to the continued weakness in the economy in that region.

*JobDirect* - In fiscal 2002, we decided to reduce our investment in the college recruitment market in the first quarter and ultimately exited this market in the third quarter.

*Compensation and Benefits.* Compensation and benefits expense decreased \$8.8 million, or 14%, to \$54.5 million in the three months ended January 31, 2003 as compared to \$63.3 million in the three months ended January 31, 2002. The decrease in executive recruitment compensation and benefits costs of \$6.1 million, or 12%, reflects the 16% reduction in our workforce in the last 12 months as a result of our restructuring initiatives. Executive recruitment compensation and benefits expense, as a percentage of fee revenue was 65% in both the current quarter and the same period last year. Futurestep compensation and benefits expense declined \$2.0 million, or 25%, to \$6.1 million in the

current quarter compared to the same period last year reflecting a 35% reduction in the number of employees in the last 12 months as a result of our restructuring initiatives. As a percentage of fee revenue, Futurestep compensation and benefits expense was 83% in the current quarter an improvement of 10 percentage points as compared to the same period last year. Corporate compensation and benefits expense declined \$0.5 million, or 10%, as a result of the reduction in our Corporate workforce in the last half of fiscal 2002 and the first half of fiscal 2003.

*General and Administrative Expenses.* General and administrative expenses decreased \$6.7 million, or 29%, to \$16.7 million in the three months ended January 31, 2003 compared to \$23.4 million in the same period last year. In executive recruitment, general and administrative expenses decreased \$4.4 million, or 26%. The decrease is primarily due to lower bad debt expense, facilities and office costs as a result of the restructuring initiatives and gains recognized as a result of favorable exchange rates. As a percentage of fee revenue, executive recruitment general and administrative expenses was 18% in the current period compared to 21% in the same period last year. Futurestep general and administrative expenses decreased \$1.3 million, or 41%, compared to the same period last year. The decrease is primarily due to lower facilities and office costs as a result of the restructuring initiatives and lower business development expenses. Futurestep general and administrative expenses as a percentage of fee revenue decreased to 26% in the current quarter compared to 38% in the same period last year. Corporate general and administrative expenses decreased \$0.4 million, or 14%, as a result of our on going cost reduction efforts.

*Out-of-Pocket Engagement Expenses.* Out-of-pocket engagement expenses are comprised of expenses incurred by candidates and our consultants that are generally billed to clients.

Out-of-pocket engagement expenses of \$5.2 million in the three months ended January 31, 2003 remained fairly constant compared to the same period last year. As a percentage of fee revenue, out-of-pocket engagement expenses remained fairly constant at 7%.

*Operating Income.* Operating income was \$0.2 million in the current quarter compared to an operating loss of \$3.5 million in the same period last year.

Executive recruitment adjusted operating income, excluding asset impairment and restructuring revisions, slightly improved to \$8.4 million, or 12% of fee revenue, in the current quarter. Europe and South America adjusted operating income improved \$4.6 million and \$0.8 million, respectively, compared to the same period last year. These improvements were a result of continued cost savings efficiencies. These improvements were partially offset by a decline in North America adjusted operating income of \$5.4 million as a result of smaller decreases in costs compared to fee revenue. Asia/Pacific adjusted operating income was constant at \$0.9 million in the current quarter.

Futurestep adjusted operating loss, excluding asset impairment and restructuring revisions, improved \$1.8 million, or 57%, reflecting the reduced compensation and benefits costs as well as decreases in general and administrative expenses discussed above. The operating loss was reduced to 18% of fee revenue in the current quarter as compared to 35% of fee revenue in the same period last year, which reflects a larger decrease in costs compared to fee revenue.

*Interest and Other Income, Net.* Interest and other income, net includes interest income of \$0.5 million and \$0.7 million for the three months ended January 31, 2003 and 2002, respectively. Other income, net primarily includes an unrealized holding loss on investments of \$0.3 million for the three months ended January 31, 2003 compared to \$0.4 million in the same period last year.

*Interest Expense.* Interest expense of \$2.8 million in the current quarter increased \$0.6 million compared to the same period last year. The increase is primarily due to the interest paid on repurchases of stock from former employees as well as an increase in the average outstanding loan balances obtained in conjunction with our Company Owned Life Insurance, or COLI policies.

*Provision for (Benefit from) Income Taxes.* The provision for income taxes was \$0.5 million in the current quarter compared to \$2.1 million in the same period last year. The income tax expense in the prior period is primarily due to taxable income in North America and certain non-deductible charges in Europe. Although we reported a pretax loss in the current quarter, certain foreign subsidiaries reported pretax income resulting in foreign income tax expense.

*Equity in Earnings of Unconsolidated Subsidiaries.* Equity in earnings of unconsolidated subsidiaries is comprised of our less than 50% shareholder interest in our Mexico subsidiaries. We report our interest in the earnings or loss of our Mexico subsidiaries on the equity basis as a one-line adjustment to net income. Equity in earnings of \$0.4 million

in the current quarter remained fairly constant as compared to the same period last year.

### **Nine Months Ended January 31, 2003 Compared to Nine Months Ended January 31, 2002**

*Fee Revenue.* Fee revenue decreased \$52.4 million, or 18%, to \$239.1 million for the nine months ended January 31, 2003 compared to \$291.5 million for the nine months ended January 31, 2002. The decrease in fee revenue was primarily a result of a decrease in demand reflecting continued weakness in the global economy.

*Executive Recruitment* - All geographic regions reported lower fee revenue in the nine months ended January 31, 2003 compared to the same period last year. North America experienced a decline in fee revenue of \$23.5 million, or 16%, to \$123.6 million in the current period primarily due to a decrease in the number of engagements. Europe reported fee revenue of \$60.0 million, a decline of \$13.6 million, or 18%, compared to the same period last year primarily driven by a decrease in the number of engagements while average fees slightly increased. Asia/Pacific fee revenue declined \$3.8 million, or 13%, to \$25.4 million primarily due to a slight decrease in demand and average fees. South America reported fee revenue of \$5.5 million, a decline of \$2.4 million, or 30%, compared to the same period last year primarily due to a decrease in average fees while the number of engagements increased slightly.

*Futurestep* - Fee revenue decreased \$7.8 million, or 24%, to \$24.6 million in the nine months ended January 31, 2003 as compared to \$32.4 million in the nine months ended January 31, 2002. Of the total decrease in fee revenue, Europe represented \$5.3 million, or 26%, of the decline while North America represented \$2.3 million, or 29%, of the decline. The decreases are primarily a result of the continued weakness of our global economy.

*JobDirect* - In fiscal 2002, we decided to reduce our investment in the college recruitment market in the first quarter and ultimately exited this market in the third quarter. In the nine months ended January 31, 2002, we recognized impairment charges of \$32.3 million representing substantially all of our unamortized goodwill resulting from our acquisition of JobDirect in July 2000.

*Compensation and Benefits.* Compensation and benefits expense decreased \$40.0 million, or 19%, to \$169.6 million in the nine months ended January 31, 2003 as compared to \$209.6 million in the nine months ended January 31, 2002. The decrease in executive recruitment compensation and benefits costs of \$27.2 million, or 16%, reflects the 16% reduction in our workforce in the last 12 months as a result of our restructuring initiatives as well as our ongoing cost reduction efforts. Executive recruitment compensation and benefits expense as a percentage of fee revenue remained constant at 65% for both periods. Futurestep compensation and benefits expense declined \$9.0 million, or 33%, to \$18.7 million in the current period compared to the same period last year reflecting a 35% reduction in the number of employees in the last 12 months as a result of our restructuring initiatives. As a percentage of fee revenue, Futurestep compensation and benefits expense was 76% in the current period an improvement of 10 percentage points as compared to the same period last year. Corporate compensation and benefits slightly declined \$0.5 million, or 4%, to \$11.0 million in the current period compared to \$11.5 million in the same period last year.

*General and Administrative Expenses.* General and administrative expenses decreased \$26.5 million, or 32%, to \$55.3 million in the nine months ended January 31, 2003 compared to \$81.8 million in the same period last year. In executive recruitment, general and administrative expenses decreased \$14.2 million, or 26%. The decrease is primarily due to lower facilities and office costs as a result of our restructuring initiatives, bad debt expense, and gains recognized as a result of favorable exchange rates. As a percentage of fee revenue, executive recruitment general and administrative expenses was 19% in the current period compared to 21% in the same period last year. Futurestep general and administrative expenses decreased \$6.4 million, or 46%. The decrease is primarily due to a decrease in business development expenses, professional services and advertising expenses and a decrease in facilities and office expenses as a result of our restructuring initiatives. Futurestep general and administrative expenses as a percentage of fee revenue decreased to 30% in the current period from 43% in the same period last year. Corporate general and administrative expenses decreased \$2.4 million, or 25%, primarily related to a decrease in professional services and advertising expenses.

*Out-of-Pocket Engagement Expenses.* Out-of-pocket engagement expenses of \$17.0 million in the nine months ended January 31, 2003 decreased \$2.8 million, or 14%, as compared to \$19.8 million in the same period last year. As a percentage of fee revenue, out-of-pocket engagement expenses remained constant at 7% in both periods.

*Operating Income.* Operating loss was \$14.5 million in the nine months ended January 31, 2003 compared to \$95.0 million in the same period last year. Excluding restructuring and asset impairment charges of \$16.3 million and \$84.3 million in the nine months ended January 31, 2003 and 2002, respectively, operating income improved \$12.6 million to \$1.8 million operating income in the current period compared to an operating loss of \$10.8 million in the same period last year.

Executive recruitment adjusted operating income, excluding asset impairment and restructuring charges, decreased to \$24.8 million, or 12% of fee revenue, in the nine months ended January 31, 2003 compared to \$27.6 million, or 11% of fee revenue, in the same period last year. The decline was primarily due to a decline of North America and Asia/Pacific adjusted operating income of \$7.7 million and \$0.8 million respectively, compared to the same period last year. The decline was primarily due to smaller decreases in costs compared to fee revenue. The decline was partially offset by an improvement of Europe and South America adjusted operating income of \$5.2 million and \$0.5 million, respectively as a result of continued cost savings efficiencies.

Futurestep adjusted operating losses, excluding asset impairment and restructuring charges, improved \$6.8 million, or 63%, reflecting the reduced compensation and benefits costs and decreased general and administrative expenses discussed above. The operating loss was reduced to 16% of fee revenue in the current period compared to 34% of fee revenue in the same period last year. These improvements reflect a larger decrease in costs compared to fee revenue.

*Interest and Other Income, Net.* Interest and other income, net includes interest income of \$1.3 million and \$2.0 million for the nine months ended January 31, 2003 and 2002, respectively. Other income, net increased \$0.6 million in the current period as compared to the same period last year primarily as a result of favorable foreign exchange rates on a U.S. dollar investment in South America.

*Interest Expense.* Interest expense was \$8.0 million and \$5.9 million in the nine months ended January 31, 2003 and January 31, 2002, respectively. The increase is primarily due to increased average borrowings under the line of credit, higher effective interest rate and the interest on convertible debt acquired in June 2002. In addition, the increase is due to the interest paid on repurchases of stock from former employees as well as an increase in the average outstanding loan balances obtained in conjunction with our COLI policies.

*Provision for (Benefit from) Income Taxes.* The provision for income taxes was \$1.5 million in the nine months ended January 31, 2003 as compared to a benefit of \$12.9 million in the nine months ended January 31, 2002. The benefit received in the prior period reflects tax savings primarily as a result of restructuring charges not duplicated in the current period. Although we reported a pretax loss in the current period, certain foreign subsidiaries reported pretax income resulting in foreign income tax expense.

*Equity in Earnings of Unconsolidated Subsidiaries.* Equity in earnings of unconsolidated subsidiaries is comprised of our less than 50% shareholder interest in our Mexico subsidiaries. We report our interest in the earnings or loss of our Mexico subsidiaries on the equity basis as a one-line adjustment to net income. Equity in earnings of \$1.1 million in the nine months ended January 31, 2003 remained fairly constant compared to \$1.2 million the same period last year.

#### **Liquidity and Capital Resources**

In June 2002, we closed a \$50.0 million private placement with Friedman, Fleischer & Lowe, a San Francisco based private equity firm, comprised of \$40.0 million 7.5% Convertible Subordinated Notes; \$10.0 million 7.5% Convertible Preferred Stock and warrants to purchase 272,727 shares of our common stock at an exercise price of \$12 per share. Interest and dividends are payable semi-annually in either additional Notes and Preferred Stock or cash, at our option, except for the first two years from the date of issuance during which 1% must be paid in cash. The Notes and Preferred Stock are convertible into shares of our common stock at \$10.25 per share which, if converted, would represent 4.9 million shares or 11.4% of our outstanding common stock. In December 2002, we paid \$0.3 million of interest and dividends in cash.

We obtained a \$30 million Senior Secured Revolving Credit Facility in February 2003. The total amount available for borrowing by the Company is limited based on certain accounts receivable balances. The credit facility is secured by substantially all of our assets including certain accounts receivable balances and guarantees by and

pledges of the capital stock of significant subsidiaries. We are required to meet certain financial condition covenants on a quarterly basis.

We believe that cash on hand, the credit facility and funds from operations will be sufficient to meet our anticipated working capital, capital expenditures and general corporate requirements for the foreseeable future.

Cash provided by operating activities was \$8.7 million in the nine months ended January 31, 2003 and the cash used in operating activities was \$78.6 million in the same period last year. The increase in operating cash in the current period is primarily due to the increase of \$19.4 million in receivables coupled with a decrease in loss in fiscal 2003 as compared to fiscal 2002.

Cash used in investing activities was \$7.0 million in the nine months ended January 31, 2003 and \$2.3 million in the same period last year. In the nine months ended January 31, 2003, cash used in investing activities was primarily related to premiums on COLI. In the same period last year, cash used in investing activities included proceeds from the sale of marketable securities of \$15.9 million offset by \$8.3 million for purchases of property and equipment and \$9.3 million for COLI premiums. The COLI premiums were funded through borrowings under these life insurance policies in both periods.

Capital expenditures consist primarily of systems hardware and software costs, upgrades to information systems and leasehold improvements. The decrease in the nine months ended January 31, 2003 of \$7.7 million compared to the same period last year reflects reduced spending in line with our cost saving initiatives.

Cash provided by financing activities was \$4.7 million and \$52.5 million during the nine months ended January 31, 2003 and 2002, respectively. In the current period, we received net proceeds of \$45.6 million from the issuance of convertible securities and paid the net outstanding borrowings of \$39 million on our previous credit facility. In the same period last year, cash provided in financing activities included net borrowings of \$48 million on our previous credit facility.

Total outstanding borrowings under COLI policies were \$66.3 million and \$58.4 million as of January 31, 2003 and 2002, respectively. Generally, we borrow under our COLI policies to pay premiums. Such borrowings do not require principal payments, bear interest at primarily variable rates and are secured by the cash surrender value of the life insurance policies of \$117.6 million and \$111.9 million as of January 31, 2003 and 2002, respectively.

### **Recently Issued Accounting Standards**

In May 2002, we adopted Statement of Financial Accounting Standards ("SFAS") No. 144, "Accounting for the Impairment or Disposal of Long-Lived Assets." This statement replaces SFAS No. 121, "Accounting for the Impairment of Long-Lived Assets and for Long-Lived assets to be Disposed Of." The adoption of SFAS No. 144 did not have an impact on our financial position or results of operations.

In July 2002, the FASB issued SFAS No. 146, "Accounting for Costs Associated with Exit or Disposal Activities." This statement requires that a liability for costs associated with an exit or disposal activity, including certain restructuring costs, be recognized and measured initially at fair value when the liability is incurred. Previously these liabilities were recognized at the date an entity committed to a plan and measurement at fair value was not required. This statement is effective prospectively for exit and disposal activities initiated after December 31, 2002. The adoption of this statement did not have a significant impact on our financial position or results of operations.

### **Item 3. *Quantitative and Qualitative Disclosures About Market Risk***

As a result of our global operating activities, we are exposed to certain market risks, including foreign currency exchange fluctuations, fluctuations in interest rates and variability in interest rate spread relationships. We manage our exposure to these risks in the normal course of our business as described below. We have not utilized financial instruments for trading or other speculative purposes nor do we trade in derivative financial instruments.

*Foreign Currency Risk.* Generally, financial results of our foreign subsidiaries are measured in their local currencies. Assets and liabilities are translated into U.S. dollars at the rates of exchange in effect at the end of each period and revenue and expenses are translated at average rates of exchange during the period. Resulting translation adjustments are reported as a component of comprehensive income.

Financial results of foreign subsidiaries in countries with highly inflationary economies are measured in U.S. dollars. The financial statements of these subsidiaries are translated using a combination of current and historical rates of exchange and any translation adjustments are included in determining net income.

Historically, we have not realized any significant translation gains or losses on transactions involving U.S. dollars and other currencies. This is primarily due to natural hedges of revenue and expenses in the functional currencies of the countries in which our offices are located and investment of excess cash balances in U.S. dollar denominated accounts. In the nine months ended January 31, 2003, we recognized foreign currency gains, after income taxes, of \$2.0 million, primarily related to our operations in Europe. During the nine months ended January 31, 2002, we recognized foreign currency loss, after income taxes, of \$0.1 million. Realization of translation gains or losses due to the translation of intercompany payables denominated in U.S. dollars is mitigated through the timing of repayment of these intercompany borrowings.

*Interest Rate Risk.* We primarily manage our exposure to fluctuations in interest rates through our regular financing activities that generally are short term and provide for variable market rates. Currently, we have all of our investments in interest bearing money market accounts at market rates. As of January 31, 2003, we had no outstanding bank borrowings. We had \$66.3 million of borrowings against the cash surrender value of COLI contracts as of January 31, 2003 bearing interest primarily at variable rates payable at least annually.

Notes payable due to shareholders of \$3.5 million and \$1.5 million due in fiscal 2003 and 2004, respectively, resulted from business acquisitions in fiscal 2000 and 2001 and bear interest at rates ranging from 6.5% to 7.0%. In June 2002, we issued \$40.0 million of 7.5% convertible debt and \$10.0 million of 7.5% convertible preferred stock that is mandatorily redeemable by us if outstanding on June 13, 2010.

#### **Item 4. Controls and Procedures**

(a) Evaluation of Disclosure Controls and Procedures

Based on their evaluation of our disclosure controls and procedures conducted within 90 days of the date of filing this report on Form 10-Q, our Chief Executive Officer and Chief Financial Officer have concluded that our disclosure controls and procedures (as defined in rules 13a-14 and 15d-14 promulgated under the Securities Exchange Act of 1934) are effective.

(b) Changes in Internal Controls

There were no significant changes in our internal controls or in other factors that could significantly affect these controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

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**PART II. OTHER INFORMATION**

**Item 6. Exhibits and Reports on Form 8-K**

(a) *Exhibits*

Exhibit Number	Description of Exhibit
3.1	Amended and Restated Bylaws of Korn/Ferry International, a Delaware Corporation.
10.1	Credit Agreement, dated February 14, 2003, among Korn/Ferry International, the Financial Institutions thereto and Wells Fargo Bank, N.A., as administrative agent.

(b) *Reports on Form 8-K*

Current report event, dated November 12, 2002, (Item 5) was filed with the SEC on November 12, 2002.

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**SIGNATURE**

Pursuant to the requirements of the Securities Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

Date: March 17, 2003

KORN/FERRY INTERNATIONAL

By: \_\_\_\_\_ /s/ GARY D. BURNISON

\_\_\_\_\_  
**Gary D. Burnison**  
Chief Financial Officer and Executive Vice President



**CERTIFICATIONS**

I, Paul C. Reilly, certify that:

- 1. I have reviewed this quarterly report on Form 10-Q of Korn/Ferry International;
- 2. Based on my knowledge, this quarterly report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this quarterly report; and
- 3. Based on my knowledge, the financial statements, and other financial information included in this quarterly report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this quarterly report;
- 4. The registrant’s other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and we have:
  - a) designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this quarterly report is being prepared;
  - b) evaluated the effectiveness of the registrant’s disclosure controls and procedures as of a date within 90 days prior to the filing date of this quarterly report (the “Evaluation Date”); and
  - c) presented in this quarterly report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
- 5. The registrant’s other certifying officers and I have disclosed, based on our most recent evaluation, to the registrant’s auditors and the audit committee of registrant’s board of directors (or persons performing the equivalent function):
  - a) all significant deficiencies in the design or operation of internal controls which could adversely affect the registrant’s ability to record, process, summarize and report financial data and have identified for the registrant’s auditors any material weaknesses in internal controls; and
  - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant’s internal controls; and
- 6. The registrant’s other certifying officers and I have indicated in this quarterly report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

By: /s/ PAUL C. REILLY

Name: **Paul C. Reilly**  
Title: **Chairman and Chief Executive Officer**

Date: March 17, 2003

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I, Gary D. Burnison, certify that:

1. I have reviewed this quarterly report on Form 10-Q of Korn/Ferry International;
2. Based on my knowledge, this quarterly report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this quarterly report; and
3. Based on my knowledge, the financial statements, and other financial information included in this quarterly report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this quarterly report;
4. The registrant's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and we have:
  - a) designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this quarterly report is being prepared;
  - b) evaluated the effectiveness of the registrant's disclosure controls and procedures as of a date within 90 days prior to the filing date of this quarterly report (the "Evaluation Date"); and
  - c) presented in this quarterly report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
5. The registrant's other certifying officers and I have disclosed, based on our most recent evaluation, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
  - a) all significant deficiencies in the design or operation of internal controls which could adversely affect the registrant's ability to record, process, summarize and report financial data and have identified for the registrant's auditors any material weaknesses in internal controls; and
  - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls; and
6. The registrant's other certifying officers and I have indicated in this quarterly report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

By: \_\_\_\_\_ /s/ GARY D. BURNISON

Name: **Gary D. Burnison**  
Title: **Chief Financial Officer and Executive Vice President**

Date: March 17, 2003

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**EXHIBIT INDEX**

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10.1	Credit Agreement, dated February 14, 2003, among Korn/Ferry International, the Financial Institutions thereto and Wells Fargo Bank, N.A., as administrative agent.

**AMENDED AND RESTATED BYLAWS**

**of**

**KORN/FERRY INTERNATIONAL,  
a Delaware corporation**

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**AMENDED AND RESTATED BYLAWS**

for the regulation, except  
as otherwise provided by statute or  
its Certificate of Incorporation,

of

**KORN/FERRY INTERNATIONAL**

**ARTICLE I. OFFICES.**

Section 1. REGISTERED OFFICE.

The registered office of the corporation in the State of Delaware shall be fixed in the Certificate of Incorporation of the corporation.

Section 2. PRINCIPAL EXECUTIVE OFFICE.

The corporation's principal executive office shall be fixed and located at such place, either within or without the State of Delaware, as the Board of Directors of the corporation (the "Board") shall determine. The Board is granted full power and authority to change said principal executive office from one location to another.

Section 3. OTHER OFFICES.

The corporation may have such other offices, either within or without the State of Delaware, as the Board may designate or the business of the corporation may from time to time require.

**ARTICLE II. STOCKHOLDERS.**

Section 1. PLACE OF MEETINGS.

Meetings of the stockholders shall be held either at the principal executive office of the corporation or at any other place within or without the State of Delaware as may be designated by the Board and filed with the Secretary of the corporation.

Section 2. ANNUAL MEETINGS.

The annual meetings of the stockholders shall be held at such time, date and place, either within or without the State of Delaware, as may be fixed by the Board. At such meetings, directors shall be elected and any other proper business may be transacted.

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Section 3. BUSINESS WHICH MAY BE CONDUCTED AT MEETINGS OF THE STOCKHOLDERS.

(a) Annual Meetings of the Stockholders

(i) Nominations of persons for election to the Board and the proposal of business to be considered by the stockholders may be made at an annual meeting of the stockholders only (A) pursuant to the corporation's notice of meeting (or any supplement thereto), (B) by or at the direction of the Board or (C) by any stockholder of the corporation who was a stockholder of record of the corporation at the time the notice provided for in this Section 3 is delivered to the Secretary of the corporation, who is entitled to vote at the meeting and who complies with the notice procedures set forth in this Section 3.

(ii) For nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to clause (C) of paragraph (a)(i) of this Section 3, the stockholder must have given timely notice thereof in writing to the Secretary of the corporation and any such proposed business other than the nominations of persons for election to the Board must constitute a proper matter for stockholder action. To be timely, a stockholder's notice shall be delivered to the Secretary at the principal executive offices of the corporation not later than the close of business on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the preceding year's annual meeting (provided, however, that in the event that the date of the annual meeting is more than 30 days before or more than 70 days after such anniversary date, notice by the stockholder must be so delivered not earlier than the close of business on the 120th day prior to such annual meeting and not later than the close of business on the later of the 90th day prior to such annual meeting or the 10th day following the day on which public announcement of the date of such meeting is first made by the corporation). In no event shall the public announcement of an adjournment or postponement of an annual meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above. Such stockholder's notice shall set forth: (A) as to each person whom the stockholder proposes to nominate for election as a director all information relating to such person that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to Regulation 14A under the Securities Exchange Act of 1934, as amended (the "Exchange Act") and Rule 14a-11 thereunder (and such person's written consent to being named in the proxy statement as a nominee and to serving as a director if elected); (B) as to any other business that the stockholder proposes to bring before the meeting, a brief description of the business desired to be brought before the meeting, the text of the proposal or business (including the text of any resolutions proposed for consideration and, in the event that such business includes a proposal to amend the Bylaws of the corporation, the language of the proposed amendment), the reasons for conducting such business at the meeting and any material interest in such business of such stockholder and the beneficial owner, if any, on whose behalf the proposal is made; and (C) as to the stockholder giving the notice and the beneficial owner, if any, on whose behalf the nomination or proposal is made (1) the name and



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address of such stockholder, as they appear on the corporation's books, and of such beneficial owner, (2) the class and number of shares of capital stock of the corporation which are owned beneficially and of record by such stockholder and such beneficial owner, (3) a representation that the stockholder is a holder of record of stock of the corporation entitled to vote at such meeting and intends to appear in person or by proxy at such meeting to propose such business or nomination, and (4) a representation whether the stockholder or beneficial owner, if any, intends or is part of a group which intends (x) to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the corporation's outstanding capital stock required to approve or adopt the proposal or elect the nominee and/or (y) otherwise to solicit proxies from stockholders in support of such proposal or nomination. The corporation may require any proposed nominee to furnish such other information as it may reasonably require to determine the eligibility of such proposed nominee to serve as a director of the corporation.

(iii) Notwithstanding anything in the second sentence of paragraph (a)(ii) of this Section 3 to the contrary, in the event that the number of directors to be elected to the Board of the corporation at the annual meeting is increased and there is no public announcement by the corporation naming the nominees for the additional directorships at least 100 days prior to the first anniversary of the preceding year's annual meeting, a stockholder's notice required by this Section 3 shall also be considered timely, but only with respect to nominees for the additional directorships, if it shall be delivered to the Secretary of the corporation at the principal executive offices of the corporation not later than the close of business on the 10th day following the day on which such public announcement is first made by the corporation.

(b) Special Meetings of the Stockholders. Only such business shall be conducted at a special meeting of the stockholders as shall have been brought before the meeting pursuant to the corporation's notice of meeting. Nominations of persons for election to the Board may be made at a special meeting of the stockholders at which directors are to be elected pursuant to the corporation's notice of meeting (i) by or at the direction of the Board or (ii) provided that the Board has determined that directors shall be elected at such meeting, by any stockholder of the corporation who is a stockholder of record at the time the notice provided for in this Section 3 is delivered to the Secretary of the corporation, who is entitled to vote at the meeting and upon such election, and who complies with the notice procedures set forth in this Section 3. In the event the corporation calls a special meeting of the stockholders for the purpose of electing one or more directors to the Board, any stockholder entitled to vote in such election of directors may nominate a person or persons (as the case may be) for election to such position(s) as specified in the corporation's notice of meeting, if the stockholder's notice required by paragraph (a)(ii) of this Section 3 shall be delivered to the Secretary at the principal executive offices of the corporation not earlier than the close of business on the 120th day prior to such special meeting and not later than the close of business on the later of the 90th day prior to such special meeting or the 10th day following the day on which public announcement is first made of the date of the special meeting and of the nominees proposed by the Board to be elected at such meeting. In no event shall the public announcement of an adjournment or postponement of a special meeting commence a new time period (or extend any time period) for the giving of a

stockholder's notice as described above.

(c) General.

(i) Only persons who are nominated in accordance with the procedures set forth in this Section 3 shall be eligible to be elected at an annual or special meeting of the stockholders of the corporation to serve as directors and only such business shall be conducted at a meeting of the stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Section 3. Except as otherwise provided by law, the Chair of the Board, as chair of the meeting, shall have the power and duty (A) to determine whether a nomination or any business proposed to be brought before the meeting was made or proposed, as the case may be, in accordance with the procedures set forth in this Section 3 (including whether the stockholder or beneficial owner, if any, on whose behalf the nomination or proposal is made or solicited (or is part of a group which solicited) or did not so solicit, as the case may be, proxies in support of such stockholder's nominee or proposal in compliance with such stockholder's representation as required by clause (a)(ii)(C)(4) of this Section 3) and (B) if any proposed nomination or business was not made or proposed in compliance with the Section 3, to declare that such nomination shall be disregarded or that such proposed business shall not be transacted.

(ii) For purposes of this Section 3, "public announcement" shall include disclosure in a press release reported by the Dow Jones News Service, Associated Press or comparable national news service or in a document publicly filed by the corporation with the Securities and Exchange Commission pursuant to Section 13, 14 or 15(d) of the Exchange Act.

(iii) Notwithstanding the foregoing provisions of this Section 3, a stockholder shall also comply with all applicable requirements of the Exchange Act and the rules and regulations thereunder with respect to the matters set forth in this Section 3. Nothing in this Section 3 shall be deemed to affect any rights (A) of stockholders to request inclusion of proposals in the corporation's proxy statement pursuant to Rule 14a-8 under the Exchange Act or (B) of the holders of any series of Preferred Stock to elect directors pursuant to any applicable provisions of the Certificate of Incorporation of the corporation.

Section 4. SPECIAL MEETINGS.

Special meetings of the stockholders may be called only by the Board, the Chair of the Board, the Chief Executive Officer or the President, and may not be called by any other person or persons. Upon written request delivered to the Secretary of the corporation by any person or persons (other than the Board) entitled to call a special meeting of the stockholders, the Secretary shall cause notice to be given to the stockholders entitled to vote that a meeting will be held at the time requested by the person or persons calling the meeting. If notice of a special meeting of the stockholders is not given within 20 days after the Secretary's receipt of the request, the person or persons entitled to call the meeting may give the notice. Subject to the

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provisions of applicable law, only such business shall be considered at a special meeting of the stockholders as shall have been stated in the notice for such meeting.

Section 5. NOTICE OF ANNUAL OR SPECIAL MEETINGS.

(a) Time Periods. Written notice of each annual or special meeting of the stockholders shall be given not less than 10 nor more than 60 days before the date of the meeting to each stockholder entitled to vote at such meeting. Such notice shall state the place, date and hour of the meeting and (i) in the case of the annual meeting, those matters which the Board, at the time of the mailing of the notice, intends to present for action by the stockholders (but, subject to Section 3 of this Article II and the provisions of applicable law, any other matters properly brought may be presented at the meeting for action) or (ii) in the case of a special meeting, the purpose or purposes for which the meeting was called. The notice of any meeting at which directors are to be elected shall include the names of nominees intended at the time of the notice to be presented by the Board for election.

(b) Method. Notice of a stockholders' meeting shall be given: (i) in writing or (ii) by United States mail, addressed to the stockholder at the address of such stockholder appearing on the books of the corporation or given by the stockholder to the corporation for the purpose of notice.

Notice by mail shall be deemed to have been given at the time written notice is deposited in the United States mail, postage prepaid. Any other written notice shall be deemed to have been given at the time it is personally delivered to the recipient, delivered to a common carrier for transmission or actually transmitted by the person giving the notice by electronic means to the recipient.

Section 6. QUORUM — REQUIRED VOTES.

Except as otherwise provided by law, the Certificate of Incorporation of the corporation or these bylaws, at each meeting of the stockholders the presence in person or by proxy of the holders of a majority in voting power of the outstanding shares of stock entitled to vote at the meeting shall be necessary and sufficient to constitute a quorum. In the absence of a quorum, the stockholders so present may, by a majority in voting power thereof, adjourn the meeting from time to time in the manner provided in Section 7 of this Article II until a quorum shall attend.

Section 7. ADJOURNED MEETINGS AND NOTICE THEREOF.

Any meeting of the stockholders, annual or special, may adjourn from time to time to reconvene at the same or some other place, and notice need not be given of any such adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting the corporation may transact any business which might have been transacted at the original meeting. If the adjournment is for more than 30 days, or if after the adjournment a new record date is fixed for the adjourned meeting, notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the

meeting.

Section 8. VOTING.

The stockholders entitled to notice of any meeting or to vote at any such meeting shall be only those persons in whose name shares stand on the stock records of the corporation on the record date determined in accordance with Section 9 of this Article II.

Voting at meetings of the stockholders need not be by written ballot. At all meetings of the stockholders for the election of directors, a plurality of the votes cast shall be sufficient to elect. All other elections and questions shall, unless otherwise provided by the Certificate of Incorporation of the corporation, these bylaws, the rules or regulations of any stock exchange applicable to the corporation or as otherwise provided by law or pursuant to any regulation applicable to the corporation, be decided by the affirmative vote of the holders of a majority in voting power of the shares of stock of the corporation which are present in person or by proxy and entitled to vote thereon.

Voting shall in all cases be subject to the following provisions:

(a) The stockholders of the corporation shall not have the right to cumulate their votes for the election of directors of the corporation.

(b) Shares held by an administrator, executor, guardian, conservator or custodian may be voted by such holder either in person or by proxy, without a transfer of such shares into the holder's name; and shares standing in the name of a trust may be voted by the trustee of such trust, either in person or by proxy, but no trustee shall be entitled to vote shares held by such trust without a transfer of such shares into the trust's name.

(c) Shares standing in the name of a receiver may be voted by such receiver, and shares held by or under the control of a receiver may be voted by such receiver without the transfer thereof into the receiver's name if authority to do so is contained in the order of the court by which such receiver was appointed.

(d) Except where otherwise agreed in writing between the parties, a stockholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred.

(e) Shares standing in the name of a minor may be voted by, and the corporation may treat all rights incident thereto as exercisable by, the minor, in person or by proxy, whether or not the corporation has notice, actual or constructive, of the minor's actual age, unless a guardian of the minor's property has been appointed and written notice of such appointment has been given to the corporation.

(f) Shares standing in the name of another corporation, domestic or foreign, may be voted by such officer, agent or proxyholder of such other corporation as the bylaws of such other corporation may prescribe or, in the absence of such provision, as the board of

directors of such other corporation may determine or, in the absence of such determination, by the chair of the board of directors, president or any vice president of such other corporation, or by any other person authorized to do so by the chair of the board, president or any vice president of such other corporation. Shares which are purported to be voted or any proxy purported to be executed in the name of a corporation (whether or not any title of the person signing is indicated) shall be presumed to be voted or the proxy executed in accordance with the provisions of this clause, unless the contrary is shown.

(g) Shares of the corporation owned by its subsidiaries shall not be entitled to vote on any matter.

(h) If shares stand of record in the names of two or more persons, whether fiduciaries, members of a partnership, joint tenants, tenants in common, husband and wife as community property, tenants by the entirety, voting trustees, persons entitled to vote under a stockholder voting agreement or otherwise, or if two or more persons (including proxyholders) have the same fiduciary relationship respecting the same shares, unless the Secretary of the corporation is given written notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship wherein it is so provided, their acts with respect to voting shall have the following effect:

(i) If only one votes, such act binds all;

(ii) If more than one vote, the act of the majority so voting binds all; or

(iii) If more than one vote, but the vote is evenly split on any particular matter, each faction may vote the securities in question proportionately.

If the instrument so filed or the registration of the shares shows that any such tenancy is held in unequal interests, a majority or even split for the purpose of this Section 8 shall be a majority or even split in interest.

#### Section 9. RECORD DATE.

In order that the corporation may determine the stockholders entitled to notice of or to vote at any meeting of the stockholders or any adjournment thereof, or to express consent to corporate action in writing without a meeting, or entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitled to exercise any rights in respect of any change, conversion or exchange of stock or for the purpose of any other lawful action, the Board may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board, and which record date: (a) in the case of determination of stockholders entitled to vote at any meeting of stockholders or adjournment thereof, shall, unless otherwise required by law, not be more than 60 nor less than 10 days before the date of such meeting; (b) in the case of determination of stockholders entitled to express consent to corporate action in writing without a meeting, shall not be more than 10 days from the date upon which the resolution fixing the record date is adopted by the Board and (c) in the case of any other action, shall not be more than 60 days prior to such other action. If no record date is fixed: (a) the record date for determining stockholders entitled to notice of or to vote at a

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meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held; (b) the record date for determining stockholders entitled to express consent to corporate action in writing without a meeting, when no prior action of the Board is required by law or the Certificate of Incorporation of the corporation, shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the corporation in accordance with applicable law, or, if prior action by the Board is required by law or the Certificate of Incorporation of the corporation, shall be at the close of business on the day on which the Board adopts the resolution taking such prior action and (c) the record date for determining stockholders for any other purpose shall be at the close of business on the day on which the Board adopts the resolution relating thereto. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board may fix a new record date for the adjourned meeting.

Section 10. CONSENT OF ABSENTEES.

The transactions of any meeting of the stockholders, however called and noticed, and wherever held, are as valid as though conducted at a meeting duly held after regular call and notice, if a quorum is present either in person or by proxy, and if, either before or after the meeting, each of the persons entitled to vote, not present in person or by proxy, signs a written waiver of notice, or a consent to the holding of the meeting or an approval of the minutes thereof. All such waivers, consents or approvals shall be filed with the corporate records or made a part of the minutes of the meeting. Attendance of a person at a meeting shall constitute a waiver of notice of and presence at such meeting, except when the person objects, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened and except that attendance at a meeting is not a waiver of any right to object to the consideration of matters required by the General Corporation Law of the State of Delaware to be included in the notice but not so included, if such objection is expressly made at the meeting. Neither the business to be transacted at nor the purpose of any regular or special meeting of the stockholders need be specified in any written waiver of notice, consent to the holding of the meeting or approval of the minutes thereof, except as provided in the General Corporation Law of the State of Delaware.

Section 11. PROXIES.

Each stockholder entitled to vote at a meeting of the stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder by proxy, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. A proxy shall be irrevocable if it states that it is irrevocable and if, and only as long as, it is coupled with an interest sufficient in law to support an irrevocable power. A stockholder may revoke any proxy which is not irrevocable by attending the meeting and voting in person or by filing an instrument in writing revoking the proxy or by delivering a proxy in accordance with applicable law bearing a later date to the Secretary of the corporation.

A proxy or consent validly delivered to the corporation shall mean any written authorization which is signed by the person executing the proxy, as well as any electronic transmission (to include without limitation transmissions by facsimile and by computer messaging systems), which is authorized by a stockholder or the stockholder's attorney in fact, which gives another person or persons power to vote with respect to the shares of such stockholder. A stockholder may authorize another person or persons to act for such stockholder as proxy by transmitting or authorizing the transmission of a telegram, cablegram, or other means of electronic transmission to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person who will be the holder of the proxy to receive such transmission, provided that any such telegram, cablegram or other means of electronic transmission must either set forth or be submitted with information from which it can be determined that the telegram, cablegram or other electronic transmission was authorized by the stockholder. If it is determined that such telegrams, cablegrams or other electronic transmissions are valid, the inspectors or, if there are no inspectors, such other persons making that determination shall specify the information upon which they relied. Any copy, facsimile telecommunication or other reliable reproduction of the writing or transmission created pursuant to this Section 11 may be substituted or used in lieu of the original writing or transmission for any and all purposes for which the original writing or transmission could be used, provided that such copy, facsimile telecommunication or other reproduction shall be a complete reproduction of the entire original writing or transmission.

Section 12. INSPECTORS OF ELECTION.

(a) Appointment of Inspectors. In advance of any meeting of the stockholders, the Board shall appoint inspectors of election to act at such meeting and any adjournment thereof. If inspectors of election are not so appointed, or if any persons so appointed fail to appear or refuse to act, the Chair of the Board presiding at any such meeting may, and on the request of any stockholder or stockholder's proxy shall, make such appointment at the meeting. The number of inspectors shall be either one or three. If appointed at a meeting on the request of one or more stockholders' proxies, the majority of shares present shall determine whether one or three inspectors are to be appointed.

(b) Duties of Inspectors. The duties of such inspectors shall include: determining the number of shares outstanding and the voting power of each; determining the shares represented at the meeting; determining the existence of a quorum; determining the authenticity, validity and effect of proxies; receiving votes, ballots or consents; hearing and determining all challenges and questions in any way arising in connection with the right to vote; counting and tabulating all votes or consents; determining when the polls shall close; determining the result; and doing such acts as may be proper to conduct the election or vote with fairness to all stockholders. If there are three inspectors, the decision, act or certificate of a majority is in all respects the decision, act or certificate of all.

Section 13. CONDUCT OF MEETING.

The Chair of the Board shall preside at all meetings of the stockholders. The Chair shall conduct each such meeting in a businesslike and fair manner, but shall not be

obligated to follow any technical, formal or parliamentary rules or principles of procedure. The Chair's rulings on procedural matters shall be conclusive and binding on all stockholders, unless at the time of a ruling a request for a vote is made to the stockholders holding shares entitled to vote and which are represented in person or by proxy at the meeting, in which case the decision of a majority of such shares shall be conclusive and binding on all stockholders. Without limiting the generality of the foregoing, the Chair shall have all of the powers usually vested in the chair of a meeting of stockholders.

Section 14. LIST OF STOCKHOLDERS ENTITLED TO VOTE.

The Secretary of the corporation shall prepare and make, at least 10 days before every meeting of the stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least 10 days prior to the meeting, either at a place within the city where the meeting is to be held, which place shall be specified in the notice of the meeting or, if not so specified, at the place where the meeting is to be held. The list shall also be produced and kept at the time and place of the meeting during the whole time thereof and may be inspected by any stockholder who is present. Upon the willful neglect or refusal of the directors to produce such a list at any meeting for the election of directors, such directors shall be ineligible for election to any office at such meeting. Except as otherwise provided by law, the stock ledger shall be the only evidence as to who are the stockholders entitled to examine the stock ledger, the list of stockholders or the books of the corporation, or to vote in person or by proxy at any meeting of the stockholders.

Section 15. CONSENT OF STOCKHOLDERS IN LIEU OF MEETING.

(a) No action that is required or permitted to be taken by the stockholders of the corporation at any annual or special meeting of the stockholders may be effected by written consent of the stockholders in lieu of a meeting of the stockholders, unless the action to be effected by written consent of the stockholders and the taking of such action by such written consent have expressly been approved in advance by the Board. Any such approved action may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted and shall be delivered to the corporation by delivery to its registered office in Delaware, its principal place of business, or an officer or agent of the corporation having custody of the book in which proceedings of meetings of the stockholders are recorded.

(b) In order that the corporation may determine the stockholders entitled to consent to corporate action in writing without a meeting, the Board may fix a record date, which



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record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board, and which date shall not be more than 30 days after the date upon which the resolution fixing the record date is adopted by the Board. If no record date has been fixed by the Board, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting shall be at the close of business on the date on which the Board adopts the resolution taking such prior action.

(c) The corporation may retain independent inspectors of elections for the purposes of performing a ministerial review of the validity of consents and any revocations thereof.

(d) Every written consent shall bear the date of signature of each stockholder who signs the consent and no written consent shall be effective to take the corporate action referred to therein unless, within 60 days of the date the earliest dated consent is delivered to the corporation, a written consent or consents signed by a sufficient number of holders to take action are delivered to the corporation by delivery to its registered office in Delaware, its principal place of business, or an officer or agent of the corporation having custody of the book in which proceedings of meetings of the stockholders are recorded. Delivery made to the corporation's registered office shall be made by hand or by certified or registered mail, return receipt requested. The Board may also establish such other procedures relating to the consents as it deems appropriate.

(e) The corporation shall give prompt notice to the stockholders of the results of any consent solicitation or the taking of corporate action without a meeting by less than unanimous written consent.

(f) This Section 15 shall in no way impair or diminish the right of any shareholder, director or officer to contest the validity of any consent or revocation thereof, or to take any other action with respect thereto.

### ARTICLE III. DIRECTORS.

#### Section 1. POWERS.

Subject to limitations of the Certificate of Incorporation of the corporation, of these bylaws and of the General Corporation Law of the State of Delaware relating to action required to be approved by the stockholders or by the outstanding shares, the business and affairs of the corporation shall be managed by or under the direction of the Board and it shall have the final authority in matters of strategy and policy matters for the corporation.

The Board may delegate management duties for the operation of the business of the corporation to those persons to whom authority is properly delegated by the Board, including officers of the company, provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board. Without prejudice to such general powers, but subject to the same limitations, it is hereby expressly declared that the Board shall have the following powers in addition to the other powers

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enumerated in these bylaws:

(a) To select and remove all the other officers (in accordance with the provisions of these bylaws), agents and employees of the corporation; prescribe the powers and duties for them as may not be inconsistent with law, the Certificate of Incorporation of the corporation or these bylaws; fix their compensation and require from them an affidavit providing for the good faith exercise of their duties only in the best interests of the corporation.

(b) To conduct, manage and control the affairs and business of the corporation and to make such rules and regulations therefor not inconsistent with law, the Certificate of Incorporation of the corporation or these bylaws, as they may deem best.

(c) To adopt, alter, amend and repeal these bylaws from time to time as they may deem best.

(d) To adopt, make and use a corporate seal, and to prescribe the forms of certificates of stock, and to alter the form of such seal and of such certificates from time to time as they may deem best.

(e) To authorize the issuance of shares of stock of the corporation from time to time, upon such terms and for such consideration as may be lawful.

(f) To borrow money and incur indebtedness for the purposes of the corporation, and to cause to be executed and delivered, in the corporate name, promissory notes, bonds, debentures, deeds of trust, mortgages, pledges, hypothecations or other evidences of debt and securities therefor.

Section 2. NUMBER OF DIRECTORS.

The authorized number of directors shall be as set forth in the Certificate of Incorporation of the corporation. The Board shall fix the exact number of directors by resolution duly adopted by the Board.

Section 3. NOMINATION, ELECTION, QUALIFICATION AND TERM OF OFFICE.

(a) Eligibility for Election as Director. Only persons who are nominated by, or at the direction of the Board or the Chair of the Board, or by a stockholder who has given timely written notice to the Secretary of the corporation in accordance with Section 3 of Article II of these bylaws, will be eligible for election as directors of the corporation.

(b) Meetings at which Directors May Be Elected The directors shall be elected at each annual meeting of the stockholders, but if any such annual meeting is not held or the directors are not elected thereat, the directors may be elected at any special meeting of the stockholders called for that purpose.

(c) Classes of the Board of Directors. The Board shall be divided into three

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classes in accordance with the provisions of the Certificate of Incorporation of the corporation.

(d) Qualified Directors. For a person to be qualified to serve as a director of the corporation, such person need not be an employee or stockholder of the corporation during his or her directorship.

(e) Length of Term for Directors. At each annual meeting of the stockholders beginning with the first annual meeting of the stockholders, the successors of the class of directors whose term expires at that meeting shall be elected to hold office for a term expiring at the annual meeting of stockholders to be held in the third year following the year of their election, with each director in each class to hold office until his or her successor is duly elected and qualified or until his or her earlier death, resignation or removal.

(f) Removal of Directors. Any director, or the entire Board, may be removed only for cause, by the affirmative vote of a majority of the shares then entitled to vote at the election of directors.

#### Section 4. VACANCIES.

Any director may resign, to be effective upon giving written notice to the Board or to the Chair of the Board, President or Secretary of the corporation, unless the notice specifies a later time for the effectiveness of such resignation. If the resignation is effective at a future time, a successor may be elected to take office when the resignation becomes effective.

Any newly-created directorship resulting from an increase in the authorized number of directors or any vacancies in the Board occurring by reason of death, resignation, retirement, disqualification or removal may be filled by a majority of the remaining directors, though less than a quorum, or by a sole remaining director, and each director so elected shall hold office until the next annual meeting at which the class of which he is a member becomes subject to re-election and until such director's successor has been elected and qualified.

A vacancy or vacancies in the Board shall be deemed to exist in case of the death, resignation or removal of any director, or if the authorized number of directors is increased, or if the stockholders fail, at any annual or special meeting of the stockholders at which any director or directors are elected, to elect the full authorized number of directors to be voted for at that meeting.

The stockholders may elect a director or directors at any time to fill any vacancy or vacancies not filled by the directors.

No reduction of the authorized number of directors shall have the effect of removing any director prior to the expiration of the director's term of office.

#### Section 5. PLACE OF MEETING.

Regular or special meetings of the Board shall be held at any place within or without the State of Delaware which has been designated from time to time by the Board. In the

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absence of such designation, regular meetings shall be held at the principal executive office of the corporation.

Section 6. REGULAR MEETINGS.

Following each annual meeting of the stockholders, the Board shall hold a regular meeting for the purpose of organization, election of officers and the transaction of other business.

Other regular meetings of the Board shall be held without call on such dates and at such times as may be fixed by the Board. Call and notice of all regular meetings of the Board are hereby dispensed with.

Section 7. SPECIAL MEETINGS.

Special meetings of the Board for any purpose or purposes may be called at any time by the Chair, the Chief Executive Officer, any Vice Chair, the President, the Secretary of the corporation or by any two directors.

Special meetings of the Board shall be held upon four days' written notice or at least twenty-four hours' notice given personally or by telephone, including a voice messaging system or other system or technology designed to record and communicate messages, telegraph, facsimile, electronic mail or other electronic means of communication. Any written notice shall be addressed or delivered to each director at such director's address as it is shown upon the records of the corporation or as may have been given to the corporation by the director for purposes of notice or, if such address is not shown on such records or is not readily ascertainable, at the place in which the meetings of the directors are regularly held.

Notice by mail shall be deemed to have been given at the time a written notice is deposited in the United States mails, postage prepaid. Any other written notice shall be deemed to have been given at the time it is personally delivered to the recipient or is delivered to a common carrier for transmission, or actually transmitted by the person giving the notice by electronic means to the recipient. Oral notice shall be deemed to have been given at the time it is communicated, in person or by telephone or wireless, to the recipient or to a person at the office of the recipient who the person giving the notice has reason to believe will promptly communicate it to the recipient.

Section 8. QUORUM.

A majority of the whole Board constitutes a quorum of the Board for the transaction of business, except to adjourn as provided in Section 11 of this Article III. Every act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present shall be regarded as the act of the Board, unless a greater number is required by law or by the Certificate of Incorporation of the corporation. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for such meeting.

Section 9. PARTICIPATION IN MEETINGS BY COMMUNICATIONS EQUIPMENT.

(a) Participation by Conference Telephone. Members of the Board, or any committee thereof, may participate in a meeting through the use of conference telephones. Participation in such a meeting shall constitute presence in person at that meeting as long as all members participating in such meeting are able to hear one another.

(b) Participation by Electronic Video Screen Equipment or Other Similar Communications Equipment. Members of the Board may participate in a meeting through the use of electronic video screen equipment or other similar communications equipment. Participation in such a meeting shall constitute presence in person at that meeting by a member of the Board if all of the following apply:

- (i) each member participating in the meeting can communicate with all of the other members concurrently;
- (ii) each member is provided the means of participating in all matters before the Board, including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the corporation; and
- (iii) the corporation adopts and implements some means of verifying both of the following: (x) a person participating in the meeting is a director or other person entitled to participate in the Board meeting, and (y) all actions of, or votes by, the Board are taken or cast only by the directors and not by persons who are not directors.

Section 10. WAIVER OF NOTICE.

Notice of a meeting need not be given to any director who signs a waiver of notice or a consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meeting.

Section 11. ADJOURNMENT.

A majority of the directors present, whether or not a quorum is present, may adjourn any directors' meeting to another time and place. Notice of the time and place of an adjourned meeting need not be given to absent directors if the time and place has been fixed at the meeting adjourned, except as provided in the next sentence. If the meeting is adjourned for more than 24 hours, notice of any adjournment to another time or place shall be given prior to the time of the commencement of the adjourned meeting to the directors who were not present at the time of the adjournment.

Section 12. FEES AND COMPENSATION.

Directors and members of committees may receive such compensation, if any, for their services, and such reimbursement for expenses, as may be fixed or determined by the

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Board. The corporation shall not compensate directors or committee members who are also employees of the corporation.

Section 13. ACTION WITHOUT MEETING.

Any action required or permitted to be taken by the Board may be taken without a meeting if all members of the Board shall consent in writing to such action. Such consent or consents shall have the same effect as a unanimous vote of the Board and shall be filed with the minutes of the proceedings of the Board.

Section 14. RIGHTS OF INSPECTION.

Every director shall have the right at any reasonable time to examine the corporation's stock ledger, a list of the stockholders of the corporation and the corporation's other books and records for any purpose reasonably related to such director's position as a director and to make copies or extracts therefrom. Such inspection by a director may be made in person or by such director's agent or attorney.

Section 15. COMMITTEES.

The Board may appoint one or more committees, each consisting of one or more directors, and delegate to such committees any of the powers and authority of the Board, except no such committee shall have power or authority in reference to the following:

(a) Approving, adopting or recommending to the stockholders any action or matter expressly required by the General Corporation Law of the State of Delaware to be submitted to the stockholders for approval; or

(b) Adopting, altering, amending or repealing these bylaws or any of them.

Any such committee must be designated, and the members or alternate members thereof appointed, by resolution adopted by a majority of the whole Board and any such committee may be designated an Executive Committee or by such other name as the Board shall specify. Alternate members of a committee may replace any absent member at any meeting of the committee. The Board shall have the power to prescribe the manner in which proceedings of any such committee shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless the Board or such committee shall otherwise provide, the regular and special meetings and other action of any such committee shall be governed by the provisions of this Article III applicable to meetings and actions of the Board. Minutes shall be kept of each meeting of each committee.

Section 16. STANDING COMMITTEES.

The Board may have the following standing committees: Audit, Executive, Nominating and Compensation and Personnel.

(a) Audit Committee. The Audit Committee shall be responsible for reviewing the activities of the corporation to ensure that such activities are being conducted within the boundaries of corporate policy and appropriate regulatory and legal requirements and for ensuring the integrity of financial information supplied to the stockholders. The Audit Committee also shall make recommendations to the Board after consultation with the Chief Financial Officer as to the selection of independent public accountants to examine the consolidated financial statements of the corporation and its subsidiaries. The Audit Committee also shall discuss with the independent public accountants the scope of their examination, recommend supplemental audit reviews or audit steps as deemed desirable, and review the accounting policies of the corporation. The Audit Committee also shall be available to receive reports, suggestions, questions and recommendations from the independent public accountants, the Chief Financial Officer and the General Counsel. It also shall confer with those parties in order to assure the sufficiency and effectiveness of the programs being followed by corporate officers in the area of compliance with the law and conflicts of interest.

(b) Executive Committee of the Board. The Executive Committee of the Board shall have all of the authority of the Board, except with respect to the approval of any action which requires stockholder approval under the General Corporation Law of the State of Delaware.

(c) Nominating Committee. The Nominating Committee shall recommend to the Board criteria for the selection of candidates to serve on the Board, evaluate all proposed candidates, recommend to the Board nominees to fill vacancies on the Board, and prior to the annual meeting of the stockholders recommend to the Board a slate of nominees for election to the Board by the stockholders of the Corporation at the annual meeting. In carrying out its duties, the committee shall seek possible candidates for the Board and otherwise aid in attracting qualified candidates to the Board. The committee shall be available to the Chair or President and other members of the Board for consultation concerning candidates for the Board. The committee shall periodically review, assess and make recommendations to the Board with regard to the size and composition of the Board. The committee shall have all additional powers necessary to carry out its responsibilities and such other duties as may be assigned by the Board from time to time.

The Nominating Committee also shall have the authority to administer a self-appraisal process by members of the Board and make a report thereon to the Board, from time to time, or as designated by the Board.

(d) Compensation and Personnel Committee. The Compensation and Personnel Committee shall have the responsibility for the compensation of the senior executives of the Corporation including salaries and benefits. In carrying out its duties, the committee shall review and approve overall executive compensation programs which are market competitive for the officers of the Corporation, and shall review the specific salaries of Executive Vice Presidents and senior vice presidents subject to the ratification of the salary programs established for the Chair and the Chief Executive Officer of the Corporation by the Board acting as a whole. The committee shall also review and make recommendations to the Board with respect to the Corporation's overall compensation program for directors and officers, including salaries,

employee benefit plans, stock options granted, equity incentive plans and payment of bonuses. The committee shall also have all additional powers necessary to carry out its responsibilities and such other duties as may be assigned by the Board from time to time.

#### ARTICLE IV. OFFICERS.

##### Section 1. OFFICERS.

The senior officers of the corporation shall be a Chair of the Board, a Chief Executive Officer, a Chief Operating Officer, a Chief Financial Officer and a Secretary. The corporation may also have, at the discretion of the Board, a President, a Chief Administrative Officer, one or more Vice Chairs of the Board, one or more Vice Presidents, one or more Assistant Secretaries, Treasurers, Assistant Treasurers, and such other officers as may be elected or appointed in accordance with the provisions of Section 2 of this Article IV.

##### Section 2. ELECTION OR APPOINTMENT.

The senior officers of the corporation shall be elected by the Board on an annual basis. In addition, other officers may be elected or appointed in accordance with the provisions of Section 5 of this Article IV. All officers, whether elected or appointed, shall be chosen annually by, and shall serve at the pleasure of, the Board, and shall hold their respective offices until their resignation, removal or other disqualification from service, or until their respective successors shall be elected.

The Board may elect, and may empower the Chair or the Chief Executive Officer to appoint, such other subordinate officers as the business of the corporation may require, each of whom shall hold office for such period and shall have such authority and perform such duties as are provided in these bylaws or as the Board may from time to time determine.

##### Section 3. ELECTED SENIOR OFFICERS.

The elected senior officers of the corporation shall have those positions and those duties named below in this Section 3. Further, in each case, the named officer also shall have the general powers and duties of governance or management usually vested in that office and such other powers and duties as may be prescribed by the Board.

In the case of the Chair of the Board, the Chair shall, if present, preside at all meetings of the Board and shall preside at all meetings of the stockholders. The Chair of the Board has the general powers and duties of management usually vested in the office of chair of the board of a corporation and such other powers and duties as may be prescribed by the Board. The Chief Executive Officer shall be the senior executive officer of the corporation. The President has the general powers and duties of management of the corporation. The Chief Operating Officer shall have the general powers and duties to carry out general administrative and financial management of the corporation. The Board also may elect one or more Vice Chairs of the Board who, in the absence of the Chair, will assume the duties of that position.

In the absence or disability of the Chief Executive Officer, the



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President, the Chief Operating Officer, the Vice Chair, or any Executive Vice President designated by the Board, shall perform all the duties of the Chief Executive Officer and, when so acting, shall have all the powers of, and be subject to all the restrictions upon, the Chief Executive Officer.

The Secretary shall keep or cause to be kept, at the principal executive office and such other place as the Board may order, a book of minutes of all meetings of stockholders, the Board and its committees, with the time and place of holding, whether regular or special, and if special, how authorized, the notice thereof given, the names of those present at Board and committee meetings, the number of shares present or represented at stockholders' meetings, and the proceedings thereof. The Secretary shall keep, or cause to be kept, a copy of these bylaws of the corporation at the principal executive office or such other place as the Board may order.

The Secretary shall keep, or cause to be kept, at the principal executive office or at the office of the corporation's transfer agent or registrar, if one has been appointed, a share register, or a duplicate share register, showing the names of the stockholders and their addresses, the number and classes of shares held by each, the number and date of certificates issued for the same, and the number and date of cancellation of every certificate surrendered for cancellation.

The Secretary shall give, or cause to be given, notice of all meetings of the stockholders and of the Board and any committees thereof required by these bylaws or by law to be given, shall keep the seal of the corporation in safe custody, and shall have such other powers and perform such other duties as may be prescribed by the Board.

The Chief Financial Officer shall keep and maintain, or cause to be kept and maintained, adequate and correct accounts of the properties and business transactions of the corporation, and shall send or cause to be sent to the stockholders of the corporation such financial statements and reports as are by law or these bylaws required to be sent to them. The books of account shall at all times be open to inspection by any director.

The Chief Financial Officer shall deposit all moneys and other valuables in the name and to the credit of the corporation with such depositories as may be designated by the Board. The Chief Financial Officer shall disburse the funds of the corporation as may be ordered by the Board, shall render to the Chair of the Board, the Chief Executive Officer, the President and the directors, whenever they request it, an account of all transactions as Chief Financial Officer and of the financial condition of the corporation, and shall have such other powers and perform such other duties as may be prescribed by the Board.

#### Section 4. REMOVAL AND RESIGNATION.

Any officer elected by the Board may be removed only by the Board, either with or without cause, at any time. In the case of an officer not elected by the Board, such an officer may be removed by another officer upon whom such power of removal may be conferred by the Board. Any removal shall be without prejudice to the rights, if any, of the officer under any contract of employment of the officer.

Any officer may resign at any time by giving written notice to the corporation,

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subject to the rights of the corporation under any contract between the corporation and the officer. Any such resignation shall take effect at the date of the receipt of such notice or at any later time specified therein and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

Section 5. VACANCIES.

A vacancy in any office because of death, resignation, removal, disqualification or any other cause shall be filled in the manner prescribed in these bylaws for regular election or appointment to such office.

ARTICLE V. OTHER PROVISIONS.

Section 1. INSPECTION OF CORPORATE RECORDS.

Any stockholder of record, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation's stock ledger, a list of its stockholders, and its other books and records and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In every instance where an attorney or other agent is the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing that authorizes the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the corporation at its registered office in the State of Delaware or at its principal executive office.

Section 2. INSPECTION OF BYLAWS.

The corporation shall keep in its principal executive office in the State of California, or if its principal executive office is not in such State at its principal business office in such State, the original or a copy of these bylaws as amended to date, which shall be open to inspection by stockholders at all reasonable times during office hours. If the principal executive office of the corporation is located outside the State of California and the corporation has no principal business office in such state, it shall upon the written request of any stockholder furnish to such stockholder a copy of these bylaws as amended to date.

Section 3. ENDORSEMENT OF DOCUMENTS; CONTRACTS.

Subject to the provisions of applicable law, any note, mortgage, evidence of indebtedness, contract, share certificate, conveyance or other instrument in writing and any assignment or endorsements thereat executed or entered into between the corporation and any other person, when signed by the Chair of the Board, the Chief Executive Officer, the Chief Operating Officer, the President, the Vice Chair, an Executive Vice President, or any senior vice president and the Secretary, any Assistant Secretary, the Chief Financial Officer or any Assistant Treasurer of the corporation shall be valid and binding on the corporation in the absence of actual knowledge on the part of the other person that the signing officers had no authority to

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execute the same. Any such instruments may be signed by any other person or persons and in such manner as from time to time shall be determined by the Board, and, unless so authorized by the Board, no officer, agent or employee shall have any power or authority to bind the corporation by any contract or engagement or to pledge its credit or to render it liable for any purpose or amount.

Section 4. CERTIFICATES OF STOCK.

Every holder of shares of the corporation shall be entitled to have a certificate signed in the name of the corporation by the Chair or Vice Chair of the Board, or the Chief Executive Officer or the President, and by the Chief Financial Officer or an Assistant Treasurer or the Secretary or an Assistant Secretary, certifying the number of shares and the class or series of shares owned by the stockholder. Any or all of the signatures on the certificate may be facsimile. If any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the corporation with the same effect as if such person were an officer, transfer agent or registrar at the date of issue.

Certificates for shares may be issued prior to full payment under such restrictions and for such purposes as the Board may provide; provided, however, that on any certificate issued to represent any partly paid shares, the total amount of the consideration to be paid therefor and the amount paid thereon shall be stated.

Except as provided in this Section 4, no new certificate for shares shall be issued in lieu of an old one unless the latter is surrendered and cancelled at the same time. The Board may, however, if any certificate for shares is alleged to have been lost, stolen or destroyed, authorize the issuance of a new certificate in lieu thereof, and the corporation may require that the corporation be given a bond or other adequate security sufficient to indemnify it against any claim that may be made against it (including expense or liability) on account of the alleged loss, theft or destruction of such certificate or the issuance of such new certificate.

The Company shall not register the transfer of any securities issued in reliance on Regulation S promulgated under the Securities Act of 1933, as amended, unless the Company has received such assurances as it may reasonably request that the transfer of such securities was made in accordance with the provisions of such Regulation S.

Section 5. REPRESENTATION OF SHARES OF OTHER CORPORATIONS.

The Chair of the Board or any other officer or officers authorized by the Board or the Chair of the Board are each authorized to vote, represent and exercise on behalf of the corporation all rights incident to any and all shares of any other corporation or corporations standing in the name of the corporation. The authority herein granted may be exercised either by any such officer in person or by any other person authorized so to do by proxy or power of attorney duly executed by said officer.

Section 6. STOCK PURCHASE PLANS.

The corporation may adopt and carry out a stock purchase plan or agreement or stock option plan or agreement providing for the issue and sale for such consideration as may be fixed of its unissued shares, or of issued shares acquired or to be acquired, to one or more of the employees or directors of the corporation or of a subsidiary or to a trustee on their behalf and for the payment for such shares in installments or at one time, and may provide for aiding any such persons in paying for such shares by compensation for services rendered, promissory notes or otherwise.

Any such stock purchase plan or agreement or stock option plan or agreement may include, among other features, the fixing of eligibility for participation therein, the class and price of shares to be issued or sold under the plan or agreement, the number of shares which may be subscribed for, the method of payment therefor, the reservation of title until full payment therefor, the effect of the termination of employment, an option or obligation on the part of the corporation to repurchase the shares upon termination of employment, restrictions upon transfer of the shares, the time limits of and termination of the plan, and any other matters, not in violation of applicable law, as may be included in the plan as approved or authorized by the Board or any committee of the Board.

Section 7. ELECTION OF FISCAL YEAR.

Upon the election of the Board, the Board may authorize the change of the current Fiscal Year of the Corporation to begin on January 1 of each year and end on December 31 of each subsequent year.

Section 8. CONSTRUCTION AND DEFINITIONS.

Unless the context otherwise requires, the general provisions, rules of construction and definitions contained in the General Corporation Law of the State of Delaware shall govern the construction of these bylaws.

Section 9. AMENDMENTS.

These bylaws may be altered, amended or repealed either by the approval of 66 and 2/3 percent of the outstanding shares of the corporation entitled to vote on such action or, subject to the provisions of the General Corporation Law of the State of Delaware, by the approval of the Board.

Section 10. LOANS TO OFFICERS AND OTHER EMPLOYEES.

The corporation may lend money to, guarantee any obligation of or otherwise assist any officer or other employee of the corporation or of any of its subsidiaries, including any officer or employee who is director of the corporation or any of its subsidiaries, whenever, in the judgment of the Board, such loan, guaranty or assistance may reasonably be expected to benefit the corporation. The loan, guaranty or other assistance may be with or without interest and may be unsecured or secured in such manner as the Board shall approve, including, without

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limitation, a pledge of shares of stock of the corporation.

Section 11. EMERGENCY BYLAWS.

(a) The Board may adopt emergency bylaws, subject to repeal or change by action of the stockholders, which shall, notwithstanding any different provision in the General Corporation Law of the State of Delaware, the Certificate of Incorporation of the corporation or these bylaws, be operative during any emergency resulting from an attack on the United States or on a locality in which the corporation conducts its business or customarily holds meetings of the Board or its stockholders, or during any nuclear or atomic disaster, or during the existence of any catastrophe, or other similar emergency condition, as a result of which a quorum of the Board or a standing committee thereof cannot readily be convened for action. The emergency bylaws may make any provision that may be practical and necessary for the circumstances of the emergency, including provisions that:

(i) A meeting of the Board or a committee thereof may be called by any officer or director in such manner and under such conditions as shall be prescribed in the emergency bylaws;

(ii) The director or directors in attendance at the meeting, or any greater number fixed by the emergency bylaws, shall constitute a quorum; and

(iii) The officers or other persons designated on a list approved by the Board before the emergency, all in such order of priority and subject to such conditions and for such period of time (not longer than reasonably necessary after the termination of the emergency) as may be provided in the emergency bylaws or in the resolution approving the list, shall, to the extent required to provide a quorum at any meeting of the Board, be deemed directors for such meeting.

(b) The Board, either before or during any such emergency, may provide, and from time to time modify, lines of succession in the event that during such emergency any or all officers or agents of the corporation shall for any reason be rendered incapable of discharging their duties.

(c) The Board, either before or during any such emergency, may, effective in the emergency, change the head office or designate several alternative head offices or regional offices, or authorize the officers so to do.

(d) No officer, director or employee acting in accordance with any emergency bylaws shall be liable except for willful misconduct.

(e) To the extent not inconsistent with any emergency bylaws so adopted, these bylaws shall remain in effect during any emergency and upon its termination the emergency bylaws shall cease to be operative.

(f) Unless otherwise provided in emergency bylaws, notice of any meeting of

the Board during such an emergency may be given only to such of the directors as it may be feasible to reach at the time and by such means as may be feasible at the time, including publication or radio.

(g) To the extent required to constitute a quorum at any meeting of the Board during such an emergency, the officers of the corporation who are present shall, unless otherwise provided in emergency bylaws, be deemed, in order of rank and within the same rank in order of seniority, directors for such meeting.

(h) Nothing contained in this Section 11 shall be deemed exclusive of any other provisions for emergency powers consistent with the General Corporation Law of the State of Delaware.

#### ARTICLE VI. INDEMNIFICATION.

##### Section 1. RIGHT TO INDEMNIFICATION.

The corporation shall indemnify and hold harmless, to the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, any person (an "Indemnitee") who was or is made or is threatened to be made a party or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a "proceeding"), by reason of the fact that he, or a person for whom he is the legal representative, is or was a director or officer of the corporation or, while a director or officer of the corporation, is or was serving at the written request of the corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust, enterprise or non-profit entity, including service with respect to employee benefit plans, against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such Indemnitee. Notwithstanding the preceding sentence, except as otherwise provided in Section 3 of this Article VI, the corporation shall be required to indemnify an Indemnitee in connection with a proceeding (or part thereof) commenced by such Indemnitee only if the commencement of such proceeding (or part thereof) by the Indemnitee was authorized by the Board.

##### Section 2. PREPAYMENT OF EXPENSES.

The corporation shall pay the expenses (including attorneys' fees) incurred by an Indemnitee in defending any proceeding in advance of its final disposition, provided, however, that, to the extent required by law, such payment of expenses in advance of the final disposition of the proceeding shall be made only upon receipt of an undertaking by the Indemnitee to repay all amounts advanced if it should be ultimately determined that the Indemnitee is not entitled to be indemnified under this Article VI or otherwise.

##### Section 3. CLAIMS.

If a claim for indemnification of advancement of expenses under this Article VI is not paid in full within 60 days after a written claim therefor by the Indemnitee has been received by the corporation, the Indemnitee may file suit to recover the unpaid amount of such claim and,

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if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action the corporation shall have the burden of proving that the Indemnitee is not entitled to the requested indemnification or advancement of expenses under applicable law.

Section 4. NON-EXCLUSIVITY OF RIGHTS.

The rights conferred on any Indemnitee by this Article VI shall not be exclusive of any other rights which such Indemnitee may have or hereafter acquire under any statute, provision of the Certificate of Incorporation of the corporation, these bylaws, agreement, vote of the stockholders or disinterested directors or otherwise.

Section 5. OTHER SOURCES.

The corporation's obligation, if any, to indemnify or to advance expenses to any Indemnitee who was or is serving at its request as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, enterprise or nonprofit entity shall be reduced by any amount such Indemnitee may collect as indemnification or advancement of expenses from such other corporation, partnership, joint venture, trust, enterprise or nonprofit entity.

Section 6. AMENDMENT OR REPEAL.

Any repeal or modification of the foregoing provisions of this Article VI shall not adversely affect any right or protection hereunder of any Indemnitee in respect of any act or omission occurring prior to the time of such repeal or modification.

Section 7. OTHER INDEMNIFICATION AND PREPAYMENT OF EXPENSES.

This Article VI shall not limit the right of the corporation, to the extent and in the manner permitted by law, to indemnify and to advance expenses to persons other than Indemnitees when and as authorized by appropriate corporate action.

**CREDIT AGREEMENT**

**DATED AS OF FEBRUARY 14, 2003**

**AMONG**

**KORN/FERRY INTERNATIONAL,**

**as Borrower,**

**THE LENDERS FROM TIME TO TIME PARTY HERETO,**

**as Lenders,**

**WELLS FARGO BANK, NATIONAL ASSOCIATION,**

**as Administrative Agent,**

**and**

**WELLS FARGO BANK, NATIONAL ASSOCIATION,**

**as Arranger**

Credit Agreement



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**KORN/FERRY INTERNATIONAL**

**CREDIT AGREEMENT**

This **CREDIT AGREEMENT** is dated as of February 14, 2003 and entered into by and among **KORN/FERRY INTERNATIONAL**, a Delaware corporation ("**Company**"), **THE FINANCIAL INSTITUTIONS FROM TIME TO TIME PARTY HERETO** (each individually referred to herein as a "**Lender**" and collectively as "**Lenders**"), and **WELLS FARGO BANK, NATIONAL ASSOCIATION ("Wells Fargo")**, as administrative agent for Lenders (in such capacity, "**Administrative Agent**").

**RECITALS**

**WHEREAS**, Lenders, at the request of Company, have agreed to extend certain credit facilities to Company, the proceeds of which will be used to provide financing for working capital and other general corporate purposes of Company and its Subsidiaries;

**WHEREAS**, Company desires to secure all of the Obligations hereunder and under the other Loan Documents by granting to Administrative Agent, on behalf of Lenders, a first priority Lien on substantially all of its real, personal and mixed property, including a pledge of certain capital stock of its Domestic Significant Subsidiaries and 66% of the capital stock of its Foreign Significant Subsidiaries; and

**WHEREAS**, all of the Domestic Significant Subsidiaries of Company have agreed to guarantee the Obligations hereunder and under the other Loan Documents and to secure their guaranties by granting to Administrative Agent, on behalf of Lenders, a first priority Lien on substantially all of their real, personal and mixed property, including a pledge of certain capital stock of their Domestic Significant Subsidiaries and 66% of the capital stock of their Foreign Significant Subsidiaries:

**NOW, THEREFORE**, in consideration of the premises and the agreements, provisions and covenants herein contained, Company, Lenders and Administrative Agent agree as follows:

**Section 1. DEFINITIONS**

**1.1 Certain Defined Terms.**

The following terms used in this Agreement shall have the following meanings:

"**Account**" means, with respect to any Person, all present and future rights of such Person to payment for goods sold or leased or for services rendered (except those evidenced by instruments or chattel paper), whether now existing or hereafter arising and wherever arising, and whether or not they have been earned by performance.

Credit Agreement

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“**Administrative Agent**” has the meaning assigned to that term in the introduction to this Agreement and also means and includes any successor Administrative Agent appointed pursuant to subsection 9.5A.

“**Affected Lender**” has the meaning assigned to that term in subsection 2.6C.

“**Affected Loans**” has the meaning assigned to that term in subsection 2.6C.

“**Affiliate**”, as applied to any Person, means any other Person directly or indirectly controlling, controlled by, or under common control with, that Person. For the purposes of this definition, “control” (including, with correlative meanings, the terms “controlling”, “controlled by” and “under common control with”), as applied to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of that Person, whether through the ownership of voting securities or by contract or otherwise.

“**Agreement**” means this Credit Agreement dated as of February 14, 2003, as it may be amended, supplemented or otherwise modified from time to time.

“**Amortization Adjustment**” means, as of the last day of any Fiscal Quarter, an amount equal to 20.00% of the average Revolving Loan Commitment for the consecutive four Fiscal Quarters ending on such day (or, to the extent that the Closing Date occurs during such period, for the period since the Closing Date).

“**Approved Fund**” means a Fund that is administered or managed by (i) a Lender, (ii) an Affiliate of a Lender or (iii) an entity or an Affiliate of an entity that administers or manages a Lender.

“**Asset Sale**” means the sale by Company or any of its Subsidiaries to any Person other than Company or any of its wholly-owned Subsidiaries of (i) any of the stock of any of Company’s Subsidiaries, (ii) substantially all of the assets of any division or line of business of Company or any of its Subsidiaries, or (iii) any other assets (whether tangible or intangible) of Company or any of its Subsidiaries (other than (a) inventory sold in the ordinary course of business, (b) sales, assignments, transfers or dispositions of accounts in the ordinary course of business for purposes of collection and (c) any such other assets to the extent that the aggregate value of such assets sold in any single transaction or related series of transactions is equal to \$1,000,000 or less).

“**Assignment Agreement**” means an Assignment Agreement in substantially the form of Exhibit VIII annexed hereto.

“**Bankruptcy Code**” means Title 11 of the United States Code entitled “Bankruptcy”, as now and hereafter in effect, or any successor statute.

“**Base Rate**” means, at any time, the higher of (i) the Prime Rate or (ii) the rate which is 1/2 of 1% in excess of the Federal Funds Effective Rate. Any change in the Base Rate due to a

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change in the Prime Rate or the Federal Funds Effective Rate shall be effective on the effective date of such change.

**“Base Rate Loans”** means Loans bearing interest at rates determined by reference to the Base Rate as provided in subsection 2.2A.

**“Borrowing Availability”** means, as of any date of determination, an amount equal to (i) the lesser of (a) the Revolving Loan Commitments then in effect and (b) the Borrowing Base then in effect minus (ii) the Total Utilization of Revolving Loan Commitments as of such date.

**“Borrowing Base”** means, as of any date of determination, an aggregate amount equal to 80% of Eligible Accounts Receivable; provided that Administrative Agent may, in its reasonable credit judgment based on its analysis of material changes arising after the date hereof in the value of Eligible Accounts Receivable, and on at least two Business Days’ prior notice to Company, revise from time to time the percentage of the value of any individual item of Eligible Accounts Receivable that shall be used in determining the Borrowing Base; provided, however, that Administrative Agent shall not increase the percentage of value of any individual item of Eligible Accounts Receivable to an amount in excess of that in effect on the Closing Date without the prior consent of the Requisite Lenders.

**“Borrowing Base Certificate”** means a certificate substantially in the form of Exhibit XI annexed hereto.

**“Business Day”** means (i) for all purposes other than as covered by clause (ii) below, any day excluding Saturday, Sunday and any day which is a legal holiday under the laws of the State of California or is a day on which banking institutions located in such state are authorized or required by law or other governmental action to close, and (ii) with respect to all notices, determinations, fundings and payments in connection with the Eurodollar Rate or any Eurodollar Rate Loans, any day that is a Business Day described in clause (i) above and that is also a day for trading by and between banks in Dollar deposits in the London interbank market.

**“Capital Lease”**, as applied to any Person, means any lease of any property (whether real, personal or mixed) by that Person as lessee that, in conformity with GAAP, is accounted for as a capital lease on the balance sheet of that Person.

**“Capital Stock”** means the capital stock or other equity interests of a Person.

**“Cash”** means money, currency or a credit balance in a Deposit Account.

**“Cash Equivalents”** means, as at any date of determination, (i) marketable securities (a) issued or directly and unconditionally guaranteed as to interest and principal by the United States Government or (b) issued by any agency of the United States the obligations of which are backed by the full faith and credit of the United States, in each case maturing within one year after such date; (ii) marketable direct obligations issued by any state of the United States of America or any political subdivision of any such state or any public instrumentality thereof, in each case maturing within one year after such date and having, at the time of the acquisition thereof, the



highest rating obtainable from either Standard & Poor's ("S&P") or Moody's Investors Service, Inc. ("Moody's"); (iii) commercial paper maturing no more than one year from the date of creation thereof and having, at the time of the acquisition thereof, a rating of at least A-1 from S&P or at least P-1 from Moody's; (iv) certificates of deposit or bankers' acceptances maturing within one year after such date and issued or accepted by any Lender or by any commercial bank organized under the laws of the United States of America or any state thereof or the District of Columbia that (a) is at least "adequately capitalized" (as defined in the regulations of its primary Federal banking regulator) and (b) has Tier 1 capital (as defined in such regulations) of not less than \$100,000,000; (v) shares of any money market mutual fund that (a) has at least 95% of its assets invested continuously in the types of investments referred to in clauses (i) and (ii) above, (b) has net assets of not less than \$500,000,000, and (c) has the highest rating obtainable from either S&P or Moody's; and (vi) other investments set forth on Schedule 1 annexed hereto.

**"Change in Control"** means any of the following: (i) any Person or group of Persons (other than Richard Ferry, either individually or as a trustee of any trust for which he has sole power to direct and control investments), shall have acquired beneficial ownership, directly or indirectly, of Securities of Company (or other Securities convertible into such Securities) representing 30% or more of the combined voting power of all Securities of Company entitled to vote in the election of members of the Governing Body of Company, other than Securities having such power only by reason of the happening of a contingency, (ii) either of the individuals serving, as of the Closing Date, as chairman of the board or chief executive officer of Company no longer hold these positions and their successors are not approved by a majority of the board of directors of Company, (iii) the occurrence of a change in the composition of the Governing Body of Company such that a majority of the members of any such Governing Body are not Continuing Members, (iv) the occurrence of any "Change of Control Event" as defined in either the Convertible Subordinated Notes or the Convertible Series A Preferred Stock, and (v) the occurrence of a "change of control" as defined in any document governing Indebtedness of Company or any of its Subsidiaries in excess of \$3,000,000 which gives the holders of such Indebtedness the right to accelerate or otherwise require payment of such Indebtedness prior to the maturity date thereof. As used herein, the term "beneficially own" or "beneficial ownership" shall have the meaning set forth in the Exchange Act and the rules and regulations promulgated thereunder.

**"Closing Date"** means the date on which the initial Loans are made.

**"Collateral"** means, collectively, all of the real, personal and mixed property (including Capital Stock) in which Liens are purported to be granted pursuant to the Collateral Documents as security for the Obligations.

**"Collateral Account"** has the meaning assigned to that term in the Security Agreement.

**"Collateral Documents"** means the Security Agreement, the Foreign Pledge Agreements and all other instruments or documents delivered by any Loan Party pursuant to this Agreement or any of the other Loan Documents in order to grant to Administrative Agent, on behalf of

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Lenders, a Lien on any real, personal or mixed property of that Loan Party as security for the Obligations.

**“Commitments”** means the commitments of Lenders to make Loans as set forth in subsection 2.1A and subsection 3.3.

**“Company”** has the meaning assigned to that term in the introduction to this Agreement.

**“Compliance Certificate”** means a certificate substantially in the form of Exhibit V annexed hereto.

**“Consolidated Capital Expenditures”** means, for any period, the sum of the aggregate of all expenditures (whether paid in cash or other consideration or accrued as a liability and including that portion of Capital Leases which is capitalized on the consolidated balance sheet of Company and its Subsidiaries) by Company and its Subsidiaries during that period that, in conformity with GAAP, are included in “additions to property, plant or equipment” or comparable items reflected in the consolidated statement of cash flows of Company and its Subsidiaries. For purposes of this definition, the purchase price of equipment that is purchased simultaneously with the trade-in of existing equipment or with insurance proceeds shall be included in Consolidated Capital Expenditures only to the extent of the gross amount of such purchase price less the credit granted by the seller of such equipment for the equipment being traded in at such time or the amount of such proceeds, as the case may be.

**“Consolidated Cash Interest Expense”** means, for any period, Consolidated Interest Expense for such period excluding, however, any interest expense not payable in Cash (including amortization of discount and amortization of debt issuance costs).

**“Consolidated Current Assets”** means, as at any date of determination, the sum of (i) current Cash and Cash Equivalents, plus (ii) trade Accounts, in each case of Company and its Subsidiaries on a consolidated basis.

**“Consolidated Current Liabilities”** means, as at any date of determination, the total liabilities of Company and its Subsidiaries on a consolidated basis which may properly be classified as current liabilities in conformity with GAAP, including the aggregate principal amount of all outstanding Revolving Loans.

**“Consolidated EBITDA”** means, for any period, the sum, without duplication, of the amounts for such period of (i) Consolidated Net Income, (ii) Consolidated Interest Expense, (iii) provisions for taxes based on income, (iv) total depreciation expense, (v) total amortization expense, (vi) a one-time restructuring charge not to exceed \$16,300,000 taken in the Fiscal Quarter ended October 31, 2002, and (vii) equity in earnings of Korn/Ferry International S.A. de C.V., Korn/Ferry Internacional del Norte, S.A. de C.V., Postgraduados y Especialistas S.A. de C.V. and Servicios Romac S.A. de C.V., except to the extent the amount of any dividends or other distributions actually paid to Company or any of its Subsidiaries by such Subsidiaries during such period have been included in the calculation of Consolidated Net Income, but only, in the case of clauses (ii)-(vi), to the extent deducted in the calculation of Consolidated Net

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Income, all of the foregoing as determined on a consolidated basis for Company and its Subsidiaries in conformity with GAAP.

**“Consolidated Fixed Charges”** means, for any period, the sum of (i) Consolidated Cash Interest Expense for such period, plus (ii) the Amortization Adjustment for such period, plus (iii) all principal payments (including, without limitation, all scheduled payments and any prepayments) on all Indebtedness of Company and its Subsidiaries during such period (excluding prepayments of Revolving Loans except to the extent the Revolving Loan Commitments are permanently reduced in connection with such prepayments), all of the foregoing as determined on a consolidated basis for Company and its Subsidiaries in conformity with GAAP.

**“Consolidated Interest Expense”** means, for any period, total interest expense (including that portion attributable to Capital Leases in accordance with GAAP and capitalized interest) of Company and its Subsidiaries on a consolidated basis with respect to all outstanding Indebtedness of Company and its Subsidiaries, including all commissions, discounts and other fees and charges owed with respect to letters of credit and bankers’ acceptance financing, net costs under Interest Rate Agreements and amounts referred to in subsection 2.3 payable to Administrative Agent and Lenders that are considered interest expense in accordance with GAAP, but excluding, however, any such amounts referred to in subsection 2.3 payable on or before the Closing Date.

**“Consolidated Leverage Ratio”** means, as of the last day of any Fiscal Quarter, the ratio of (i) Consolidated Total Debt as at such day to (ii) Consolidated EBITDA for the consecutive four Fiscal Quarters ending on such day.

**“Consolidated Net Income”** means, for any period, the net income (or loss) of Company and its Subsidiaries on a consolidated basis for such period taken as a single accounting period determined in conformity with GAAP; provided that there shall be excluded (i) the income (or loss) of any Person (other than a Subsidiary of Company) in which any other Person (other than Company or any of its Subsidiaries) has a joint interest, except to the extent of the amount of dividends or other distributions actually paid to Company or any of its Subsidiaries by such Person during such period, (ii) the income (or loss) of any Person accrued prior to the date it becomes a Subsidiary of Company or is merged into or consolidated with Company or any of its Subsidiaries or that Person’s assets are acquired by Company or any of its Subsidiaries, (iii) the income of any Subsidiary of Company to the extent that the declaration or payment of dividends or similar distributions by that Subsidiary of that income is not at the time permitted by operation of the terms of its charter or any agreement, instrument, judgment, decree, order, statute, rule or governmental regulation applicable to that Subsidiary, (iv) any after-tax gains or losses attributable to asset sales or returned surplus assets of any Pension Plan, and (v) (to the extent not included in clauses (i) through (iv) above) any net extraordinary gains or net non-cash extraordinary losses.

**“Consolidated Quick Ratio”** means, as of the last day of any Fiscal Quarter, the ratio of (i) Consolidated Current Assets to (ii) Consolidated Current Liabilities.

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**“Consolidated Total Debt”** means, as at any date of determination, the aggregate stated balance sheet amount of all Indebtedness of Company and its Subsidiaries, determined on a consolidated basis in accordance with GAAP, but excluding the Convertible Series A Preferred Stock and the Convertible Subordinated Notes.

**“Contingent Obligation”**, as applied to any Person, means any direct or indirect liability, contingent or otherwise, of that Person (i) with respect to any Indebtedness, lease, dividend or other obligation of another if the primary purpose or intent thereof by the Person incurring the Contingent Obligation is to provide assurance to the obligee of such obligation of another that such obligation of another will be paid or discharged, or that any agreements relating thereto will be complied with, or that the holders of such obligation will be protected (in whole or in part) against loss in respect thereof, (ii) with respect to any letter of credit issued for the account of that Person or as to which that Person is otherwise liable for reimbursement of drawings, or (iii) under Hedge Agreements. Contingent Obligations shall include (a) the direct or indirect guaranty, endorsement (otherwise than for collection or deposit in the ordinary course of business), co-making, discounting with recourse or sale with recourse by such Person of the obligation of another, (b) the obligation to make take-or-pay or similar payments if required regardless of non-performance by any other party or parties to an agreement, and (c) any liability of such Person for the obligation of another through any agreement (contingent or otherwise) (1) to purchase, repurchase or otherwise acquire such obligation or any security therefor, or to provide funds for the payment or discharge of such obligation (whether in the form of loans, advances, stock purchases, capital contributions or otherwise) or (2) to maintain the solvency or any balance sheet item, level of income or financial condition of another if, in the case of any agreement described under subclauses (1) or (2) of this sentence, the primary purpose or intent thereof is as described in the preceding sentence. The amount of any Contingent Obligation shall be equal to the amount of the obligation so guaranteed or otherwise supported or, if less, the amount to which such Contingent Obligation is specifically limited.

**“Continuing Member”** means, as of any date of determination any member of the Governing Body of Company who (i) was a member of such Governing Body on the Closing Date or (ii) was nominated for election or elected to such Governing Body with the affirmative vote of a majority of the members who were either members of such Governing Body on the Closing Date or whose nomination or election was previously so approved.

**“Contractual Obligation”**, as applied to any Person, means any provision of any Security issued by that Person or of any material indenture, mortgage, deed of trust, contract, undertaking, agreement or other instrument to which that Person is a party or by which it or any of its properties is bound or to which it or any of its properties is subject.

**“Convertible Series A Preferred Stock”** means, collectively, (i) 10,000 shares of Company’s Convertible Series A Preferred Stock, (ii) the Certificate of Designation pursuant to which such shares were issued, and (iii) any shares of additional securities of the same nature issued as payment in kind of dividends in respect thereto.

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**“Convertible Subordinated Notes”** means the Company’s Convertible Subordinated Notes dated as of June 13, 2002, in an aggregate principal amount of \$40,000,000 and any additional notes of the same nature issued as payment in kind of interest in respect thereto.

**“Currency Agreement”** means any foreign exchange contract, currency swap agreement, futures contract, option contract, synthetic cap or other similar agreement or arrangement to which Company or any of its Subsidiaries is a party.

**“Deposit Account”** means a demand, time, savings, passbook or similar account maintained with a Person engaged in the business of banking, including a savings bank, savings and loan association, credit union or trust company.

**“Dollars”** and the sign “\$” mean the lawful money of the United States of America.

**“Domestic Significant Subsidiary”** means any Domestic Subsidiary that is a Significant Subsidiary.

**“Domestic Subsidiary”** means any Subsidiary of Company that is incorporated or organized under the laws of the United States of America, any state thereof or in the District of Columbia.

**“Eligible Accounts Receivable”** means all Accounts of Company; provided that an Account shall not be an Eligible Account Receivable if:

- (a) it arises out of a sale made by Company to (a) an Affiliate or (b) a natural person (other than credit card sales not otherwise ineligible hereunder); or
- (b) its payment terms are longer than 30 days from date of invoice; or
- (c) it is unpaid more than 90 days after the original payment due date; or
- (d) it is from the same account debtor or its Affiliate and 20% or more of all Accounts from that account debtor (and its Affiliates) are ineligible under (c) above; or
- (e) when aggregated with all other Accounts of an account debtor, such Account exceeds 5% in face value of all Accounts of Company then outstanding, but only to the extent of such excess, unless such excess is supported by an irrevocable letter of credit satisfactory to Administrative Agent (as to form, substance and issuer) and assigned to and directly drawable by Administrative Agent; or
- (f) the account debtor for such Account is a creditor of Company or any other Loan Party, has or has asserted a right of setoff against Company or any other Loan Party, or has disputed its liability or otherwise has made any claim

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with respect to such Account or any other Account which has not been resolved, in each case to the extent of the amount owed by such Loan Party to such account debtor, the amount of such actual or asserted right of setoff, or the amount of such dispute or claim, as the case may be; or

- (g) the account debtor is (or its assets are) the subject of an Insolvency Event; or
- (h) such Account is not payable in Dollars or the account debtor for such Account is located outside the continental United States; or
- (i) the account debtor is the United States of America or any department, agency or instrumentality thereof; or
- (j) such Account is subject to any adverse security deposit, progress payment or other similar advance made by or for the benefit of the applicable account debtor; or
- (k) it is not subject to a valid and perfected First Priority Lien in favor of Administrative Agent or does not otherwise conform to the representations and warranties contained in the Loan Documents.

In determining the amount to be so included, the face amount of such Accounts shall be reduced by the amount of all returns, discounts, deductions, claims, credits, charges, or other allowances.

**“Eligible Assignee”** means (i) any Lender, any Affiliate of any Lender and any Approved Fund of any Lender; and (ii) (a) a commercial bank organized under the laws of the United States or any state thereof; (b) a savings and loan association or savings bank organized under the laws of the United States or any state thereof; (c) a commercial bank organized under the laws of any other country or a political subdivision thereof; provided that (1) such bank is acting through a branch or agency located in the United States or (2) such bank is organized under the laws of a country that is a member of the Organization for Economic Cooperation and Development or a political subdivision of such country; and (d) any other entity that is an “accredited investor” (as defined in Regulation D under the Securities Act) that extends credit or buys loans as one of its businesses including insurance companies, mutual funds and lease financing companies; provided that neither Company nor any Affiliate of Company shall be an Eligible Assignee.

**“Employee Benefit Plan”** means any “employee benefit plan” as defined in Section 3(3) of ERISA which is or was maintained or contributed to by Company, any of its Subsidiaries or any of their respective ERISA Affiliates.

**“Environmental Claim”** means any investigation, notice, notice of violation, claim, action, suit, proceeding, demand, abatement order or other order or directive (conditional or otherwise), by any Government Authority or any other Person, arising (i) pursuant to or in connection with any actual or alleged violation of any Environmental Law, (ii) in connection

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with any Hazardous Materials or any actual or alleged Hazardous Materials Activity, or (iii) in connection with any actual or alleged damage, injury, threat or harm to health, safety, natural resources or the environment.

**“Environmental Laws”** means any and all current or future statutes, ordinances, orders, rules, regulations, guidance documents, judgments, Governmental Authorizations, or any other requirements of any Government Authority relating to (i) environmental matters, including those relating to any Hazardous Materials Activity, (ii) the generation, use, storage, transportation or disposal of Hazardous Materials, or (iii) occupational safety and health, industrial hygiene, land use or the protection of human, plant or animal health or welfare, in any manner applicable to Company or any of its Subsidiaries or any Facility.

**“ERISA”** means the Employee Retirement Income Security Act of 1974, as amended from time to time, and any successor thereto.

**“ERISA Affiliate”**, as applied to any Person, means (i) any corporation that is a member of a controlled group of corporations within the meaning of Section 414(b) of the Internal Revenue Code of which that Person is a member; (ii) any trade or business (whether or not incorporated) that is a member of a group of trades or businesses under common control within the meaning of Section 414(c) of the Internal Revenue Code of which that Person is a member; and (iii) any member of an affiliated service group within the meaning of Section 414(m) or (o) of the Internal Revenue Code of which that Person, any corporation described in clause (i) above or any trade or business described in clause (ii) above is a member. Any former ERISA Affiliate of a Person or any of its Subsidiaries shall continue to be considered an ERISA Affiliate of such Person or such Subsidiary within the meaning of this definition with respect to the period such entity was an ERISA Affiliate of such Person or such Subsidiary and with respect to liabilities arising after such period for which such Person or such Subsidiary could be liable under the Internal Revenue Code or ERISA.

**“ERISA Event”** means (i) a “reportable event” within the meaning of Section 4043 of ERISA and the regulations issued thereunder with respect to any Pension Plan (excluding those for which the provision for 30-day notice to the PBGC has been waived by regulation); (ii) the failure to meet the minimum funding standard of Section 412 of the Internal Revenue Code with respect to any Pension Plan (whether or not waived in accordance with Section 412(d) of the Internal Revenue Code) or the failure to make by its due date a required installment under Section 412(m) of the Internal Revenue Code with respect to any Pension Plan or the failure to make any required contribution to a Multiemployer Plan; (iii) the provision by the administrator of any Pension Plan pursuant to Section 4041(a)(2) of ERISA of a notice of intent to terminate such plan in a distress termination described in Section 4041(c) of ERISA; (iv) the withdrawal by Company, any of its Subsidiaries or any of their respective ERISA Affiliates from any Pension Plan with two or more contributing sponsors or the termination of any such Pension Plan resulting in liability pursuant to Section 4063 or 4064 of ERISA; (v) the institution by the PBGC of proceedings to terminate any Pension Plan, or the occurrence of any event or condition which might constitute grounds under ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan; (vi) the imposition of liability on Company, any of its Subsidiaries

or any of their respective ERISA Affiliates pursuant to Section 4062(e) or 4069 of ERISA or by reason of the application of Section 4212(c) of ERISA; (vii) the withdrawal of Company, any of its Subsidiaries or any of their respective ERISA Affiliates in a complete or partial withdrawal (within the meaning of Sections 4203 and 4205 of ERISA) from any Multiemployer Plan if there is any potential liability therefor, or the receipt by Company, any of its Subsidiaries or any of their respective ERISA Affiliates of notice from any Multiemployer Plan that it is in reorganization or insolvency pursuant to Section 4241 or 4245 of ERISA, or that it intends to terminate or has terminated under Section 4041A or 4042 of ERISA; (viii) the assertion of a material claim (other than routine claims for benefits) against any Employee Benefit Plan other than a Multiemployer Plan or the assets thereof, or against Company, any of its Subsidiaries or any of their respective ERISA Affiliates in connection with any Employee Benefit Plan; (ix) receipt from the Internal Revenue Service of notice of the failure of any Pension Plan (or any other Employee Benefit Plan intended to be qualified under Section 401(a) of the Internal Revenue Code) to qualify under Section 401(a) of the Internal Revenue Code, or the failure of any trust forming part of any Pension Plan to qualify for exemption from taxation under Section 501(a) of the Internal Revenue Code; or (x) the imposition of a Lien pursuant to Section 401(a)(29) or 412(n) of the Internal Revenue Code or pursuant to ERISA with respect to any Pension Plan.

**“Eurodollar Rate”** means, for any Interest Rate Determination Date with respect to an Interest Period for a Eurodollar Rate Loan, the rate per annum obtained by dividing (i) (A) the rate per annum (rounded upward to the nearest 1/16 of one percent) that appears on the Moneyline Telerate, page 3750 (or such other comparable page as may, in the opinion of Administrative Agent, replace such page for the purpose of displaying such rate) as the interbank offered rate for Dollar deposits with maturities comparable to such Interest Period as of approximately 11:00 a.m. (London time) on such Interest Rate Determination Date or (B) if such rate is not available at such time for any reason, the arithmetic average (rounded upward to the nearest 1/16 of one percent) of the offered quotations, if any, to first class banks in the interbank Eurodollar market by Wells Fargo for Dollar deposits of amounts in same day funds comparable to the principal amount of the Eurodollar Rate Loan of Wells Fargo for which the Eurodollar Rate is then being determined with maturities comparable to such Interest Period as of approximately 10:00 A.M. (California time) on such Interest Rate Determination Date by (ii) a percentage equal to 100% minus the stated maximum rate of all reserve requirements (including any marginal, emergency, supplemental, special or other reserves) applicable on such Interest Rate Determination Date to any member bank of the Federal Reserve System in respect of “Eurocurrency liabilities” as defined in Regulation D (or any successor category of liabilities under Regulation D).

**“Eurodollar Rate Loans”** means Loans bearing interest at rates determined by reference to the Eurodollar Rate as provided in subsection 2.2A.

**“Event of Default”** means each of the events set forth in Section 8.

**“Exchange Act”** means the Securities Exchange Act of 1934, as amended from time to time, and any successor statute.



**“Exchange Rate”** means, on any date when an amount expressed in a currency other than Dollars is to be determined with respect to any Letter of Credit, the nominal rate of exchange of Administrative Agent in the New York foreign exchange market for the sale of such currency in exchange for Dollars at 12:00 noon (New York time) one Business Day prior to such date, expressed as a number of units of such currency per one Dollar.

**“Facilities”** means any and all real property (including all buildings, fixtures or other improvements located thereon) now, hereafter or heretofore owned, leased, operated or used by Company or any of its Subsidiaries or any of their respective predecessors or Affiliates.

**“Federal Funds Effective Rate”** means, for any period, a fluctuating interest rate equal for each day during such period to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published for such day (or, if such day is not a Business Day, for the next preceding Business Day) by the Federal Reserve Bank of New York, or, if such rate is not so published for any day which is a Business Day, the average of the quotations for such day on such transactions received by Administrative Agent from three Federal funds brokers of recognized standing selected by Administrative Agent.

**“Financial Plan”** has the meaning assigned to that term in subsection 6.1(xii).

**“First Priority”** means, with respect to any Lien purported to be created in any Collateral pursuant to any Collateral Document, that (i) such Lien is perfected and has priority over any other Lien on such Collateral and (ii) such Lien is the only Lien (other than Liens permitted pursuant to subsection 7.2) to which such Collateral is subject.

**“Fiscal Month”** means a fiscal month of any Fiscal Year.

**“Fiscal Quarter”** means a fiscal quarter of any Fiscal Year.

**“Fiscal Year”** means the fiscal year of Company and its Subsidiaries ending on April 30 of each calendar year. For purposes of this Agreement, any particular Fiscal Year shall be designated by reference to the calendar year in which such Fiscal Year ends.

**“Foreign Plan”** means any employee benefit plan maintained by Company or any of its Subsidiaries that is mandated or governed by any law, rule or regulation of any Government Authority other than the United States of America, any state thereof or any other political subdivision thereof.

**“Foreign Pledge Agreement”** means each pledge agreement or similar instrument governed by the laws of a country other than the United States, executed from time to time in accordance with subsection 6.8 by Company or any Domestic Significant Subsidiary that owns Capital Stock of one or more Foreign Significant Subsidiaries organized in such country, in form and substance satisfactory to Administrative Agent, as such Foreign Pledge Agreement may be amended, supplemented or otherwise modified from time to time.

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**“Foreign Significant Subsidiary”** means any Foreign Subsidiary that is a Significant Subsidiary.

**“Foreign Subsidiary”** means any Subsidiary of Company that is not a Domestic Subsidiary.

**“Fund”** means any Person (other than a natural Person) that is (or will be) engaged in making, purchasing, holding or otherwise investing in commercial loans and similar extensions of credit in the ordinary course of its business.

**“Funding and Payment Office”** means (i) the office of Administrative Agent located at Commercial Banking Loan Center, 201 3<sup>rd</sup> Street, 8<sup>th</sup> Floor, San Francisco, California 94105 or (ii) such other office of Administrative Agent as may from time to time hereafter be designated as such in a written notice delivered by Administrative Agent to Company and each Lender.

**“Funding Date”** means the date of the funding of a Loan.

**“GAAP”** means, subject to the limitations on the application thereof set forth in subsection 1.2, generally accepted accounting principles set forth in opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as may be approved by a significant segment of the accounting profession, in each case as the same are applicable to the circumstances as of the date of determination.

**“Governing Body”** means the board of directors or other body having the power to direct or cause the direction of the management and policies of a Person that is a corporation, partnership, trust or limited liability company.

**“Government Authority”** means any political subdivision or department thereof, any other governmental or regulatory body, commission, central bank, board, bureau, organ or instrumentality or any court, in each case whether federal, state, local or foreign.

**“Governmental Authorization”** means any permit, license, registration, authorization, plan, directive, consent, order or consent decree of or from, or notice to, any Government Authority.

**“Hazardous Materials”** means (i) any chemical, material or substance at any time defined as or included in the definition of “hazardous substances”, “hazardous wastes”, “hazardous materials”, “extremely hazardous waste”, “acutely hazardous waste”, “radioactive waste”, “biohazardous waste”, “pollutant”, “toxic pollutant”, “contaminant”, “restricted hazardous waste”, “infectious waste”, “toxic substances”, or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor environment (including harmful properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, “TCLP toxicity” or “EP toxicity” or words of similar import under any applicable Environmental Laws); (ii) any oil, petroleum,

petroleum fraction or petroleum derived substance; (iii) any drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources; (iv) any flammable substances or explosives; (v) any radioactive materials; (vi) any asbestos-containing materials; (vii) urea formaldehyde foam insulation; (viii) electrical equipment which contains any oil or dielectric fluid containing polychlorinated biphenyls; (ix) pesticides; and (x) any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any Government Authority or which may or could pose a hazard to the health and safety of the owners, occupants or any Persons in the vicinity of any Facility or to the indoor or outdoor environment.

**“Hazardous Materials Activity”** means any past, current, proposed or threatened activity, event or occurrence involving any Hazardous Materials, including the use, manufacture, possession, storage, holding, presence, existence, location, Release, threatened Release, discharge, placement, generation, transportation, processing, construction, treatment, abatement, removal, remediation, disposal, disposition or handling of any Hazardous Materials, and any corrective action or response action with respect to any of the foregoing.

**“Hedge Agreement”** means an Interest Rate Agreement or a Currency Agreement designed to hedge against fluctuations in interest rates or currency values, respectively.

**“Indebtedness”**, as applied to any Person, means (i) all indebtedness for borrowed money, (ii) that portion of obligations with respect to Capital Leases that is properly classified as a liability on a balance sheet in conformity with GAAP, (iii) notes payable and drafts accepted representing extensions of credit whether or not representing obligations for borrowed money, (iv) any obligation owed for all or any part of the deferred purchase price of property or services (excluding any such obligations incurred under ERISA), which purchase price is (a) due more than six months from the date of incurrence of the obligation in respect thereof or (b) evidenced by a note or similar written instrument, and (v) all indebtedness secured by any Lien on any property or asset owned or held by that Person regardless of whether the indebtedness secured thereby shall have been assumed by that Person or is nonrecourse to the credit of that Person. Obligations under Interest Rate Agreements and Currency Agreements constitute (1) in the case of Hedge Agreements, Contingent Obligations, and (2) in all other cases, Investments, and in neither case constitute Indebtedness.

**“Indemnified Liabilities”** has the meaning assigned to that term in subsection 10.3.

**“Indemnitee”** has the meaning assigned to that term in subsection 10.3.

**“Insolvency Event”** means, with respect to any Person, the occurrence of any of the events described in subsection 8.6 or 8.7; provided that, solely for purposes of this definition, any references to Company or any of its Subsidiaries in subsection 8.6 or 8.7 shall be deemed to be a reference to such Person.

**“Intellectual Property”** means all patents, trademarks, tradenames, copyrights, technology, software, know-how and processes used in or necessary for the conduct of the

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business of Company and its Subsidiaries as currently conducted that are material to the condition (financial or otherwise), business or operations of Company and its Subsidiaries, taken as a whole.

**“Interest Payment Date”** means (i) with respect to any Base Rate Loan, each March 31, June 30, September 30 and December 31 of each year, commencing on the first such date to occur after the Closing Date, and (ii) with respect to any Eurodollar Rate Loan, the last day of each Interest Period applicable to such Loan; provided that in the case of each Interest Period of six months “Interest Payment Date” shall also include the date that is three months after the commencement of such Interest Period.

**“Interest Period”** has the meaning assigned to that term in subsection 2.2B.

**“Interest Rate Agreement”** means any interest rate swap agreement, interest rate cap agreement, interest rate collar agreement or other similar agreement or arrangement to which Company or any of its Subsidiaries is a party.

**“Interest Rate Determination Date”**, with respect to any Interest Period, means the second Business Day prior to the first day of such Interest Period.

**“Internal Revenue Code”** means the Internal Revenue Code of 1986, as amended to the date hereof and from time to time hereafter, and any successor statute.

**“Investment”** means (i) any direct or indirect purchase or other acquisition by Company or any of its Subsidiaries of, or of a beneficial interest in, any Securities of any other Person (including any Subsidiary of Company), (ii) any direct or indirect redemption, retirement, purchase or other acquisition for value, by any Subsidiary of Company from any Person other than Company or any of its Subsidiaries, of any equity Securities of such Subsidiary, (iii) any direct or indirect loan, advance (other than advances to employees for moving, entertainment and travel expenses, drawing accounts and similar expenditures in the ordinary course of business) or capital contribution by Company or any of its Subsidiaries to any other Person, including all indebtedness and accounts receivable from that other Person that are not current assets or did not arise from sales to that other Person in the ordinary course of business, or (iv) Interest Rate Agreements or Currency Agreements not constituting Hedge Agreements. As used herein, the term “Investment” does not include investments relating to the cash surrender value of insurance policies. The amount of any Investment shall be the original cost of such Investment plus the cost of all additions thereto, without any adjustments for increases or decreases in value, or write-ups, write-downs or write-offs with respect to such Investment (other than adjustments for the repayment of, or the refund of capital with respect to, the original principal amount of any such Investment).

**“IP Collateral”** means, collectively, the Intellectual Property that constitutes Collateral under the Security Agreement.

**“Issuing Lender”** means Wells Fargo, in its capacity as issuer of any Letter of Credit hereunder.

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**“Joint Venture”** means a joint venture, partnership or other similar arrangement, whether in corporate, partnership or other legal form.

**“Lender”** and **“Lenders”** means the Persons identified as “Lenders” and listed on the signature pages of this Agreement, together with their successors and permitted assigns pursuant to subsection 10.1.

**“Letter of Credit”** or **“Letters of Credit”** means any standby letters of credit or similar instruments issued by Issuing Lender for the account of Company pursuant to subsection 3.1 for the purpose of supporting (i) Indebtedness of Company or any of its Subsidiaries in respect of industrial revenue or development bonds or financings, (ii) workers’ compensation liabilities of Company or any of its Subsidiaries, (iii) the obligations of third party insurers of Company or any of its Subsidiaries arising by virtue of the laws of any jurisdiction requiring third party insurers, (iv) obligations with respect to Capital Leases or Operating Leases of Company or any of its Subsidiaries, and (v) performance, payment, deposit or surety obligations of Company or any of its Subsidiaries, in any case if required by law or governmental rule or regulation or in accordance with custom and practice in the industry.

**“Letter of Credit Usage”** means, as at any date of determination, the sum of (i) the maximum aggregate amount which is or at any time thereafter may become available for drawing under all Letters of Credit then outstanding plus (ii) the aggregate amount of all drawings under Letters of Credit honored by Issuing Lender and not theretofore reimbursed out of the proceeds of Revolving Loans pursuant to subsection 3.3B or otherwise reimbursed by Company. For purposes of this definition, any amount described in clause (i) or (ii) of the preceding sentence which is denominated in a currency other than Dollars shall be valued based on the applicable Exchange Rate for such currency as of the applicable date of determination.

**“Lien”** means any lien, mortgage, pledge, assignment, security interest, charge or encumbrance of any kind (including any conditional sale or other title retention agreement, any lease in the nature thereof, and any agreement to give any security interest) and any option, trust or other preferential arrangement having the practical effect of any of the foregoing.

**“Loan”** or **“Loans”** means one or more of the Revolving Loans.

**“Loan Documents”** means this Agreement, the Notes, the Letters of Credit (and any applications for, or reimbursement agreements or other documents or certificates executed by Company in favor of Issuing Lender relating to, the Letters of Credit), the Subsidiary Guaranty and the Collateral Documents.

**“Loan Party”** means each of Company and any of Company’s Significant Subsidiaries from time to time executing a Loan Document, and **“Loan Parties”** means all such Persons, collectively.

**“Margin Stock”** has the meaning assigned to that term in Regulation U of the Board of Governors of the Federal Reserve System as in effect from time to time.

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**“Material Adverse Effect”** means (i) a material adverse effect upon the business, operations, properties, assets, condition (financial or otherwise) or prospects of Company and its Subsidiaries taken as a whole or (ii) the impairment of the ability of any Loan Party to perform, or of Administrative Agent or Lenders to enforce, the Obligations.

**“Maximum Consolidated Capital Expenditures Amount”** has the meaning assigned to that term in subsection 7.8.

**“Multiemployer Plan”** means any Employee Benefit Plan that is a “multiemployer plan” as defined in Section 3(37) of ERISA.

**“Net Business Interruption Insurance Proceeds”** means any Cash payments or proceeds received by Company or any of its Subsidiaries under any business interruption or similar insurance policy in respect of a covered loss thereunder, net of any actual and reasonable documented costs incurred by Company or any of its Subsidiaries in connection with the adjustment or settlement of any claims of Company or such Subsidiary in respect thereof.

**“Non-US Lender”** means a Lender that is organized under the laws of any jurisdiction other than the United States or any state or other political subdivision thereof.

**“Notes”** means one or more of the Revolving Notes.

**“Notice of Borrowing”** means a notice substantially in the form of Exhibit I annexed hereto.

**“Notice of Conversion/Continuation”** means a notice substantially in the form of Exhibit II annexed hereto.

**“Obligations”** means all obligations of every nature of each Loan Party from time to time owed to Administrative Agent, Lenders or any of them under the Loan Documents, whether for principal, interest, reimbursement of amounts drawn under Letters of Credit, fees, expenses, indemnification or otherwise.

**“Officer”** means the president, chief executive officer, a vice president, chief financial officer, treasurer, general partner (if an individual), managing member (if an individual) or other individual appointed by the Governing Body or the Organizational Documents of a corporation, partnership, trust or limited liability company to serve in a similar capacity as the foregoing.

**“Officer’s Certificate”**, as applied to any Person that is a corporation, partnership, trust or limited liability company, means a certificate executed on behalf of such Person by one or more Officers of such Person or one or more Officers of a general partner or a managing member if such general partner or managing member is a corporation, partnership, trust or limited liability company.

**“Operating Lease”**, as applied to any Person, means any lease (including leases that may be terminated by the lessee at any time) of any property (whether real, personal or mixed) that is not a Capital Lease other than any such lease under which that Person is the lessor.

**“Organizational Documents”** means the documents (including Bylaws, if applicable) pursuant to which a Person that is a corporation, partnership, trust or limited liability company is organized.

**“Participant”** means a purchaser of a participation in the rights and obligations under this Agreement pursuant to subsection 10.1C.

**“PBGC”** means the Pension Benefit Guaranty Corporation or any successor thereto.

**“Pension Plan”** means any Employee Benefit Plan, other than a Multiemployer Plan, that is subject to Section 412 of the Internal Revenue Code or Section 302 of ERISA, and, for purposes of subsection 8.10, any Foreign Plan.

**“Permitted Encumbrances”** means the following types of Liens (excluding any such Lien imposed pursuant to Section 401(a)(29) or 412(n) of the Internal Revenue Code or by ERISA, any such Lien imposed by a Government Authority in connection with any Foreign Plan, any such Lien relating to or imposed in connection with any Environmental Claim, and any such Lien expressly prohibited by any applicable terms of any of the Collateral Documents):

(i) Liens for taxes, assessments or governmental charges or claims the payment of which is not, at the time, required by subsection 6.3;

(ii) statutory Liens of landlords, Liens of collecting banks under the UCC on items in the course of collection, statutory Liens and rights of set-off of banks, statutory Liens of carriers, warehousemen, mechanics, repairmen, workmen and materialmen, and other Liens imposed by law, in each case incurred in the ordinary course of business (a) for amounts not yet overdue or (b) for amounts that are overdue and that (in the case of any such amounts overdue for a period in excess of 5 days) are being contested in good faith by appropriate proceedings, so long as (1) such reserves or other appropriate provisions, if any, as shall be required by GAAP shall have been made for any such contested amounts, and (2) in the case of a Lien with respect to any portion of the Collateral, such contest proceedings conclusively operate to stay the sale of any portion of the Collateral on account of such Lien;

(iii) deposits made in the ordinary course of business in connection with workers’ compensation, unemployment insurance and other types of social security, or to secure the performance of statutory obligations, bids, leases, government contracts, trade contracts, and other similar obligations (exclusive of obligations for the payment of borrowed money), so long as no foreclosure, sale or similar proceedings have been commenced with respect to any portion of the Collateral on account thereof;

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- (iv) any attachment or judgment Lien not constituting an Event of Default under subsection 8.8;
  - (v) licenses (with respect to Intellectual Property and other property), leases or subleases granted to third parties in accordance with any applicable terms of the Collateral Documents and not interfering in any material respect with the ordinary conduct of the business of Company or any of its Subsidiaries or resulting in a material diminution in the value of any Collateral as security for the Obligations;
  - (vi) easements, rights-of-way, restrictions, encroachments, and other minor defects or irregularities in title, in each case which do not and will not interfere in any material respect with the ordinary conduct of the business of Company or any of its Subsidiaries or result in a material diminution in the value of any Collateral as security for the Obligations;
  - (vii) any (a) interest or title of a lessor or sublessor under any lease not prohibited by this Agreement, (b) Lien or restriction that the interest or title of such lessor or sublessor may be subject to, or (c) subordination of the interest of the lessee or sublessee under such lease to any Lien or restriction referred to in the preceding clause (b), so long as the holder of such Lien or restriction agrees to recognize the rights of such lessee or sublessee under such lease;
  - (viii) Liens arising from filing UCC financing statements relating solely to leases not prohibited by this Agreement;
  - (ix) any zoning or similar law or right reserved to or vested in any governmental office or agency to control or regulate the use of any real property;
  - (x) Liens granted pursuant to the Collateral Documents; and
  - (xi) Liens securing obligations (other than obligations representing Indebtedness for borrowed money) under operating, reciprocal easement or similar agreements entered into in the ordinary course of business of Company and its Subsidiaries.

**“Person”** means and includes natural persons, corporations, limited partnerships, general partnerships, limited liability companies, limited liability partnerships, joint stock companies, Joint Ventures, associations, companies, trusts, banks, trust companies, land trusts, business trusts or other organizations, whether or not legal entities, and governments (whether federal, state or local, domestic or foreign, and including political subdivisions thereof) and agencies or other administrative or regulatory bodies thereof.

**“Pledged Collateral”** means, collectively, the “Pledged Collateral” as defined in the Security Agreement and any Foreign Pledge Agreement.



**“Potential Event of Default”** means a condition or event that, after notice or lapse of time or both, would constitute an Event of Default.

**“Prime Rate”** means the rate that Wells Fargo announces from time to time as its prime lending rate, as in effect from time to time. The Prime Rate is a reference rate and does not necessarily represent the lowest or best rate actually charged to any customer. Wells Fargo or any other Lender may make commercial loans or other loans at rates of interest at, above or below the Prime Rate.

**“Prior Letters of Credit”** means, collectively, (i) that certain Letter of Credit No. 3020196 in the original face amount of approximately \$470,400.00, issued by Bank of America, N.A. on or about November 2, 1999 for the account of Company and for the benefit of 444 Madison LLC, (ii) that certain Letter of Credit No. 3033942 in the original face amount of approximately 3,257,059.50 British Pounds, issued by Bank of America, N.A. on or about January 9, 2001 for the account of Company and for the benefit of Bank of America London, and (iii) that certain Letter of Credit No. 3041996 in the original face amount of approximately 125,000.00 British Pounds, issued by Bank of America, N.A. on or about November 9, 2001 for the account of Company and for the benefit of Bank of America London.

**“Prior Reimbursement Obligations”** means any and all reimbursement obligations in respect of the Prior Letters of Credit issued by Bank of America, N.A.

**“Proceedings”** means any action, suit, proceeding (whether administrative, judicial or otherwise), governmental investigation or arbitration.

**“Pro Rata Share”** means, with respect to all payments, computations and other matters relating to the Revolving Loan Commitment or the Revolving Loans of any Lender or any Letters of Credit issued or participations therein deemed purchased by any Lender, the percentage obtained by dividing (x) the Revolving Loan Exposure of that Lender by (y) the aggregate Revolving Loan Exposure of all Lenders, as the applicable percentage may be adjusted by assignments permitted pursuant to subsection 10.1. The initial Pro Rata Share of each Lender is set forth opposite the name of that Lender set forth on Schedule 2.1 annexed hereto.

**“PTO”** means the United States Patent and Trademark Office or any successor or substitute office in which filings are necessary or, in the opinion of Administrative Agent, desirable in order to create or perfect Liens on any IP Collateral.

**“Real Property Asset”** means, at any time of determination, any interest then owned by any Loan Party (other than any Foreign Subsidiary) in any real property.

**“Regional Consolidated Financial Statements”** means, with respect to the Foreign Subsidiaries located in Europe, Latin America and Asia, financial statements prepared such that individual Subsidiaries within the above-mentioned geographic areas are consolidated together and presented as consolidated entities (e.g., presented as “consolidated European Subsidiaries”, “consolidated Asian Subsidiaries”, etc.), each in form satisfactory to Administrative Agent.

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“**Register**” has the meaning assigned to that term in subsection 2.1D.

“**Regulation D**” means Regulation D of the Board of Governors of the Federal Reserve System, as in effect from time to time.

“**Reimbursement Date**” has the meaning assigned to that term in subsection 3.3B.

“**Release**” means any release, spill, emission, leaking, pumping, pouring, injection, escaping, deposit, disposal, discharge, dispersal, dumping, leaching or migration of Hazardous Materials into the indoor or outdoor environment (including the abandonment or disposal of any barrels, containers or other closed receptacles containing any Hazardous Materials), including the movement of any Hazardous Materials through the air, soil, surface water or groundwater.

“**Request for Issuance**” means a request substantially in the form of Exhibit III annexed hereto.

“**Requisite Lenders**” means Revolving Lenders having or holding more than 50% of the aggregate Revolving Loan Exposure of all Lenders.

“**Restricted Junior Payment**” means (i) any dividend or other distribution, direct or indirect, on account of any shares of any class of stock of Company now or hereafter outstanding, except a dividend payable solely in shares of that class of stock to the holders of that class, (ii) any redemption, retirement, sinking fund or similar payment, purchase or other acquisition for value, direct or indirect, of any shares of any class of stock of Company now or hereafter outstanding, (iii) any payment made to retire, or to obtain the surrender of, any outstanding warrants, options or other rights to acquire shares of any class of stock of Company now or hereafter outstanding, and (iv) any payment or prepayment of principal of, premium, if any, or interest on, or redemption, purchase, retirement, defeasance (including in-substance or legal defeasance), sinking fund or similar payment with respect to, any Subordinated Indebtedness.

“**Revolving Lender**” means a Lender that has a Revolving Loan Commitment and/or that has an outstanding Revolving Loan.

“**Revolving Loan Commitment**” means the commitment of a Revolving Lender to make Revolving Loans to Company pursuant to subsection 2.1A, and

“**Revolving Loan Commitments**” means such commitments of all Revolving Lenders in the aggregate.

“**Revolving Loan Commitment Termination Date**” means February 14, 2005.

“**Revolving Loan Exposure**”, with respect to any Revolving Lender, means, as of any date of determination (i) prior to the termination of the Revolving Loan Commitments, that Lender’s Revolving Loan Commitment, and (ii) after the termination of the Revolving Loan Commitments, the sum of (a) the aggregate outstanding principal amount of the Revolving Loans of that Lender plus (b) in the event that Lender is Issuing Lender, the aggregate Letter of Credit Usage in respect of all Letters of Credit issued by that Lender (in each case net of any

participations purchased by other Lenders in such Letters of Credit or in any unreimbursed drawings thereunder) plus (c) the aggregate amount of all participations purchased by that Lender in any outstanding Letters of Credit or any unreimbursed drawings under any Letters of Credit.

**“Revolving Loans”** means the Loans made by Revolving Lenders to Company pursuant to subsection 2.1A.

**“Revolving Notes”** means any promissory notes of Company issued pursuant to subsection 2.1E to evidence the Revolving Loans of any Revolving Lenders, substantially in the form of Exhibit IV annexed hereto, as they may be amended, supplemented or otherwise modified from time to time.

**“Securities”** means any stock, shares, partnership interests, voting trust certificates, certificates of interest or participation in any profit-sharing agreement or arrangement, options, warrants, bonds, debentures, notes, or other evidences of indebtedness, secured or unsecured, convertible, subordinated, certificated or uncertificated, or otherwise, or in general any instruments commonly known as “securities” or any certificates of interest, shares or participations in temporary or interim certificates for the purchase or acquisition of, or any right to subscribe to, purchase or acquire, any of the foregoing.

**“Securities Act”** means the Securities Act of 1933, as amended from time to time, and any successor statute.

**“Security Agreement”** means the Security Agreement executed and delivered on the Closing Date, substantially in the form of Exhibit X annexed hereto, as such Security Agreement may thereafter be amended, supplemented or otherwise modified from time to time.

**“Significant Subsidiary”** means, collectively, (i) Korn/Ferry International Futurestep, Inc., Korn/Ferry International GmbH, Korn/Ferry International, Limited, Nippon Korn/Ferry International, Korn/Ferry International (H.K.) Limited, and (ii), as of any date of determination, each additional Subsidiary of Company that had on the last day of the Fiscal Quarter then most recently ended, any of the following: (a) total assets (excluding intercompany Indebtedness owing from Company or any of the Significant Subsidiaries) with a book value equal to 5% or greater of the total assets (excluding intercompany Indebtedness) of Company and its Subsidiaries, on a consolidated basis, or (b) total revenue (excluding intercompany revenue) equal to 5% or greater of the total revenue (excluding intercompany revenue) of Company and its Subsidiaries, on a consolidated basis, in each case as determined in accordance with GAAP.

**“Solvent”**, with respect to any Person, means that as of the date of determination both (i)(a) the then fair saleable value of the property of such Person is (1) greater than the total amount of liabilities (including contingent liabilities) of such Person and (2) not less than the amount that will be required to pay the probable liabilities on such Person’s then existing debts as they become absolute and due considering all financing alternatives and potential asset sales reasonably available to such Person; (b) such Person’s capital is not unreasonably small in

relation to its business or any contemplated or undertaken transaction; and (c) such Person does not intend to incur, or believe (nor should it reasonably believe) that it will incur, debts beyond its ability to pay such debts as they become due; and (ii) such Person is “solvent” within the meaning given that term and similar terms under applicable laws relating to fraudulent transfers and conveyances. For purposes of this definition, the amount of any contingent liability at any time shall be computed as the amount that, in light of all of the facts and circumstances existing at such time, represents the amount that can reasonably be expected to become an actual or matured liability.

“**Subordinated Indebtedness**” means (i) the Convertible Subordinated Notes and the Convertible Series A Preferred Stock, and (ii) any Indebtedness of Company incurred from time to time and subordinated in right of payment to the Obligations.

“**Subordination Agreement**” has the meaning assigned to that term in subsection 4.1N.

“**Subsidiary**”, with respect to any Person, means any corporation, partnership, trust, limited liability company, association, Joint Venture or other business entity of which more than 50% of the total voting power of shares of stock or other ownership interests entitled (without regard to the occurrence of any contingency) to vote in the election of the members of the Governing Body is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof.

“**Subsidiary Guarantor**” means any Domestic Significant Subsidiary of Company that executes and delivers a counterpart of the Subsidiary Guaranty on the Closing Date or from time to time thereafter pursuant to subsection 6.8.

“**Subsidiary Guaranty**” means the Subsidiary Guaranty executed and delivered by existing Subsidiaries of Company on the Closing Date and to be executed and delivered by additional Subsidiaries of Company from time to time thereafter in accordance with subsection 6.8, substantially in the form of Exhibit IX annexed hereto, as such Subsidiary Guaranty may hereafter be amended, supplemented or otherwise modified from time to time.

“**Supplemental Collateral Agent**” has the meaning assigned to that term in subsection 9.1B.

“**Tax**” or “**Taxes**” means any present or future tax, levy, impost, duty, charge, fee, deduction or withholding of any nature and whatever called, by whomsoever, on whomsoever and wherever imposed, levied, collected, withheld or assessed, including interest, penalties, additions to tax and any similar liabilities with respect thereto; except that, in the case of a Lender, there shall be excluded (i) taxes that are imposed on the overall net income or net profits (including franchise taxes imposed in lieu thereof) (a) by the United States, (b) by any other Government Authority under the laws of which such Lender is organized or has its principal office or maintains its applicable lending office, or (c) by any jurisdiction solely as a result of a present or former connection between such Lender and such jurisdiction (other than any such connection arising solely from such Lender having executed, delivered or performed its

obligations or received a payment under, or enforced, any of the Loan Documents), (ii) any branch profits taxes imposed by the United States or any similar tax imposed by any other jurisdiction in which such Lender is located, and (iii) any tax, assessment or other governmental charge that would not have been imposed but for such Lender's failure to comply with any certification, identification or other reporting requirements concerning such Lender's nationality, residence, identity or connection with the United States, if compliance is required as a precondition to exemption from or reduction of such tax, assessment or other governmental charge.

**"Total Utilization of Revolving Loan Commitments"** means, as at any date of determination, the sum of (i) the aggregate principal amount of all outstanding Revolving Loans plus (ii) the Letter of Credit Usage.

**"UCC"** means the Uniform Commercial Code as in effect in any applicable jurisdiction.

**"Wells Fargo"** has the meaning assigned to that term in the introduction to this Agreement.

**"WF Letter of Credit"** means that certain Letter of Credit No. NZS472364 in the original face amount of approximately \$470,400.00, issued by Wells Fargo on or about February 12, 2003 for the account of Company and for the benefit of 444 Madison LLC.

### **1.2 Accounting Terms: Utilization of GAAP for Purposes of Calculations Under Agreement**

Except as otherwise expressly provided in this Agreement, all accounting terms not otherwise defined herein shall have the meanings assigned to them in conformity with GAAP. Financial statements and other information required to be delivered by Company to Lenders pursuant to clauses (ii), (iii), (iv) and (xii) of subsection 6.1 shall be prepared in accordance with GAAP as in effect at the time of such preparation (and delivered together with the reconciliation statements provided for in subsection 6.1(vi)). Calculations in connection with the definitions, covenants and other provisions of this Agreement shall utilize GAAP as in effect on the date of determination, applied in a manner consistent with that used in preparing the financial statements referred to in subsection 5.3. If at any time any change in GAAP would affect the computation of any financial ratio or requirement set forth in any Loan Document, and Company, Administrative Agent or Requisite Lenders shall so request, Administrative Agent, Lenders and Company shall negotiate in good faith to amend such ratio or requirement to preserve the original intent thereof in light of such change in GAAP (subject to the approval of Requisite Lenders), provided that, until so amended, such ratio or requirement shall continue to be computed in accordance with GAAP prior to such change therein and Company shall provide to Administrative Agent and Lenders reconciliation statements provided for in subsection 6.1(vi).

### **1.3 Other Definitional Provisions and Rules of Construction.**

A. Any of the terms defined herein may, unless the context otherwise requires, be used in the singular or the plural, depending on the reference.

**B.** References to “Sections” and “subsections” shall be to Sections and subsections, respectively, of this Agreement unless otherwise specifically provided. Section and subsection headings in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purpose or be given any substantive effect.

**C.** The use in any of the Loan Documents of the word “include” or “including”, when following any general statement, term or matter, shall not be construed to limit such statement, term or matter to the specific items or matters set forth immediately following such word or to similar items or matters, whether or not nonlimiting language (such as “without limitation” or “but not limited to” or words of similar import) is used with reference thereto, but rather shall be deemed to refer to all other items or matters that fall within the broadest possible scope of such general statement, term or matter.

## **Section 2. AMOUNTS AND TERMS OF COMMITMENTS AND LOANS**

### **2.1 Commitments; Making of Loans; the Register; Optional Notes**

**A. Commitments.** Subject to the terms and conditions of this Agreement and in reliance upon the representations and warranties of Company herein set forth, each Lender severally agrees, subject to the limitations set forth below with respect to the maximum amount of Revolving Loans permitted to be outstanding from time to time, to lend to Company from time to time during the period from the Closing Date to but excluding the Revolving Loan Commitment Termination Date an aggregate amount not exceeding its Pro Rata Share of the aggregate amount of the Revolving Loan Commitments to be used for the purposes identified in subsection 2.5A. The original amount of each Revolving Lender’s Revolving Loan Commitment is set forth opposite its name set forth on Schedule 2.1 annexed hereto and the aggregate original amount of the Revolving Loan Commitments is \$30,000,000; provided that the Revolving Loan Commitments of Revolving Lenders shall be adjusted to give effect to any assignments of the Revolving Loan Commitments pursuant to subsection 10.1B and shall be reduced from time to time by the amount of any reductions thereto made pursuant to subsection 2.4. Each Revolving Lender’s Revolving Loan Commitment shall expire on the Revolving Loan Commitment Termination Date and all Revolving Loans and all other amounts owed hereunder with respect to the Revolving Loans and the Revolving Loan Commitments shall be paid in full no later than that date. Amounts borrowed under this subsection 2.1A may be repaid and reborrowed to but excluding the Revolving Loan Commitment Termination Date. Anything contained in this Agreement to the contrary notwithstanding, the Revolving Loans and the Revolving Loan Commitments shall be subject to the limitation that in no event shall the Total Utilization of Revolving Loan Commitments at any time exceed the lesser of the Revolving Loan Commitments then in effect or the Borrowing Base then in effect.

**B. Borrowing Mechanics.** Revolving Loans made on any Funding Date (other than Revolving Loans made pursuant to subsection 3.3B) shall be in an aggregate minimum amount of \$500,000 and multiples of \$100,000 in excess of that amount; provided that Revolving Loans made on any Funding Date as Eurodollar Rate Loans with a particular Interest Period shall be in an aggregate minimum amount of \$1,000,000 and multiples of \$500,000 in excess of that

amount. Whenever Company desires that Lenders make Revolving Loans it shall deliver to Administrative Agent a duly executed Notice of Borrowing no later than 10:00 A.M. (California time) at least three Business Days in advance of the proposed Funding Date (in the case of a Eurodollar Rate Loan) or on the proposed Funding Date (in the case of a Base Rate Loan). Revolving Loans may be continued as or converted into Base Rate Loans and Eurodollar Rate Loans in the manner provided in subsection 2.2D. In lieu of delivering a Notice of Borrowing, Company may give Administrative Agent telephonic notice by the required time of any proposed borrowing under this subsection 2.1B; provided that such notice shall be promptly confirmed in writing by delivery of a duly executed Notice of Borrowing to Administrative Agent on or before the applicable Funding Date.

Neither Administrative Agent nor any Lender shall incur any liability to Company in acting upon any telephonic notice referred to above that Administrative Agent believes in good faith to have been given by an Officer or other person authorized to borrow on behalf of Company or for otherwise acting in good faith under this subsection 2.1B or under subsection 2.2D, and upon funding of Loans by Lenders, and upon conversion or continuation of the applicable basis for determining the interest rate with respect to any Loans pursuant to subsection 2.2D, in each case in accordance with this Agreement, pursuant to any such telephonic notice Company shall have effected Loans or a conversion or continuation, as the case may be, hereunder.

Company shall notify Administrative Agent prior to the funding of any Loans in the event that any of the matters to which Company is required to certify in the applicable Notice of Borrowing is no longer true and correct as of the applicable Funding Date, and the acceptance by Company of the proceeds of any Loans shall constitute a re-certification by Company, as of the applicable Funding Date, as to the matters to which Company is required to certify in the applicable Notice of Borrowing.

Except as otherwise provided in subsections 2.6B, 2.6C and 2.6G, a Notice of Borrowing for, or a Notice of Conversion/Continuation for conversion to, or continuation of, a Eurodollar Rate Loan (or telephonic notice in lieu thereof) shall be irrevocable on and after the related Interest Rate Determination Date, and Company shall be bound to make a borrowing or to effect a conversion or continuation in accordance therewith.

**C. Disbursement of Funds.** All Revolving Loans shall be made by Lenders simultaneously and proportionately to their respective Pro Rata Shares, it being understood that neither Administrative Agent nor any Lender shall be responsible for any default by any other Lender in that other Lender's obligation to make a Loan requested hereunder nor shall the Commitment of any Lender to make the particular type of Loan requested be increased or decreased as a result of a default by any other Lender in that other Lender's obligation to make a Loan requested hereunder. Promptly after receipt by Administrative Agent of a Notice of Borrowing pursuant to subsection 2.1B (or telephonic notice in lieu thereof), Administrative Agent shall notify each Lender for that type of Loan of the proposed borrowing. Each such Lender shall make the amount of its Loan available to Administrative Agent not later than 10:00 A.M. (California time) on the applicable Funding Date in same day funds in Dollars at the

Funding and Payment Office. Except as provided in subsection 3.3B with respect to Revolving Loans used to reimburse Issuing Lender for the amount of a drawing under a Letter of Credit issued by it, upon satisfaction or waiver of the conditions precedent specified in subsections 4.1 (in the case of Loans made on the Closing Date) and 4.2 (in the case of all Loans), Administrative Agent shall make the proceeds of such Loans available to Company on the applicable Funding Date by causing an amount of same day funds in Dollars equal to the proceeds of all such Loans received by Administrative Agent from Lenders to be credited to the account of Company at the Funding and Payment Office.

Unless Administrative Agent shall have been notified by any Lender prior to a Funding Date for any Loans that such Lender does not intend to make available to Administrative Agent the amount of such Lender's Loan requested on such Funding Date, Administrative Agent may assume that such Lender has made such amount available to Administrative Agent on such Funding Date and Administrative Agent may, in its sole discretion, but shall not be obligated to, make available to Company a corresponding amount on such Funding Date. If such corresponding amount is not in fact made available to Administrative Agent by such Lender, Administrative Agent shall be entitled to recover such corresponding amount on demand from such Lender together with interest thereon, for each day from such Funding Date until the date such amount is paid to Administrative Agent, at the customary rate set by Administrative Agent for the correction of errors among banks for three Business Days and thereafter at the Base Rate. If such Lender does not pay such corresponding amount forthwith upon Administrative Agent's demand therefor, Administrative Agent shall promptly notify Company and Company shall immediately pay such corresponding amount to Administrative Agent together with interest thereon, for each day from such Funding Date until the date such amount is paid to Administrative Agent, at the rate payable under this Agreement for Base Rate Loans. Nothing in this subsection 2.1C shall be deemed to relieve any Lender from its obligation to fulfill its Commitments hereunder or to prejudice any rights that Company may have against any Lender as a result of any default by such Lender hereunder.

**D. The Register.**

Administrative Agent, acting for these purposes solely as an agent of Company (it being acknowledged that Administrative Agent, in such capacity, and its officers, directors, employees, agent and affiliates shall constitute Indemnitees under subsection 10.3), shall maintain (and make available for inspection by Company upon reasonable prior notice at reasonable times) at its address referred to in subsection 10.8 a register for the recordation of, and shall record, the names and addresses of Lenders and the Revolving Loan Commitment and Revolving Loans of each Lender from time to time (the "**Register**"). Company and Administrative Agent shall deem and treat the Persons listed as Lenders in the Register as the holders and owners of the corresponding Commitments and Loans listed therein for all purposes hereof; all amounts owed with respect to any Commitment or Loan shall be owed to the Lender listed in the Register as the owner thereof; and any request, authority or consent of any Person who, at the time of making such request or giving such authority or consent, is listed in the Register as a Lender shall be conclusive and binding on any subsequent holder, assignee or transferee of the corresponding Commitments or Loans. Each Lender shall record on its internal records the amount of its Loans



and Commitments and each payment in respect hereof, and any such recordation shall be conclusive and binding on Company, absent manifest error, subject to the entries in the Register, which shall, absent manifest error, govern in the event of any inconsistency with any Lender's records. Failure to make any recordation in the Register or in any Lender's records, or any error in such recordation, shall not affect any Loans or Commitments or any Obligations in respect of any Loans.

**E. Optional Notes.** If so requested by any Lender by written notice to Company (with a copy to Administrative Agent) at least two Business Days prior to the Closing Date or at any time thereafter, Company shall execute and deliver to such Lender (and/or, if applicable and if so specified in such notice, to any Person who is an assignee of such Lender pursuant to subsection 10.1) on the Closing Date (or, if such notice is delivered after the Closing Date, promptly after Company's receipt of such notice) a promissory note or promissory notes to evidence such Lender's Revolving Loans, substantially in the form of Exhibit IV annexed hereto, with appropriate insertions.

## **2.2 Interest on the Loans.**

**A. Rate of Interest.** Subject to the provisions of subsections 2.6 and 2.7, each Revolving Loan shall bear interest on the unpaid principal amount thereof from the date made through maturity (whether by acceleration or otherwise) at a rate determined by reference to the Base Rate or the Eurodollar Rate. The applicable basis for determining the rate of interest with respect to any Revolving Loan shall be selected by Company initially at the time a Notice of Borrowing is given with respect to such Loan pursuant to subsection 2.1B, and the basis for determining the interest rate with respect to any Revolving Loan may be changed from time to time pursuant to subsection 2.2D. If on any day a Revolving Loan is outstanding with respect to which notice has not been delivered to Administrative Agent in accordance with the terms of this Agreement specifying the applicable basis for determining the rate of interest, then for that day that Loan shall bear interest determined by reference to the Base Rate. Subject to the provisions of subsections 2.2E, 2.2G and 2.7, the Revolving Loans shall bear interest through maturity as follows: (i) if a Base Rate Loan, then at the sum of the Base Rate plus 1.00% per annum or (ii) if a Eurodollar Rate Loan, then at the sum of the Eurodollar Rate plus 2.50% per annum.

**B. Interest Periods.** In connection with each Eurodollar Rate Loan, Company may, pursuant to the applicable Notice of Borrowing or Notice of Conversion/Continuation, as the case may be, select an interest period (each an "Interest Period") to be applicable to such Loan, which Interest Period shall be, at Company's option, either a one, two, three or six month period; provided that:

- (i) the initial Interest Period for any Eurodollar Rate Loan shall commence on the Funding Date in respect of such Loan, in the case of a Loan initially made as a Eurodollar Rate Loan, or on the date specified in the applicable Notice of Conversion/Continuation, in the case of a Loan converted to a Eurodollar Rate Loan;

(ii) in the case of immediately successive Interest Periods applicable to a Eurodollar Rate Loan continued as such pursuant to a Notice of Conversion/Continuation, each successive Interest Period shall commence on the day on which the next preceding Interest Period expires;

(iii) if an Interest Period would otherwise expire on a day that is not a Business Day, such Interest Period shall expire on the next succeeding Business Day; provided that, if any Interest Period would otherwise expire on a day that is not a Business Day but is a day of the month after which no further Business Day occurs in such month, such Interest Period shall expire on the next preceding Business Day;

(iv) any Interest Period that begins on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period) shall, subject to clause (v) of this subsection 2.2B, end on the last Business Day of a calendar month;

(v) no Interest Period with respect to any portion of the Revolving Loans shall extend beyond the Revolving Loan Commitment Termination Date;

(vi) there shall be no more than five Interest Periods outstanding at any time; and

(vii) in the event Company fails to specify an Interest Period for any Eurodollar Rate Loan in the applicable Notice of Borrowing or Notice of Conversion/Continuation, Company shall be deemed to have selected an Interest Period of one month.

**C. Interest Payments.** Subject to the provisions of subsection 2.2E, interest on each Loan shall be payable in arrears on and to each Interest Payment Date applicable to that Loan, upon any prepayment of that Loan (to the extent accrued on the amount being prepaid) and at maturity (including final maturity) provided that in the event any Revolving Loans that are Base Rate Loans are prepaid pursuant to subsection 2.4A(i), interest accrued on such Loans through the date of such prepayment shall be payable on the next succeeding Interest Payment Date applicable to Base Rate Loans (or, if earlier, at final maturity).

**D. Conversion or Continuation.** Subject to the provisions of subsection 2.6, Company shall have the option (i) to convert at any time all or any part of its outstanding Revolving Loans equal to \$500,000 and multiples of \$100,000 in excess of that amount from Loans bearing interest at a rate determined by reference to one basis to Loans bearing interest at a rate determined by reference to an alternative basis or (ii) upon the expiration of any Interest Period applicable to a Eurodollar Rate Loan, to continue all or any portion of such Loan equal to \$1,000,000 and multiples of \$500,000 in excess of that amount as a Eurodollar Rate Loan; provided, however, that a Eurodollar Rate Loan may only be converted into a Base Rate Loan on the expiration date of an Interest Period applicable thereto.

Company shall deliver a duly executed Notice of Conversion/Continuation to Administrative Agent no later than 10:00 A.M. (California time) at least one Business Day in

advance of the proposed conversion date (in the case of a conversion to a Base Rate Loan) and at least three Business Days in advance of the proposed conversion/continuation date (in the case of a conversion to, or a continuation of, a Eurodollar Rate Loan). In lieu of delivering a Notice of Conversion/Continuation, Company may give Administrative Agent telephonic notice by the required time of any proposed conversion/continuation under this subsection 2.2D; provided that such notice shall be promptly confirmed in writing by delivery of a duly executed Notice of Conversion/Continuation to Administrative Agent on or before the proposed conversion/continuation date. Upon receipt of written or telephonic notice of any proposed conversion/continuation under this subsection 2.2D, Administrative Agent shall promptly transmit such notice by telefacsimile or telephone to each Lender of the Loan subject to the Notice of Conversion/Continuation.

**E. Default Rate.** Upon the occurrence and during the continuation of any Event of Default, the outstanding principal amount of all Loans and, to the extent permitted by applicable law, any interest payments thereon not paid when due and any fees and other amounts then due and payable hereunder, shall thereafter bear interest (including post-petition interest in any proceeding under the Bankruptcy Code or other applicable bankruptcy laws) payable upon demand at a rate that is 2% per annum in excess of the interest rate otherwise payable under this Agreement with respect to the applicable Loans (or, in the case of any such fees and other amounts, at a rate which is 2% per annum in excess of the interest rate otherwise payable under this Agreement for Base Rate Loans); provided that, in the case of Eurodollar Rate Loans, upon the expiration of the Interest Period in effect at the time any such increase in interest rate is effective such Eurodollar Rate Loans shall thereupon become Base Rate Loans and shall thereafter bear interest payable upon demand at a rate which is 2% per annum in excess of the interest rate otherwise payable under this Agreement for Base Rate Loans. Payment or acceptance of the increased rates of interest provided for in this subsection 2.2E is not a permitted alternative to timely payment and shall not constitute a waiver of any Event of Default or otherwise prejudice or limit any rights or remedies of Administrative Agent or any Lender.

**F. Computation of Interest.** Interest on the Loans shall be computed on the basis of a 360-day year, in each case for the actual number of days elapsed in the period during which it accrues. In computing interest on any Loan, the date of the making of such Loan or the first day of an Interest Period applicable to such Loan or, with respect to a Base Rate Loan being converted from a Eurodollar Rate Loan, the date of conversion of such Eurodollar Rate Loan to such Base Rate Loan, as the case may be, shall be included, and the date of payment of such Loan or the expiration date of an Interest Period applicable to such Loan or, with respect to a Base Rate Loan being converted to a Eurodollar Rate Loan, the date of conversion of such Base Rate Loan to such Eurodollar Rate Loan, as the case may be, shall be excluded; provided that if a Loan is repaid on the same day on which it is made, one day's interest shall be paid on that Loan.

**G. Maximum Rate.** Notwithstanding the foregoing provisions of this subsection 2.2, in no event shall the rate of interest payable by Company with respect to any Loan exceed the maximum rate of interest permitted to be charged under applicable law.

### 2.3 Fees.

**A. Commitment Fees.** Company agrees to pay to Administrative Agent, for distribution to each Revolving Lender in proportion to that Lender's Pro Rata Share, commitment fees for the period from and including the Closing Date to and excluding the Revolving Loan Commitment Termination Date equal to the average of the daily excess of the Revolving Loan Commitments over the sum of (i) the aggregate principal amount of outstanding Revolving Loans plus (ii) the Letter of Credit Usage multiplied by 0.50% per annum, such commitment fees to be calculated on the basis of a 360-day year and the actual number of days elapsed and to be payable quarterly in arrears on March 31, June 30, September 30 and December 31 of each year, commencing on the first such date to occur after the Closing Date, and on the Revolving Loan Commitment Termination Date.

**B. Other Fees.** Company agrees to pay to Administrative Agent such fees in the amounts and at the times separately agreed upon between Company and Administrative Agent.

### 2.4 Repayments, Prepayments and Reductions in Revolving Loan Commitments; General Provisions Regarding Payments; Application of Proceeds of Collateral and Payments Under Subsidiary Guaranty.

#### **A. Prepayments and Reductions in Revolving Loan Commitments.**

(i) Voluntary Prepayments. Company may, upon any Business Day with prior written or telephonic notice, in the case of Base Rate Loans, and three Business Days' prior written or telephonic notice, in the case of Eurodollar Rate Loans, in each case given to Administrative Agent by 10:00 A.M. (California time) on the date required and, if given by telephone, promptly confirmed in writing to Administrative Agent (which original written or telephonic notice Administrative Agent will promptly transmit by telefacsimile or telephone to each Lender for the Loans to be prepaid), at any time and from time to time prepay any Revolving Loans on any Business Day in whole or in part in an aggregate minimum amount of \$1,000,000 and multiples of \$500,000 in excess of that amount with respect to Eurodollar Rate Loans, and \$500,000 and multiples of \$100,000 in excess of that amount with respect to Base rate Loans. Notice of prepayment having been given as aforesaid, the principal amount of the Loans specified in such notice shall become due and payable on the prepayment date specified therein. Any such voluntary prepayment shall be applied as specified in subsection 2.4A(iv).

(ii) Voluntary Reductions of Revolving Loan Commitments. Company may, upon not less than three Business Days' prior written or telephonic notice confirmed in writing to Administrative Agent (which original written or telephonic notice Administrative Agent will promptly transmit by telefacsimile or telephone to each Revolving Lender), at any time and from time to time terminate in whole or permanently reduce in part, without premium or penalty, the Revolving Loan Commitments in an amount up to the amount by which the Revolving Loan Commitments exceed the Total Utilization of Revolving Loan Commitments at the time of such proposed termination or

reduction; provided that any such partial reduction of the Revolving Loan Commitments shall be in an aggregate minimum amount of \$1,000,000 and multiples of \$1,000,000 in excess of that amount. Company's notice to Administrative Agent shall designate the date (which shall be a Business Day) of such termination or reduction and the amount of any partial reduction, and such termination or reduction of the Revolving Loan Commitments shall be effective on the date specified in Company's notice and shall reduce the Revolving Loan Commitment of each Revolving Lender proportionately to its Pro Rata Share. Any such voluntary reduction of the Revolving Loan Commitments shall be applied as specified in subsection 2.4A(iv).

(iii) Mandatory Prepayments and Mandatory Reductions of Revolving Loan Commitments The Loans shall be prepaid and/or the Revolving Loan Commitments shall be permanently reduced in the amounts and under the circumstances set forth below, all such prepayments and/or reductions to be applied as set forth below or as more specifically provided in subsection 2.4A(iv):

(a) Prepayments and Reductions from Net Business Interruption Insurance Proceeds No later than the first Business Day following the date of receipt by Administrative Agent or by Company or any of its Subsidiaries of any Net Business Interruption Insurance Proceeds that are required to be applied to prepay the Loans and/or reduce the Revolving Loan Commitments pursuant to the provisions of subsection 6.4C, Company shall prepay the Loans and/or the Revolving Loan Commitments shall be permanently reduced in an aggregate amount equal to the amount of such Net Business Interruption Insurance Proceeds.

(b) Calculations of Net Business Interruption Insurance Proceeds Amounts; Additional Prepayments and Reductions Based on Subsequent Calculations. Concurrently with any prepayment of the Loans and/or reduction of the Revolving Loan Commitments pursuant to subsection 2.4A(iii)(a), Company shall deliver to Administrative Agent an Officer's Certificate demonstrating the calculation of the amount of the applicable Net Business Interruption Insurance Proceeds that gave rise to such prepayment and/or reduction. In the event that Company shall subsequently determine that the actual amount was greater than the amount set forth in such Officer's Certificate, Company shall promptly make an additional prepayment of the Loans (and/or, if applicable, the Revolving Loan Commitments shall be permanently reduced) in an amount equal to the amount of such excess, and Company shall concurrently therewith deliver to Administrative Agent an Officer's Certificate demonstrating the derivation of the additional amount resulting in such excess.

(c) Prepayments Due to Reductions or Restrictions of Revolving Loan Commitments or Due to Insufficient Borrowing Base Company shall from time to time prepay the Revolving Loans to the extent necessary so that the Total Utilization of Revolving Loan Commitments shall not at any time exceed the

lesser of the Revolving Loan Commitments then in effect and the Borrowing Base then in effect.

(iv) Application of Prepayments.

(a) Application of Voluntary Prepayments by Type of Loans and Order of Maturity. Any voluntary prepayments pursuant to subsection 2.4A(i) shall be applied as specified by Company in the applicable notice of prepayment; provided that in the event Company fails to specify the Loans to which any such prepayment shall be applied, such prepayment shall be applied to repay outstanding Revolving Loans to the full extent thereof.

(b) Application of Mandatory Prepayments by Type of Loans. Except as provided in subsection 2.4C, any amount required to be applied as a mandatory prepayment of the Loans and/or a reduction of the Revolving Loan Commitments pursuant to subsection 2.4A(iii)(a) shall be applied first, to prepay the Revolving Loans to the full extent thereof and to further permanently reduce the Revolving Loan Commitments by the amount of such prepayment, and second, to the extent of any remaining portion of such amount, to further permanently reduce the Revolving Loan Commitments to the full extent thereof. Any mandatory reduction of Revolving Commitments pursuant to this subsection 2.4A shall be in proportion to each Revolving Lender's Pro Rata Share.

(c) Application of Prepayments to Base Rate Loans and Eurodollar Rate Loans. Any prepayment shall be applied first to Base Rate Loans to the full extent thereof before application to Eurodollar Rate Loans, in each case in a manner that minimizes the amount of any payments required to be made by Company pursuant to subsection 2.6D.

**B. General Provisions Regarding Payments.**

(i) Manner and Time of Payment. All payments by Company of principal, interest, fees and other Obligations shall be made in Dollars in same day funds, without defense, setoff or counterclaim, free of any restriction or condition, and delivered to Administrative Agent not later than 10:00 A.M. (California time) on the date due at the Funding and Payment Office for the account of Lenders; funds received by Administrative Agent after that time on such due date shall be deemed to have been paid by Company on the next succeeding Business Day. Company hereby authorizes Administrative Agent to charge its accounts with Administrative Agent in order to cause timely payment to be made to Administrative Agent of all principal, interest, fees and expenses due hereunder (subject to sufficient funds being available in its accounts for that purpose).

(ii) Application of Payments to Principal and Interest. Except as provided in subsection 2.2C, all payments in respect of the principal amount of any Loan shall

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include payment of accrued interest on the principal amount being repaid or prepaid, and all such payments (and, in any event, any payments in respect of any Loan on a date when interest is due and payable with respect to such Loan) shall be applied to the payment of interest before application to principal.

(iii) Apportionment of Payments. Aggregate principal and interest payments in respect of Revolving Loans shall be apportioned among all outstanding Loans to which such payments relate, in each case proportionately to Lenders' respective Pro Rata Shares. Administrative Agent shall promptly distribute to each Lender, at its primary address set forth below its name on the appropriate signature page hereof or at such other address as such Lender may request, its Pro Rata Share of all such payments received by Administrative Agent and the commitment fees of such Lender, if any, when received by Administrative Agent pursuant to subsection 2.3. Notwithstanding the foregoing provisions of this subsection 2.4B(iii), if, pursuant to the provisions of subsection 2.6C, any Notice of Conversion/Continuation is withdrawn as to any Affected Lender or if any Affected Lender makes Base Rate Loans in lieu of its Pro Rata Share of any Eurodollar Rate Loans, Administrative Agent shall give effect thereto in apportioning payments received thereafter.

(iv) Payments on Business Days. Whenever any payment to be made hereunder shall be stated to be due on a day that is not a Business Day, such payment shall be made on the next succeeding Business Day and such extension of time shall be included in the computation of the payment of interest hereunder or of the commitment fees hereunder, as the case may be.

(v) Notation of Payment. Each Lender agrees that before disposing of any Note held by it, or any part thereof (other than by granting participations therein), that Lender will make a notation thereon of all Loans evidenced by that Note and all principal payments previously made thereon and of the date to which interest thereon has been paid; provided that the failure to make (or any error in the making of) a notation of any Loan made under such Note shall not limit or otherwise affect the obligations of Company hereunder or under such Note with respect to any Loan or any payments of principal or interest on such Note.

#### **C. Application of Proceeds of Collateral and Payments after Event of Default**

Upon termination of the Revolving Loan Commitments or upon the occurrence and during the continuation of an Event of Default, if requested by Requisite Lenders (a) all payments received on account of the Obligations, whether from Company, from any Guarantor or otherwise, shall be applied by Administrative Agent against the Obligations and (b) all proceeds received by Administrative Agent in respect of any sale of, collection from, or other realization upon all or any part of the Collateral under any Collateral Document may, in the discretion of Administrative Agent, be held by Administrative Agent as Collateral for, and/or (then or at any time thereafter) applied in full or in part by Administrative Agent against, the

applicable Secured Obligations (as defined in such Collateral Document), in each case in the following order of priority:

(i) to the payment of all costs and expenses of such sale, collection or other realization, all other expenses, liabilities and advances made or incurred by Administrative Agent in connection therewith, and all amounts for which Administrative Agent is entitled to compensation (including the fees described in subsection 2.3), reimbursement and indemnification under any Loan Document and all advances made by Administrative Agent thereunder for the account of the applicable Loan Party, and to the payment of all costs and expenses paid or incurred by Administrative Agent in connection with the Loan Documents, all in accordance with subsections 9.4, 10.2 and 10.3 and the other terms of this Agreement and the Loan Documents;

(ii) thereafter, to the payment of all other Obligations for the ratable benefit of the holders thereof (subject to the provisions of subsection 2.4B(ii) hereof); and

(iii) thereafter, to the payment to or upon the order of such Loan Party or to whosoever may be lawfully entitled to receive the same or as a court of competent jurisdiction may direct.

## **2.5 Use of Proceeds.**

**A. Revolving Loans.** The proceeds of any Revolving Loans shall be applied by Company for working capital and other general corporate purposes, which may include the making of intercompany loans to any of Company's Subsidiaries, to the extent permitted pursuant to subsection 7.1, for their own general corporate purposes.

**B. Margin Regulations.** No portion of the proceeds of any borrowing under this Agreement shall be used by Company or any of its Subsidiaries in any manner that might cause the borrowing or the application of such proceeds to violate Regulation U, Regulation T or Regulation X of the Board of Governors of the Federal Reserve System or any other regulation of such Board or to violate the Exchange Act, in each case as in effect on the date or dates of such borrowing and such use of proceeds.

## **2.6 Special Provisions Governing Eurodollar Rate Loans.**

Notwithstanding any other provision of this Agreement to the contrary, the following provisions shall govern with respect to Eurodollar Rate Loans as to the matters covered:

**A. Determination of Applicable Interest Rate.** As soon as practicable after 10:00 A.M. (California time) on each Interest Rate Determination Date, Administrative Agent shall determine (which determination shall, absent manifest error, be conclusive and binding upon all parties) the interest rate that shall apply to the Eurodollar Rate Loans for which an interest rate is then being determined for the applicable Interest Period and shall promptly give notice thereof (in writing or by telephone confirmed in writing) to Company and each Lender.



**B. Inability to Determine Applicable Interest Rate.** In the event that Administrative Agent shall have determined (which determination shall be conclusive and binding upon all parties hereto), on any Interest Rate Determination Date that by reason of circumstances affecting the London interbank market adequate and fair means do not exist for ascertaining the interest rate applicable to such Loans on the basis provided for in the definition of Eurodollar Rate, Administrative Agent shall on such date give notice (by telefacsimile or by telephone confirmed in writing) to Company and each Lender of such determination, whereupon (i) no Loans may be made as, or converted to, Eurodollar Rate Loans until such time as Administrative Agent notifies Company and Lenders that the circumstances giving rise to such notice no longer exist and (ii) any Notice of Borrowing or Notice of Conversion/Continuation given by Company with respect to the Loans in respect of which such determination was made shall be deemed to be for a Base Rate Loan.

**C. Illegality or Impracticability of Eurodollar Rate Loans** In the event that on any date any Lender shall have determined (which determination shall be conclusive and binding upon all parties hereto but shall be made only after consultation with Company and Administrative Agent) that the making, maintaining or continuation of its Eurodollar Rate Loans (i) has become unlawful as a result of compliance by such Lender in good faith with any law, treaty, governmental rule, regulation, guideline or order (or would conflict with any such treaty, governmental rule, regulation, guideline or order not having the force of law even though the failure to comply therewith would not be unlawful) or (ii) has become impracticable, or would cause such Lender material hardship, as a result of contingencies occurring after the date of this Agreement which materially and adversely affect the London interbank market or the position of such Lender in that market, then, and in any such event, such Lender shall be an “**Affected Lender**” and it shall on that day give notice (by telefacsimile or by telephone confirmed in writing) to Company and Administrative Agent of such determination (which notice Administrative Agent shall promptly transmit to each other Lender). Thereafter (a) the obligation of the Affected Lender to make Loans as, or to convert Loans to, Eurodollar Rate Loans shall be suspended until such notice shall be withdrawn by the Affected Lender, (b) to the extent such determination by the Affected Lender relates to a Eurodollar Rate Loan then being requested by Company pursuant to a Notice of Borrowing or a Notice of Conversion/Continuation, the Affected Lender shall make such Loan as (or convert such Loan to, as the case may be) a Base Rate Loan, (c) the Affected Lender’s obligation to maintain its outstanding Eurodollar Rate Loans (the “**Affected Loans**”) shall be terminated at the earlier to occur of the expiration of the Interest Period then in effect with respect to the Affected Loans or when required by law, and (d) the Affected Loans shall automatically convert into Base Rate Loans on the date of such termination. Notwithstanding the foregoing, to the extent a determination by an Affected Lender as described above relates to a Eurodollar Rate Loan then being requested by Company pursuant to a Notice of Borrowing or a Notice of Conversion/Continuation, Company shall have the option, subject to the provisions of subsection 2.6D, to rescind such Notice of Borrowing or Notice of Conversion/Continuation as to all Lenders by giving notice (by telefacsimile or by telephone confirmed in writing) to Administrative Agent of such rescission on the date on which the Affected Lender gives notice of its determination as described above (which notice of rescission Administrative Agent shall promptly transmit to each other Lender). Except as provided in the immediately preceding

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sentence, nothing in this subsection 2.6C shall affect the obligation of any Lender other than an Affected Lender to make or maintain Loans as, or to convert Loans to, Eurodollar Rate Loans in accordance with the terms of this Agreement.

**D. Compensation For Breakage or Non-Commencement of Interest Periods.** Company shall compensate each Lender, upon written request by that Lender pursuant to subsection 2.8, for all reasonable losses, expenses and liabilities (including any interest paid by that Lender to lenders of funds borrowed by it to make or carry its Eurodollar Rate Loans and any loss, expense or liability sustained by that Lender in connection with the liquidation or re-employment of such funds) which that Lender may sustain: (i) if for any reason (other than a default by that Lender) a borrowing of any Eurodollar Rate Loan does not occur on a date specified therefor in a Notice of Borrowing or a telephonic request therefor, or a conversion to or continuation of any Eurodollar Rate Loan does not occur on a date specified therefor in a Notice of Conversion/Continuation or a telephonic request therefor, (ii) if any prepayment or other principal payment or any conversion of any of its Eurodollar Rate Loans (including any prepayment or conversion occasioned by the circumstances described in subsection 2.6C) occurs on a date prior to the last day of an Interest Period applicable to that Loan, (iii) if any prepayment of any of its Eurodollar Rate Loans is not made on any date specified in a notice of prepayment given by Company, or (iv) as a consequence of any other default by Company in the repayment of its Eurodollar Rate Loans when required by the terms of this Agreement.

**E. Booking of Eurodollar Rate Loans.** Any Lender may make, carry or transfer Eurodollar Rate Loans at, to, or for the account of any of its branch offices or the office of an Affiliate of that Lender.

**F. Assumptions Concerning Funding of Eurodollar Rate Loans.** Calculation of all amounts payable to a Lender under this subsection 2.6 and under subsection 2.7A shall be made as though that Lender had funded each of its Eurodollar Rate Loans through the purchase of a Eurodollar deposit bearing interest at the rate obtained pursuant to clause (i) of the definition of Eurodollar Rate in an amount equal to the amount of such Eurodollar Rate Loan and having a maturity comparable to the relevant Interest Period, whether or not its Eurodollar Rate Loans had been funded in such manner.

**G. Eurodollar Rate Loans After Default.** After the occurrence of and during the continuation of a Potential Event of Default or an Event of Default, (i) Company may not elect to have a Loan be made or maintained as, or converted to, a Eurodollar Rate Loan after the expiration of any Interest Period then in effect for that Loan and (ii) subject to the provisions of subsection 2.6D, any Notice of Borrowing or Notice of Conversion/Continuation given by Company with respect to a requested borrowing or conversion/continuation that has not yet occurred shall be deemed to be for a Base Rate Loan or, if the conditions to making a Loan set forth in subsection 4.2 cannot then be satisfied, to be rescinded by Company.

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**2.7 Increased Costs; Taxes; Capital Adequacy.**

**A. Compensation for Increased Costs.** Subject to the provisions of subsection 2.7B (which shall be controlling with respect to the matters covered thereby), in the event that any Lender (including Issuing Lender) shall determine (which determination shall, absent manifest error, be final and conclusive and binding upon all parties hereto) that any law, treaty or governmental rule, regulation or order, or any change therein or in the interpretation, administration or application thereof (including the introduction of any new law, treaty or governmental rule, regulation or order), or any determination of a court or other Government Authority, in each case that becomes effective after the date hereof, or compliance by such Lender with any guideline, request or directive issued or made after the date hereof by any central bank or other Government Authority (whether or not having the force of law):

- (i) subjects such Lender to any additional Tax with respect to this Agreement or any of its obligations hereunder (including with respect to issuing or maintaining any Letters of Credit or purchasing or maintaining any participations therein or maintaining any Commitment hereunder) or any payments to such Lender of principal, interest, fees or any other amount payable hereunder;
- (ii) imposes, modifies or holds applicable any reserve, special deposit, compulsory loan, insurance charge or similar requirement against assets held by, or deposits or other liabilities in or for the account of, or advances or loans by, or other credit extended by, or any other acquisition of funds by, any office of such Lender (other than any such reserve or other requirements with respect to Eurodollar Rate Loans that are reflected in the definition of Eurodollar Rate); or
- (iii) imposes any other condition (other than with respect to Taxes) on or affecting such Lender or its obligations hereunder or the London interbank market;

and the result of any of the foregoing is to increase the cost to such Lender of agreeing to make, making or maintaining its Loans or Commitments or agreeing to issue, issuing or maintaining any Letter of Credit or agreeing to purchase, purchasing or maintaining any participation therein or to reduce any amount received or receivable by such Lender with respect thereto; then, in any such case, Company shall promptly pay to such Lender, upon receipt of the statement referred to in subsection 2.8A, such additional amount or amounts (in the form of an increased rate of, or a different method of calculating, interest or otherwise as such Lender in its sole discretion shall determine) as may be necessary to compensate such Lender for any such increased cost or reduction in amounts received or receivable hereunder.

**B. Taxes.**

- (i) Payments to Be Free and Clear. All sums payable by Company under this Agreement and the other Loan Documents shall be paid free and clear of, and without any deduction or withholding on account of, any Tax imposed, levied, collected, withheld or assessed by or within the United States of America or any political subdivision in or of

the United States of America or any other jurisdiction from which a payment is made by or on behalf of Company or by any federation or organization of which the United States of America or any such jurisdiction is a member at the time of payment.

(ii) Grossing-up of Payments. If Company or any other Person is required by law to make any deduction or withholding on account of any such Tax from any sum paid or payable by Company to Administrative Agent or any Lender under any of the Loan Documents:

(a) Company shall notify Administrative Agent of any such requirement or any change in any such requirement as soon as Company becomes aware of it;

(b) Company shall pay any such Tax when such Tax is due, such payment to be made (if the liability to pay is imposed on Company) for its own account or (if that liability is imposed on Administrative Agent or such Lender, as the case may be) on behalf of and in the name of Administrative Agent or such Lender;

(c) the sum payable by Company in respect of which the relevant deduction, withholding or payment is required shall be increased to the extent necessary to ensure that, after the making of that deduction, withholding or payment, Administrative Agent or such Lender, as the case may be, receives on the due date a net sum equal to what it would have received had no such deduction, withholding or payment been required or made; and

(d) within 30 days after paying any sum from which it is required by law to make any deduction or withholding, and within 30 days after the due date of payment of any Tax which it is required by clause (b) above to pay, Company shall deliver to Administrative Agent evidence satisfactory to the other affected parties of such deduction, withholding or payment and of the remittance thereof to the relevant taxing or other authority;

provided that no such additional amount shall be required to be paid to any Lender under clause (c) above except to the extent that any change after the date on which such Lender became a Lender in any such requirement for a deduction, withholding or payment as is mentioned therein shall result in an increase in the rate of such deduction, withholding or payment from that in effect on the date on which such Lender became a Lender, in respect of payments to such Lender.

(iii) Evidence of Exemption from U.S. Withholding Tax.

(a) Each Non-US Lender shall deliver to Administrative Agent and to Company, on or prior to the Closing Date (in the case of each Lender listed on the signature pages hereof) or on or prior to the date of the Assignment Agreement pursuant to which it becomes a Lender (in the case of each other Lender), and at

such other times as may be necessary in the determination of Company or Administrative Agent (each in the reasonable exercise of its discretion), two original copies of Internal Revenue Service Form W-8BEN or W-8ECI (or any successor forms) properly completed and duly executed by such Lender, or, in the case of a Non-US Lender claiming exemption from United States federal withholding tax under Section 871(h) or 881(c) of the Internal Revenue Code with respect to payments of "portfolio interest", a form W-8BEN, and, in the case of a Lender that has certified in writing to Administrative Agent that it is not a "bank" (as defined in Section 881(c)(3)(A) of the Internal Revenue Code), a certificate of such Lender certifying that such Lender is not (i) a "bank" for purposes of Section 881(c) of the Internal Revenue Code, (ii) a ten-percent shareholder (within the meaning of Section 871(h)(3)(B) of the Internal Revenue Code) of Company or (iii) a controlled foreign corporation related to Company (within the meaning of Section 864(d)(4) of the Internal Revenue Code) in each case together with any other certificate or statement of exemption required under the Internal Revenue Code or the regulations issued thereunder to establish that such Lender is not subject to United States withholding tax with respect to any payments to such Lender of interest payable under any of the Loan Documents.

(b) Each Non-US Lender, to the extent it does not act or ceases to act for its own account with respect to any portion of any sums paid or payable to such Lender under any of the Loan Documents (for example, in the case of a typical participation by such Lender), shall deliver to Administrative Agent and to Company, on or prior to the Closing Date (in the case of each Lender listed on the signature pages hereof), on or prior to the date of the Assignment Agreement pursuant to which it becomes a Lender (in the case of each other Lender), or on such later date when such Lender ceases to act for its own account with respect to any portion of any such sums paid or payable, and at such other times as may be necessary in the determination of Company or Administrative Agent (each in the reasonable exercise of its discretion), (1) two original copies of the forms or statements required to be provided by such Lender under subsection 2.7B(iii)(a), properly completed and duly executed by such Lender, to establish the portion of any such sums paid or payable with respect to which such Lender acts for its own account that is not subject to United States withholding tax, and (2) two original copies of Internal Revenue Service Form W-8IMY (or any successor forms) properly completed and duly executed by such Lender, together with any information, if any, such Lender chooses to transmit with such form, and any other certificate or statement of exemption required under the Internal Revenue Code or the regulations issued thereunder, to establish that such Lender is not acting for its own account with respect to a portion of any such sums payable to such Lender.

(c) Each Non-US Lender hereby agrees, from time to time after the initial delivery by such Lender of such forms, whenever a lapse in time or change in circumstances renders such forms, certificates or other evidence so delivered

obsolete or inaccurate in any material respect, that such Lender shall promptly (1) deliver to Administrative Agent and to Company two original copies of renewals, amendments or additional or successor forms, properly completed and duly executed by such Lender, together with any other certificate or statement of exemption required in order to confirm or establish that such Lender is not subject to United States withholding tax with respect to payments to such Lender under the Loan Documents and, if applicable, that such Lender does not act for its own account with respect to any portion of such payment, or (2) notify Administrative Agent and Company of its inability to deliver any such forms, certificates or other evidence.

(d) Company shall not be required to pay any additional amount to any Non-US Lender under clause (c) of subsection 2.7B(ii), (1) with respect to any Tax required to be deducted or withheld on the basis of the information, certificates or statements of exemption such Lender chooses to transmit with an Internal Revenue Service Form W-8IMY pursuant to subsection 2.7B(iii)(b)(2) or (2) if such Lender shall have failed to satisfy the requirements of clause (a), (b) or (c)(1) of this subsection 2.7B(iii); provided that if such Lender shall have satisfied the requirements of subsection 2.7B(iii)(a) on the date such Lender became a Lender, nothing in this subsection 2.7B(iii)(d) shall relieve Company of its obligation to pay any amounts pursuant to subsection 2.7B(ii)(c) in the event that, as a result of any change in any applicable law, treaty or governmental rule, regulation or order, or any change in the interpretation, administration or application thereof, such Lender is no longer properly entitled to deliver forms, certificates or other evidence at a subsequent date establishing the fact that such Lender is not subject to withholding as described in subsection 2.7B(iii)(a).

**C. Capital Adequacy Adjustment.** If any Lender shall have determined that the adoption, effectiveness, phase-in or applicability after the date hereof of any law, rule or regulation (or any provision thereof) regarding capital adequacy, or any change therein or in the interpretation or administration thereof by any Government Authority charged with the interpretation or administration thereof, or compliance by any Lender with any guideline, request or directive regarding capital adequacy (whether or not having the force of law) of any such Government Authority, has or would have the effect of reducing the rate of return on the capital of such Lender or any corporation controlling such Lender as a consequence of, or with reference to, such Lender's Loans or Commitments or Letters of Credit or participations therein or other obligations hereunder with respect to the Loans or the Letters of Credit to a level below that which such Lender or such controlling corporation could have achieved but for such adoption, effectiveness, phase-in, applicability, change or compliance (taking into consideration the policies of such Lender or such controlling corporation with regard to capital adequacy), then from time to time, within five Business Days after receipt by Company from such Lender of the statement referred to in subsection 2.8A, Company shall pay to such Lender such additional amount or amounts as will compensate such Lender or such controlling corporation on an after-tax basis for such reduction.

## 2.8 Statement of Lenders; Obligation of Lenders and Issuing Lender to Mitigate

**A. Statements.** Each Lender claiming compensation or reimbursement pursuant to subsection 2.6D, 2.7 or 2.8B shall deliver to Company (with a copy to Administrative Agent) a written statement, setting forth in reasonable detail the basis of the calculation of such compensation or reimbursement, which statement shall be conclusive and binding upon all parties hereto absent manifest error.

**B. Mitigation.** Each Lender and Issuing Lender agrees that, as promptly as practicable after the officer of such Lender or Issuing Lender responsible for administering the Loans or Letters of Credit of such Lender or Issuing Lender, as the case may be, becomes aware of the occurrence of an event or the existence of a condition that would cause such Lender to become an Affected Lender or that would entitle such Lender or Issuing Lender to receive payments under subsection 2.7, use reasonable effort to make, issue, fund or maintain the Commitments of such Lender or the Affected Loans or Letters of Credit of such Lender or Issuing Lender through another lending or letter of credit office of such Lender or Issuing Lender, if (i) as a result thereof the circumstances which would cause such Lender to be an Affected Lender would cease to exist or the additional amounts which would otherwise be required to be paid to such Lender or Issuing Lender pursuant to subsection 2.7 would be materially reduced and (ii) as determined by such Lender or Issuing Lender in its sole discretion, such action would not otherwise be disadvantageous to such Lender or Issuing Lender; provided that such Lender or Issuing Lender will not be obligated to utilize such other lending or letter of credit office pursuant to this subsection 2.8B unless Company agrees to pay all incremental expenses incurred by such Lender or Issuing Lender as a result of utilizing such other lending or letter of credit office as described above.

## 2.9 Replacement of a Lender.

If Company receives a statement of amounts due pursuant to subsection 2.8A from a Lender, a Revolving Lender defaults in its obligations to fund a Revolving Loan pursuant to this Agreement, or a Lender becomes an Affected Lender (any such Lender, a "**Subject Lender**"), so long as (i) no Potential Event of Default or Event of Default shall have occurred and be continuing and Company has obtained a commitment from another Lender or an Eligible Assignee to purchase at par the Subject Lender's Loans and assume the Subject Lender's Commitments and all other obligations of the Subject Lender hereunder, (ii) such Lender is not Issuing Lender with respect to any Letters of Credit outstanding (unless all such Letters of Credit are terminated or arrangements acceptable to Issuing Lender (such as a "back-to-back" letter of credit) are made) and (iii), if applicable, the Subject Lender is unwilling to withdraw the notice delivered to Company pursuant to subsection 2.8 and/or is unwilling to remedy its default upon 10 days prior written notice to the Subject Lender and Administrative Agent, Company may require the Subject Lender to assign all of its Loans and Commitments to such other Lender, Lenders, Eligible Assignee or Eligible Assignees pursuant to the provisions of subsection 10.1B; provided that, prior to or concurrently with such replacement, (1) the Subject Lender shall have received payment in full of all principal, interest, fees and other amounts (including all amounts under subsections 2.6D, 2.7 and/or 2.8B (if applicable)) through such date of replacement and a

release from its obligations under the Loan Documents, (2) the processing fee required to be paid by subsection 10.1B(i) shall have been paid to Administrative Agent, and (3) all of the requirements for such assignment contained in subsection 10.1B, including, without limitation, the consent of Administrative Agent (if required) and the receipt by Administrative Agent of an executed Assignment Agreement and other supporting documents, have been fulfilled.

### **Section 3. LETTERS OF CREDIT**

#### **3.1 Issuance of Letters of Credit and Lenders' Purchase of Participations Therein.**

**A. Letters of Credit.** In addition to Company requesting that Lenders make Revolving Loans pursuant to subsection 2.1A, Company may request, in accordance with the provisions of this subsection 3.1, from time to time during the period from the Closing Date to but excluding the 30th day prior to the Revolving Loan Commitment Termination Date, that Issuing Lender issue Letters of Credit payable on a sight basis for the account of Company for the purposes specified in the definition of Letters of Credit. Subject to the terms and conditions of this Agreement and in reliance upon the representations and warranties of Company herein set forth, Issuing Lender shall issue such Letters of Credit in accordance with the provisions of this subsection 3.1; provided that Company shall not request that Issuing Lender issue (and Issuing Lender shall not issue):

(i) any Letter of Credit if, after giving effect to such issuance, the Total Utilization of Revolving Loan Commitments would exceed the lesser of the Revolving Loan Commitments then in effect or the Borrowing Base then in effect;

(ii) any Letter of Credit if, after giving effect to such issuance, the Letter of Credit Usage would exceed \$8,000,000;

(iii) any Letter of Credit having an expiration date later than the earlier of (a) ten days prior to the Revolving Loan Commitment Termination Date and (b) the date which is one year from the date of issuance of such Letter of Credit; provided that the immediately preceding clause (b) shall not prevent Issuing Lender from agreeing that a Letter of Credit will automatically be extended for one or more successive periods not to exceed one year each unless Issuing Lender elects not to extend for any such additional period; and provided, further that Issuing Lender shall elect not to extend such Letter of Credit if it has knowledge that an Event of Default has occurred and is continuing (and has not been waived in accordance with subsection 10.6) at the time Issuing Lender must elect whether or not to allow such extension;

(iv) any Letter of Credit issued for the purpose of supporting (a) trade payables or (b) any Indebtedness constituting "antecedent debt" (as that term is used in Section 547 of the Bankruptcy Code); or

(v) any Letter of Credit denominated in a currency other than Dollars or Pounds.



On and after the date of this Agreement, the WF Letter of Credit shall be deemed for all purposes, including for purposes of the fees to be collected pursuant to subsection 3.2, and reimbursement of costs and expenses to the extent provided herein, to be a Letter of Credit outstanding under this Agreement and entitled to the benefits of this Agreement and the other Loan Documents, and shall be governed by the applications and agreements pertaining thereto and by this Agreement; provided, however, that, notwithstanding any other provision of this Agreement, no fees with respect to the issuance of the WF Letter of Credit shall be due hereunder.

**B. Mechanics of Issuance.**

(i) Request for Issuance. Whenever Company desires the issuance of a Letter of Credit, it shall deliver to Administrative Agent a Request for Issuance no later than 10:00 A.M. (California time) at least three Business Days, or such shorter period as may be agreed to by Issuing Lender in any particular instance, in advance of the proposed date of issuance. Issuing Lender, in its reasonable discretion, may require changes in the text of the proposed Letter of Credit or any documents described in or attached to the Request for Issuance. In furtherance of the provisions of subsection 10.8, and not in limitation thereof, Company may submit Requests for Issuance by telefacsimile and Administrative Agent and Issuing Lender may rely and act upon any such Request for Issuance without receiving an original signed copy thereof. No Letter of Credit shall require payment against a conforming demand for payment to be made thereunder on the same business day (under the laws of the jurisdiction in which the office of Issuing Lender to which such demand for payment is required to be presented is located) that such demand for payment is presented if such presentation is made after 10:00 A.M. (in the time zone of such office of Issuing Lender) on such business day.

Company shall notify Issuing Lender prior to the issuance of any Letter of Credit in the event that any of the matters to which Company is required to certify in the applicable Request for Issuance is no longer true and correct as of the proposed date of issuance of such Letter of Credit, and upon the issuance of any Letter of Credit Company shall be deemed to have re-certified, as of the date of such issuance, as to the matters to which Company is required to certify in the applicable Request for Issuance.

(ii) Issuance of Letter of Credit. Upon satisfaction or waiver (in accordance with subsection 10.6) of the conditions set forth in subsection 4.3, Issuing Lender shall issue the requested Letter of Credit in accordance with Issuing Lender's standard operating procedures.

(iii) Notification to Revolving Lenders. Upon the issuance of or amendment to any Letter of Credit Issuing Lender shall promptly notify Administrative Agent and Company of such issuance or amendment in writing and such notice shall be accompanied by a copy of such Letter of Credit or amendment. Upon receipt of such notice (or, if Administrative Agent is Issuing Lender, together with such notice), Administrative Agent shall notify each Revolving Lender in writing of such issuance or

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amendment and the amount of such Revolving Lender's respective participation in such Letter of Credit or amendment, and, if so requested by a Revolving Lender, Administrative Agent shall provide such Lender with a copy of such Letter of Credit or amendment.

**C. Revolving Lenders' Purchase of Participations in Letters of Credit** Immediately upon the issuance of each Letter of Credit, each Revolving Lender shall be deemed to, and hereby agrees to, have irrevocably purchased from Issuing Lender a participation in such Letter of Credit and any drawings honored thereunder in an amount equal to such Revolving Lender's Pro Rata Share of the maximum amount that is or at any time may become available to be drawn thereunder.

**3.2 Letter of Credit Fees.**

Company agrees to pay, with respect to Letters of Credit issued hereunder, (i) a fronting fee, payable directly to Issuing Lender for its own account, equal to the greater of (a) \$500 and (b) 0.25% per annum of the daily amount available to be drawn under such Letter of Credit and (ii) a letter of credit fee, payable to Administrative Agent for the account of Revolving Lenders, equal to 2.50% per annum of the daily amount available to be drawn under such Letter of Credit, each such fronting fee or letter of credit fee to be payable in arrears on and to (but excluding) each March 31, June 30, September 30 and December 31 of each year and computed on the basis of a 360-day year for the actual number of days elapsed, and (ii) with respect to the issuance, amendment or transfer of each Letter of Credit and each payment of a drawing made thereunder (without duplication of the fees payable under clauses (i) above), documentary and processing charges payable directly to Issuing Lender for its own account in accordance with Issuing Lender's standard schedule for such charges in effect at the time of such issuance, amendment, transfer or payment, as the case may be. For purposes of calculating any fees payable under this subsection 3.2, (1) the daily amount available to be drawn under any Letter of Credit shall be determined as of the close of business on any date of determination and (2) any amount described in such clauses which is denominated in a currency other than Dollars shall be valued based on the applicable Exchange Rate for such currency as of the applicable date of determination. Promptly upon receipt by Administrative Agent of any amount described in clause (i)(b) of this subsection 3.2, Administrative Agent shall distribute to each Revolving Lender its Pro Rata Share of such amount.

**3.3 Drawings and Reimbursement of Amounts Paid Under Letters of Credit**

**A. Responsibility of Issuing Lender With Respect to Drawings** In determining whether to honor any drawing under any Letter of Credit by the beneficiary thereof, Issuing Lender shall be responsible only to examine the documents delivered under such Letter of Credit with reasonable care so as to ascertain whether they appear on their face to be in accordance with the terms and conditions of such Letter of Credit.

**B. Reimbursement by Company of Amounts Paid Under Letters of Credit** In the event Issuing Lender has determined to honor a drawing under a Letter of Credit issued by it,

Issuing Lender shall immediately notify Company and Administrative Agent, and Company shall reimburse Issuing Lender on or before the Business Day immediately following the date on which such drawing is honored (the “**Reimbursement Date**”) in an amount in Dollars (which amount, in the case of a payment under a Letter of Credit which is denominated in a currency other than Dollars, shall be calculated by reference to the applicable Exchange Rate) and in same day funds equal to the amount of such payment; provided that, anything contained in this Agreement to the contrary notwithstanding, (i) unless Company shall have notified Administrative Agent and Issuing Lender prior to 10:00 A.M. (California time) on the date such drawing is honored that Company intends to reimburse Issuing Lender for the amount of such payment with funds other than the proceeds of Revolving Loans, Company shall be deemed to have given a timely Notice of Borrowing to Administrative Agent requesting Revolving Lenders to make Revolving Loans that are Base Rate Loans on the Reimbursement Date in an amount in Dollars (which amount, in the case of a payment under a Letter of Credit which is denominated in a currency other than Dollars, shall be calculated by reference to the applicable Exchange Rate) equal to the amount of such payment and (ii) subject to satisfaction or waiver of the conditions specified in subsection 4.2C, Revolving Lenders shall, on the Reimbursement Date, make Revolving Loans that are Base Rate Loans in the amount of such payment, the proceeds of which shall be applied directly by Administrative Agent to reimburse Issuing Lender for the amount of such payment; and provided, further that if for any reason proceeds of Revolving Loans are not received by Issuing Lender on the Reimbursement Date in an amount equal to the amount of such payment, Company shall reimburse Issuing Lender, on demand, in an amount in same day funds equal to the excess of the amount of such payment over the aggregate amount of such Revolving Loans, if any, which are so received. Nothing in this subsection 3.3B shall be deemed to relieve any Revolving Lender from its obligation to make Revolving Loans on the terms and conditions set forth in this Agreement, and Company shall retain any and all rights it may have against any Revolving Lender resulting from the failure of such Revolving Lender to make such Revolving Loans under this subsection 3.3B.

**C. Payment by Lenders of Unreimbursed Amounts Paid Under Letters of Credit**

(i) Payment by Revolving Lenders. In the event that Company shall fail for any reason to reimburse Issuing Lender as provided in subsection 3.3B in an amount (calculated, in the case of a payment under a Letter of Credit denominated in a currency other than Dollars, by reference to the applicable Exchange Rate) equal to the amount of any payment by Issuing Lender under a Letter of Credit issued by it, Issuing Lender shall promptly notify each other Lender of the unreimbursed amount of such honored drawing and of such other Revolving Lender’s respective participation therein based on such Revolving Lender’s Pro Rata Share. Each Revolving Lender shall make available to Issuing Lender an amount equal to its respective participation, in Dollars and in same day funds, at the office of Issuing Lender specified in such notice, not later than 10:00 A.M. (California time) on the first business day (under the laws of the jurisdiction in which such office of Issuing Lender is located) after the date notified by Issuing Lender. In the event that any Revolving Lender fails to make available to Issuing Lender on such business day the amount of such Revolving Lender’s participation in such Letter of

Credit as provided in this subsection 3.3C, Issuing Lender shall be entitled to recover such amount on demand from such Revolving Lender together with interest thereon at the rate customarily used by Issuing Lender for the correction of errors among banks for three Business Days and thereafter at the Base Rate. Nothing in this subsection 3.3C shall be deemed to prejudice the right of any Lender to recover from Issuing Lender any amounts made available by such Revolving Lender to Issuing Lender pursuant to this subsection 3.3C in the event that it is determined by the final judgment of a court of competent jurisdiction that the payment with respect to a Letter of Credit by Issuing Lender in respect of which payment was made by such Revolving Lender constituted gross negligence or willful misconduct on the part of Issuing Lender.

(ii) Distribution to Lenders of Reimbursements Received From Company. In the event Issuing Lender shall have been reimbursed by other Revolving Lenders pursuant to subsection 3.3C(i) for all or any portion of any payment by Issuing Lender under a Letter of Credit issued by it, Issuing Lender shall distribute to each other Revolving Lender that has paid all amounts payable by it under subsection 3.3C(i) with respect to such payment such other Revolving Lender's Pro Rata Share of all payments subsequently received by Issuing Lender from Company in reimbursement of such payment under the Letter of Credit when such payments are received. Any such distribution shall be made to a Revolving Lender at its primary address set forth below its name on the appropriate signature page hereof or at such other address as such Revolving Lender may request.

**D. Interest on Amounts Paid Under Letters of Credit.**

(i) Payment of Interest by Company. Company agrees to pay to Issuing Lender, with respect to payments under any Letters of Credit issued by it, interest on the amount paid by Issuing Lender in respect of each such payment from the date a drawing is honored to but excluding the date such amount is reimbursed by Company (including any such reimbursement out of the proceeds of Revolving Loans pursuant to subsection 3.3B) at a rate equal to (a) for the period from the date such drawing is honored to but excluding the Reimbursement Date, the rate then in effect under this Agreement with respect to Revolving Loans that are Base Rate Loans and (b) thereafter, a rate which is 2% per annum in excess of the rate of interest otherwise payable under this Agreement with respect to Revolving Loans that are Base Rate Loans. Interest payable pursuant to this subsection 3.3D(i) shall be computed on the basis of a 360-day year for the actual number of days elapsed in the period during which it accrues and shall be payable on demand or, if no demand is made, on the date on which the related drawing under a Letter of Credit is reimbursed in full.

(ii) Distribution of Interest Payments by Issuing Lender. Promptly upon receipt by Issuing Lender of any payment of interest pursuant to subsection 3.3D(i) with respect to a payment under a Letter of Credit issued by it, (a) Issuing Lender shall distribute to each other Revolving Lender, out of the interest received by Issuing Lender in respect of the period from the date such drawing is honored to but excluding the date

on which Issuing Lender is reimbursed for the amount of such payment (including any such reimbursement out of the proceeds of Revolving Loans pursuant to subsection 3.3B), the amount that such other Revolving Lender would have been entitled to receive in respect of the letter of credit fee that would have been payable in respect of such Letter of Credit for such period pursuant to subsection 3.2 if no drawing had been honored under such Letter of Credit, and (b) in the event Issuing Lender shall have been reimbursed by other Revolving Lenders pursuant to subsection 3.3C(i) for all or any portion of such payment, Issuing Lender shall distribute to each other Revolving Lender that has paid all amounts payable by it under subsection 3.3C(i) with respect to such payment such other Revolving Lender's Pro Rata Share of any interest received by Issuing Lender in respect of that portion of such payment so reimbursed by other Revolving Lenders for the period from the date on which Issuing Lender was so reimbursed by other Revolving Lenders to but excluding the date on which such portion of such payment is reimbursed by Company. Any such distribution shall be made to a Revolving Lender at its primary address set forth below its name on the appropriate signature page hereof or at such other address as such Revolving Lender may request.

#### **3.4 Obligations Absolute.**

The obligation of Company to reimburse Issuing Lender for payments under the Letters of Credit issued by it and to repay any Revolving Loans made by Revolving Lenders pursuant to subsection 3.3B and the obligations of Revolving Lenders under subsection 3.3C(i) shall be unconditional and irrevocable and shall be paid strictly in accordance with the terms of this Agreement under all circumstances including any of the following circumstances:

- (i) any lack of validity or enforceability of any Letter of Credit;
- (ii) the existence of any claim, set-off, defense or other right which Company or any Lender may have at any time against a beneficiary or any transferee of any Letter of Credit (or any Persons for whom any such transferee may be acting), Issuing Lender or other Revolving Lender or any other Person or, in the case of a Revolving Lender, against Company, whether in connection with this Agreement, the transactions contemplated herein or any unrelated transaction (including any underlying transaction between Company or one of its Subsidiaries and the beneficiary for which any Letter of Credit was procured);
- (iii) any draft or other document presented under any Letter of Credit proving to be forged, fraudulent, invalid or insufficient in any respect or any statement therein being untrue or inaccurate in any respect;
- (iv) payment by Issuing Lender under any Letter of Credit against presentation of a draft or other document which does not substantially comply with the terms of such Letter of Credit;

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- (v) any adverse change in the business, operations, properties, assets, condition (financial or otherwise) or prospects of Company or any of its Subsidiaries;
  - (vi) any breach of this Agreement or any other Loan Document by any party thereto;
  - (vii) any other circumstance or happening whatsoever, whether or not similar to any of the foregoing; or
  - (viii) the fact that an Event of Default or a Potential Event of Default shall have occurred and be continuing;

provided, in each case, that payment by Issuing Lender under the applicable Letter of Credit shall not have constituted gross negligence or willful misconduct of Issuing Lender under the circumstances in question (as determined by a final judgment of a court of competent jurisdiction).

### **3.5 Nature of Issuing Lender's Duties.**

As between Company and Issuing Lender, Company assumes all risks of the acts and omissions of, or misuse of the Letters of Credit issued by Issuing Lender by, the respective beneficiaries of such Letters of Credit. In furtherance and not in limitation of the foregoing, Issuing Lender shall not be responsible for: (i) the form, validity, sufficiency, accuracy, genuineness or legal effect of any document submitted by any party in connection with the application for and issuance of any such Letter of Credit, even if it should in fact prove to be in any or all respects invalid, insufficient, inaccurate, fraudulent or forged; (ii) the validity or sufficiency of any instrument transferring or assigning or purporting to transfer or assign any such Letter of Credit or the rights or benefits thereunder or proceeds thereof, in whole or in part, which may prove to be invalid or ineffective for any reason; (iii) failure of the beneficiary of any such Letter of Credit to comply fully with any conditions required in order to draw upon such Letter of Credit; (iv) errors, omissions, interruptions or delays in transmission or delivery of any messages, by mail, cable, telegraph, telex or otherwise, whether or not they be in cipher; (v) errors in interpretation of technical terms; (vi) any loss or delay in the transmission or otherwise of any document required in order to make a drawing under any such Letter of Credit or of the proceeds thereof; (vii) the misapplication by the beneficiary of any such Letter of Credit of the proceeds of any drawing under such Letter of Credit; or (viii) any consequences arising from causes beyond the control of Issuing Lender, including any act or omission by a Government Authority, and none of the above shall affect or impair, or prevent the vesting of, any of Issuing Lender's rights or powers hereunder.

In furtherance and extension and not in limitation of the specific provisions set forth in the first paragraph of this subsection 3.5, any action taken or omitted by Issuing Lender under or in connection with the Letters of Credit issued by it or any documents and certificates delivered thereunder, if taken or omitted in good faith, shall not put Issuing Lender under any resulting liability to Company.

Notwithstanding anything to the contrary contained in this subsection 3.5, Company shall retain any and all rights it may have against Issuing Lender for any liability arising solely out of the gross negligence or willful misconduct of Issuing Lender, as determined by a final judgment of a court of competent jurisdiction.

**Section 4. CONDITIONS TO LOANS AND LETTERS OF CREDIT**

The obligations of Lenders to make Loans and the issuance of Letters of Credit hereunder are subject to the satisfaction of the following conditions.

**4.1 Conditions to Initial Revolving Loans.**

The obligations of Lenders to make any Revolving Loans to be made on the Closing Date are, in addition to the conditions precedent specified in subsection 4.2, subject to prior or concurrent satisfaction of the following conditions:

**A. Loan Party Documents.** On or before the Closing Date, Company shall, and shall cause each other Loan Party to, deliver to Lenders (or to Administrative Agent with sufficient originally executed copies, where appropriate, for each Lender) the following with respect to Company or such Loan Party, as the case may be, each, unless otherwise noted, dated the Closing Date:

- (i) Copies of the Organizational Documents of such Person, certified by the Secretary of State of its jurisdiction of organization or, if such document is of a type that may not be so certified, certified by the secretary or similar officer of the applicable Loan Party, together with a good standing certificate from the Secretary of State of its jurisdiction of organization and each other state in which such Person is qualified to do business and, to the extent generally available, a certificate or other evidence of good standing as to payment of any applicable franchise or similar taxes from the appropriate taxing authority of each of such jurisdictions, each dated a recent date prior to the Closing Date;
- (ii) Resolutions of the Governing Body of such Person approving and authorizing the execution, delivery and performance of the Loan Documents to which it is a party, certified as of the Closing Date by the secretary or similar officer of such Person as being in full force and effect without modification or amendment;
- (iii) Signature and incumbency certificates of the officers of such Person executing the Loan Documents to which it is a party;
- (iv) Executed originals of the Loan Documents to which such Person is a party; and
- (v) Such other documents as Administrative Agent may reasonably request.

**B. Fees.** Company shall have paid to Administrative Agent, for distribution (as appropriate) to Administrative Agent and Lenders, the fees payable on the Closing Date referred to in subsection 2.3.

**C. Corporate and Capital Structure.**

- (i) Corporate Structure. The corporate organizational structure of Company and its Subsidiaries shall be as set forth on Schedule 4.1C annexed hereto.
- (ii) Capital Structure. The capital structure of Company shall be as set forth on Schedule 4.1C annexed hereto.

**D. Representations and Warranties; Performance of Agreements.** Company shall have delivered to Administrative Agent an Officer's Certificate, in form and substance satisfactory to Administrative Agent, to the effect that the representations and warranties in Section 5 are true, correct and complete in all material respects on and as of the Closing Date to the same extent as though made on and as of that date (or, to the extent such representations and warranties specifically relate to an earlier date, that such representations and warranties were true, correct and complete in all material respects on and as of such earlier date) and that Company shall have performed in all material respects all agreements and satisfied all conditions which this Agreement provides shall be performed or satisfied by it on or before the Closing Date except as otherwise disclosed to and agreed to in writing by Administrative Agent; provided that, if a representation and warranty, covenant or condition is qualified as to materiality, with respect to such representation and warranty, covenant or condition the applicable materiality qualifier set forth above shall be disregarded for purposes of this condition.

**E. Opinions of Counsel to Loan Parties.** Lenders shall have received originally executed copies of one or more favorable written opinions of Sullivan & Cromwell, counsel for Loan Parties, in form and substance reasonably satisfactory to Administrative Agent and its counsel, dated as of the Closing Date and setting forth substantially the matters in the opinions designated in Exhibit VI annexed hereto and as to such other matters as Administrative Agent acting on behalf of Lenders may reasonably request (this Credit Agreement constituting a written request by Company to such counsel to deliver such opinions to Lenders).

**F. Opinion of Administrative Agent's Counsel.** Lenders shall have received originally executed copies of a favorable written opinion of O'Melveny & Myers LLP, counsel to Administrative Agent, dated as of the Closing Date, substantially in the form of Exhibit VII annexed hereto.

**G. Evidence of Insurance.** Administrative Agent shall have received a certificate from Company's insurance broker or other evidence satisfactory to it that all insurance required to be maintained pursuant to subsection 6.4 is in full force and effect and that Administrative Agent on behalf of Lenders has been named as additional insured and/or loss payee thereunder to the extent required under subsection 6.4.



**H. Necessary Governmental Authorizations and Consents; Expiration of Waiting Periods, Etc.** Company shall have obtained all Governmental Authorizations and all consents of other Persons, in each case that are necessary or advisable in connection with the transactions contemplated by the Loan Documents and the continued operation of the business conducted by Company and its Subsidiaries in substantially the same manner as conducted prior to the Closing Date. Each such Governmental Authorization and consent shall be in full force and effect, except in a case where the failure to obtain or maintain a Governmental Authorization or consent, either individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect. All applicable waiting periods shall have expired without any action being taken or threatened by any competent authority that would restrain, prevent or otherwise impose adverse conditions on the transactions contemplated by the Loan Documents or the financing thereof. No action, request for stay, petition for review or rehearing, reconsideration, or appeal with respect to any of the foregoing shall be pending, and the time for any applicable Government Authority to take action to set aside its consent on its own motion shall have expired. There shall not have occurred any material adverse change in governmental regulation or policy of any Governmental Authority that adversely affects any of the Company, its Subsidiaries or the Lenders.

**I. Security Interests in Personal and Mixed Property.** Administrative Agent shall have received evidence satisfactory to it that Company and Subsidiary Guarantors shall have taken or caused to be taken all such actions, executed and delivered or caused to be executed and delivered all such agreements, documents and instruments, and made or caused to be made all such filings and recordings (other than the filing or recording of items described in clauses (ii), (iii) and (iv) below) that may be necessary or, in the opinion of Administrative Agent, desirable in order to create in favor of Administrative Agent, for the benefit of Lenders, a valid and (upon such filing and recording) perfected First Priority security interest in the entire personal and mixed property Collateral. Such actions shall include the following:

(i) Stock Certificates and Instruments. Delivery to Administrative Agent of (a) certificates (which certificates shall be accompanied by irrevocable undated stock powers, duly endorsed in blank and otherwise satisfactory in form and substance to Administrative Agent) representing all Capital Stock pledged pursuant to the Security Agreement and (b) all promissory notes or other instruments (duly endorsed, where appropriate, in a manner satisfactory to Administrative Agent) evidencing any Collateral;

(ii) Lien Searches and UCC Termination Statements. Delivery to Administrative Agent of (a) the results of a recent search, by a Person satisfactory to Administrative Agent, of all effective UCC financing statements and fixture filings and all judgment and tax lien filings which may have been made with respect to any personal or mixed property of any Loan Party, together with copies of all such filings disclosed by such search, and (b) UCC termination statements duly executed by all applicable Persons for filing in all applicable jurisdictions as may be necessary to terminate any effective UCC financing statements or fixture filings disclosed in such search (other than any such financing statements or fixture filings in respect of Liens permitted to remain outstanding pursuant to the terms of this Agreement).

(iii) UCC Financing Statements and Fixture Filings. Delivery to Administrative Agent of UCC financing statements and, where appropriate, fixture filings, duly executed by each applicable Loan Party (if required) with respect to all personal and mixed property Collateral of such Loan Party, for filing in all jurisdictions as may be necessary or, in the opinion of Administrative Agent, desirable to perfect the security interests created in such Collateral pursuant to the Collateral Documents; and

(iv) PTO Cover Sheets, Etc. Delivery to Administrative Agent of all cover sheets or other documents or instruments required to be filed with the PTO in order to create or perfect Liens in respect of any IP Collateral.

**J. Matters Relating to Existing Indebtedness of Company and its Subsidiaries** On the Closing Date, Company and its Subsidiaries shall have (a) repaid in full all Indebtedness in respect of the Prior Reimbursement Obligations, (b) delivered to Administrative Agent all documents or instruments necessary to release all Liens securing Indebtedness or other obligations of Company and its Subsidiaries in connection therewith, and (d) made arrangements satisfactory to Administrative Agent with respect to the cancellation of the Prior Letters of Credit.

**K. Borrowing Base Certificate.** On or before the Closing Date, Company shall have delivered to Administrative Agent and Lenders a Borrowing Base Certificate substantially in the form of Exhibit XI annexed hereto, prepared as of December 31, 2002.

**L. Collateral Audits and Appraisals.** Administrative Agent shall have received audits of the Accounts of Company and its Subsidiaries in form, scope and substance satisfactory to Administrative Agent.

**M. Completion of Proceedings.** All corporate and other proceedings taken or to be taken in connection with the transactions contemplated hereby and all documents incidental thereto not previously found acceptable by Administrative Agent, acting on behalf of Lenders, and its counsel shall be satisfactory in form and substance to Administrative Agent and such counsel, and Administrative Agent and such counsel shall have received all such counterpart originals or certified copies of such documents as Administrative Agent may reasonably request.

**N. Subordination Agreement.** Administrative Agent, Company and each of the holders of the Convertible Subordinated Notes and the Convertible Series A Preferred Stock shall have entered into a subordination agreement (the "**Subordination Agreement**") in form and substance satisfactory to Administrative Agent.

#### **4.2 Conditions to All Loans.**

The obligations of Lenders to make Loans on each Funding Date are subject to the following further conditions precedent:

A. Administrative Agent shall have received before that Funding Date, in accordance with the provisions of subsection 2.1B, an originally executed Notice of Borrowing, in each case signed by a duly authorized Officer of Company.

B. Administrative Agent shall have received before that Funding Date, the timely delivery of the most recent Borrowing Base Certificate (dated as contemplated in subsection 6.1(xvii)) required to be delivered hereunder.

C. As of that Funding Date:

(i) The representations and warranties contained herein and in the other Loan Documents shall be true, correct and complete in all material respects on and as of that Funding Date to the same extent as though made on and as of that date, except to the extent such representations and warranties specifically relate to an earlier date, in which case such representations and warranties shall have been true, correct and complete in all material respects on and as of such earlier date; provided that, if a representation and warranty is qualified as to materiality, with respect to such representation and warranty the materiality qualifier set forth above shall be disregarded for purposes of this condition;

(ii) No event shall have occurred and be continuing or would result from the consummation of the borrowing contemplated by such Notice of Borrowing that would constitute an Event of Default or a Potential Event of Default;

(iii) Each Loan Party shall have performed in all material respects all agreements and satisfied all conditions which this Agreement provides shall be performed or satisfied by it on or before that Funding Date; and

(iv) No order, judgment or decree of any arbitrator or Government Authority shall purport to enjoin or restrain any Lender from making the Loans to be made by it on that Funding Date.

#### **4.3 Conditions to Letters of Credit.**

The issuance of any Letter of Credit hereunder (whether or not Issuing Lender is obligated to issue such Letter of Credit) is subject to the following conditions precedent:

A. On or before the date of issuance of such Letter of Credit, Administrative Agent shall have received, in accordance with the provisions of subsection 3.1B(i), an originally executed Request for Issuance (or a facsimile copy thereof) in each case signed by a duly authorized Officer of Company, together with all other information specified in subsection 3.1B(i) and such other documents or information as Issuing Lender may reasonably require in connection with the issuance of such Letter of Credit.

**B.** Administrative Agent shall have received the timely delivery of the most recent Borrowing Base Certificate (dated as contemplated in subsection 6.1(xvii)) required to be delivered hereunder.

**C.** On the date of issuance of such Letter of Credit, all conditions precedent described in subsection 4.2B shall be satisfied to the same extent as if the issuance of such Letter of Credit were the making of a Loan and the date of issuance of such Letter of Credit were a Funding Date.

**Section 5. COMPANY'S REPRESENTATIONS AND WARRANTIES**

In order to induce Lenders to enter into this Agreement and to make the Loans, to induce Issuing Lender to issue Letters of Credit and to induce Revolving Lenders to purchase participations therein, Company represents and warrants to each Lender:

**5.1 Organization, Powers, Qualification, Good Standing, Business and Subsidiaries**

**A. Organization and Powers.** Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Each of Company and its Subsidiaries has all requisite power and authority to enter into the Loan Documents to which it is a party and to carry out the transactions contemplated thereby.

**B. Qualification and Good Standing.** Each of Company and its Subsidiaries is qualified to do business and in good standing in every jurisdiction where its assets are located and wherever necessary to carry out its business and operations, except in jurisdictions where the failure to be so qualified or in good standing has not had and could not reasonably be expected to result in a Material Adverse Effect.

**C. Conduct of Business.** Company and its Subsidiaries are engaged only in the businesses permitted to be engaged in pursuant to subsection 7.12.

**D. Subsidiaries.** All of the Subsidiaries of Company as of the Closing Date and their jurisdictions of organization, and the identity of those Subsidiaries deemed to be Significant Subsidiaries in accordance with the terms hereof, are set forth on Schedule 5.1 annexed hereto, as said Schedule 5.1 may be supplemented from time to time pursuant to the provisions of subsection 6.1(xv). The Capital Stock of each of the Subsidiaries of Company set forth on Schedule 5.1 annexed hereto (as so supplemented) is duly authorized, validly issued, fully paid and nonassessable and none of such Capital Stock constitutes Margin Stock. Each of the Subsidiaries of Company set forth on Schedule 5.1 annexed hereto (as so supplemented) is a corporation, partnership, trust or limited liability company duly organized, validly existing and in good standing under the laws of its respective jurisdiction of organization set forth therein, has all requisite power and authority to own and operate its properties and to carry on its business as now conducted and as proposed to be conducted, and is qualified to do business and in good standing in every jurisdiction where its assets are located and wherever necessary to carry out its business and operations, in each case except where failure to be so qualified or in good standing

or a lack of such power and authority has not had and could not reasonably be expected to result in a Material Adverse Effect. Schedule 5.1 annexed hereto (as so supplemented) correctly sets forth, as of the Closing Date, the ownership interest of Company and each of its Subsidiaries in each of the Subsidiaries of Company identified therein.

## **5.2 Authorization of Borrowing, etc.**

**A. Authorization of Borrowing.** The execution, delivery and performance of the Loan Documents have been duly authorized by all necessary action on the part of each Loan Party that is a party thereto.

**B. No Conflict.** The execution, delivery and performance by Loan Parties of the Loan Documents to which they are parties and the consummation of the transactions contemplated by the Loan Documents do not and will not (i) violate any provision of any law or any governmental rule or regulation applicable to Company or any of its Subsidiaries, the Organizational Documents of Company or any of its Subsidiaries or any order, judgment or decree of any court or other Government Authority binding on Company or any of its Subsidiaries, (ii) conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any Contractual Obligation of Company or any of its Subsidiaries, (iii) result in or require the creation or imposition of any Lien upon any of the properties or assets of Company or any of its Subsidiaries (other than any Liens created under any of the Loan Documents in favor of Administrative Agent on behalf of Lenders), or (iv) require any approval of stockholders or any approval or consent of any Person under any Contractual Obligation of Company or any of its Subsidiaries, except for such approvals or consents which will be obtained on or before the Closing Date and disclosed in writing to Lenders.

**C. Governmental Consents.** The execution, delivery and performance by Loan Parties of the Loan Documents to which they are parties and the consummation of the transactions contemplated by the Loan Documents do not and will not require any Governmental Authorization other than filings and recordings pursuant to this Agreement and the Loan Documents relating to the Collateral.

**D. Binding Obligation.** Each of the Loan Documents has been duly executed and delivered by each Loan Party that is a party thereto and is the legally valid and binding obligation of such Loan Party, enforceable against such Loan Party in accordance with its respective terms, except as may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws relating to or limiting creditors' rights generally or by equitable principles relating to enforceability.

## **5.3 Financial Condition.**

Company has heretofore delivered to Lenders, at Lenders' request, financial statements and information for the Fiscal Year ended April 30, 2002 and interim statements for the Fiscal Quarters ended July 31, 2002 and October 31, 2002. All such statements were prepared in conformity with GAAP and fairly present, in all material respects, the financial position (on a

consolidated and, where applicable, consolidating basis) of the entities described in such financial statements as at the respective dates thereof and the results of operations and cash flows (on a consolidated and, where applicable, consolidating basis) of the entities described therein for each of the periods then ended, subject, in the case of any such unaudited financial statements, to changes resulting from audit and normal year-end adjustments. Neither Company nor any of its Subsidiaries has (and will not have following the funding of the initial Loans) any Contingent Obligation, contingent liability or liability for taxes, long-term lease or unusual forward or long-term commitment that, as of the Closing Date, is not reflected in the foregoing financial statements or the notes thereto and, as of any Funding Date subsequent to the Closing Date, is not reflected in the most recent financial statements delivered to Lenders pursuant to subsection 6.1 or the notes thereto and that, in any such case, is material in relation to the business, operations, properties, assets, condition (financial or otherwise) or prospects of Company or any of its Subsidiaries.

#### **5.4 No Material Adverse Change; No Restricted Junior Payments**

Since April 30, 2002, no event or change has occurred that has resulted in or evidences, either in any case or in the aggregate, a Material Adverse Effect, and neither Company nor any of its Subsidiaries has directly or indirectly declared, ordered, paid or made, or set apart any sum or property for, any Restricted Junior Payment or agreed to do so, except as permitted by subsection 7.5.

#### **5.5 Title to Properties; Liens; Real Property; Intellectual Property.**

**A. Title to Properties; Liens.** Company and its Subsidiaries have (i) good, sufficient and legal title to (in the case of fee interests in real property), (ii) valid leasehold interests in (in the case of leasehold interests in real or personal property), or (iii) good title to (in the case of all other personal property), all of their respective properties and assets reflected in the financial statements referred to in subsection 5.3 or in the most recent financial statements delivered pursuant to subsection 6.1, in each case except for assets disposed of since the date of such financial statements in the ordinary course of business or as otherwise permitted under subsection 7.7, and except for such defects in title and interests that do not interfere with the ability of Company and its Subsidiaries to conduct their business. Except as permitted by this Agreement, all such properties and assets are free and clear of Liens.

**B. Real Property.** As of the Closing Date, Schedule 5.5B annexed hereto contains a true, accurate and complete list of (i) all fee interests in any Real Property Assets and (ii) all leases, subleases or assignments of leases (together with all amendments, modifications, supplements, renewals or extensions of any thereof) affecting each Real Property Asset, regardless of whether a Loan Party is the landlord or tenant (whether directly or as an assignee or successor in interest) under such lease, sublease or assignment. Except as set forth on Schedule 5.5B annexed hereto, each agreement listed in clause (ii) of the immediately preceding sentence is in full force and effect and Company does not have knowledge of any material default that has occurred and is continuing thereunder, and each such agreement constitutes the legally valid and binding obligation of each applicable Loan Party, enforceable against such

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Loan Party in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws relating to or limiting creditors' rights generally or by equitable principles.

**C. Intellectual Property.** As of the Closing Date, Company and its Subsidiaries own or have the right to use, all Intellectual Property used in the conduct of their business, except where the failure to own or have such right to use in the aggregate could not reasonably be expected to result in a Material Adverse Effect. No claim has been asserted and is pending by any Person challenging or questioning the use of any such Intellectual Property or the validity or effectiveness of any such Intellectual Property, nor does Company know of any valid basis for any such claim, except for such claims that in the aggregate could not reasonably be expected to result in a Material Adverse Effect. The use of such Intellectual Property by Company and its Subsidiaries does not infringe on the rights of any Person, except for such claims and infringements that, in the aggregate, could not reasonably be expected to result in a Material Adverse Effect. All federal and state and all foreign registrations of and applications for Intellectual Property that are owned or licensed by Company or any of its Subsidiaries on the Closing Date are set forth on Schedule 5.5C annexed hereto.

**5.6 Litigation: Adverse Facts.**

Except as set forth in Schedule 5.6 annexed hereto, there are no Proceedings (whether or not purportedly on behalf of Company or any of its Subsidiaries) at law or in equity, or before or by any court or other Government Authority (including any Environmental Claims) that are pending or, to the knowledge of Company, threatened against or affecting Company or any of its Subsidiaries or any property of Company or any of its Subsidiaries and that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect. Neither Company nor any of its Subsidiaries (i) is in violation of any applicable laws (including Environmental Laws) that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect, or (ii) is subject to or in default with respect to any final judgments, writs, injunctions, decrees, rules or regulations of any court or other Government Authority that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect.

**5.7 Payment of Taxes.**

Except to the extent permitted by subsection 6.3, all material tax returns and reports of Company and its Subsidiaries required to be filed by any of them have been timely filed, and all taxes shown on such tax returns to be due and payable and all assessments, fees and other governmental charges upon Company and its Subsidiaries and upon their respective properties, assets, income, businesses and franchises that are due and payable have been paid when due and payable, except where the failure to pay could not reasonably be expected to result in a Material Adverse Effect. Company knows of no material proposed tax assessment against Company or any of its Subsidiaries that is not being actively contested by Company or such Subsidiary in good faith and by appropriate

proceedings; provided that such reserves or other appropriate provisions, if any, as shall be required in conformity with GAAP shall have been made or provided therefor.

**5.8 Performance of Agreements.**

Neither Company nor any of its Subsidiaries is in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any of its Contractual Obligations, and no condition exists that, with the giving of notice or the lapse of time or both, would constitute such a default, except where the consequences, direct or indirect, of such default or defaults, if any, could not reasonably be expected to result in a Material Adverse Effect.

**5.9 Governmental Regulation.**

Neither Company nor any of its Subsidiaries is subject to regulation under the Public Utility Holding Company Act of 1935, the Federal Power Act, the Interstate Commerce Act or the Investment Company Act of 1940 or under any other federal or state statute or regulation which may limit its ability to incur Indebtedness or which may otherwise render all or any portion of the Obligations unenforceable.

**5.10 Securities Activities.**

A. Neither Company nor any of its Subsidiaries is engaged principally, or as one of its important activities, in the business of extending credit for the purpose of purchasing or carrying any Margin Stock.

B. Following application of the proceeds of each Loan, not more than 25% of the value of the assets (either of Company only or of Company and its Subsidiaries on a consolidated basis) subject to the provisions of subsection 7.2 or 7.7 or subject to any restriction contained in any agreement or instrument, between Company and any Lender or any Affiliate of any Lender, relating to Indebtedness and within the scope of subsection 8.2, will be Margin Stock.

**5.11 Employee Benefit Plans.**

A. Company, each of its Subsidiaries and each of their respective ERISA Affiliates are in compliance with all applicable provisions and requirements of ERISA and the regulations and published interpretations thereunder with respect to each Employee Benefit Plan, and have performed all their obligations under each Employee Benefit Plan, except for any failure to comply that, individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect. Each Employee Benefit Plan that is intended to qualify under Section 401(a) of the Internal Revenue Code is so qualified.

B. No ERISA Event has occurred or is reasonably expected to occur.

C. Except to the extent required under Section 4980B of the Internal Revenue Code, or except as set forth in Schedule 5.11 annexed hereto, no Employee Benefit Plan provides



health or welfare benefits (through the purchase of insurance or otherwise) for any retired or former employee of Company, any of its Subsidiaries or any of their respective ERISA Affiliates.

**D.** As of the most recent valuation date for any Pension Plan, the amount of unfunded benefit liabilities (as defined in Section 4001(a)(18) of ERISA), individually or in the aggregate for all Pension Plans (excluding for purposes of such computation any Pension Plans with respect to which assets exceed benefit liabilities), does not exceed \$1,000,000.

**E.** As of the most recent valuation date for each Multiemployer Plan for which the actuarial report is available, the potential liability of Company, its Subsidiaries and their respective ERISA Affiliates for a complete withdrawal from such Multiemployer Plan (within the meaning of Section 4203 of ERISA), when aggregated with such potential liability for a complete withdrawal from all Multiemployer Plans, based on information available pursuant to Section 4221(e) of ERISA, does not exceed \$1,000,000.

**F.** As of the date hereof, Company and its Subsidiaries have made full payment when due of all material required contributions to any Foreign Plan.

**5.12 Certain Fees.**

No broker's or finder's fee or commission will be payable with respect to this Agreement or any of the transactions contemplated hereby, and Company hereby indemnifies Lenders against, and agrees that it will hold Lenders harmless from, any claim, demand or liability for any such broker's or finder's fees alleged to have been incurred in connection herewith or therewith and any expenses (including reasonable fees, expenses and disbursements of counsel) arising in connection with any such claim, demand or liability.

**5.13 Environmental Protection.**

(i) to Company's knowledge, neither Company nor any of its Subsidiaries nor any of their respective Facilities or operations are subject to any outstanding written order, consent decree or settlement agreement with any Person relating to (a) any Environmental Law, (b) any Environmental Claim, or (c) any Hazardous Materials Activity that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect;

(ii) to Company's knowledge, neither Company nor any of its Subsidiaries has received any letter or request for information under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9604) or any comparable state law;

(iii) to Company's knowledge, there are and have been no conditions, occurrences, or Hazardous Materials Activities that could be reasonably expected to form the basis of an Environmental Claim against Company or any of its Subsidiaries that,

individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect;

(iv) to Company's knowledge, neither Company nor any of its Subsidiaries nor any predecessor of Company or any of its Subsidiaries has filed any notice under any Environmental Law indicating past or present treatment of Hazardous Materials at any Facility, and none of Company's or any of its Subsidiaries' operations involves the generation, transportation, treatment, storage or disposal of hazardous waste, as defined under 40 C.F.R. Parts 260-270 or any state equivalent; and

(v) to Company's knowledge, compliance with all current or reasonably foreseeable future requirements pursuant to or under Environmental Laws would not, individually or in the aggregate, reasonably be expected to result in a Material Adverse Effect.

**5.14 Employee Matters.**

There is no strike or work stoppage in existence or threatened involving Company or any of its Subsidiaries that could reasonably be expected to result in a Material Adverse Effect.

**5.15 Solvency.**

Each Loan Party is and, upon the incurrence of any Obligations by such Loan Party on any date on which this representation is made, will be, Solvent.

**5.16 Matters Relating to Collateral.**

**A. Creation, Perfection and Priority of Liens.** The execution and delivery of the Collateral Documents by Loan Parties, together with (i) the actions taken on or prior to the date hereof pursuant to subsections 4.11 and 6.8 and (ii) the delivery to Administrative Agent of any Pledged Collateral not delivered to Administrative Agent at the time of execution and delivery of the applicable Collateral Document are effective to create in favor of Administrative Agent for the benefit of Lenders, as security for the respective Secured Obligations (as defined in the applicable Collateral Document in respect of any Collateral), a valid First Priority Lien on all of the Collateral, and all filings and other actions necessary or desirable to perfect and maintain the perfection and First Priority status of such Liens have been duly made or taken and remain in full force and effect, other than the filing of any UCC financing statements delivered to Administrative Agent for filing (but not yet filed) and the periodic filing of UCC continuation statements in respect of UCC financing statements filed by or on behalf of Administrative Agent.

**B. Governmental Authorizations.** No authorization, approval or other action by, and no notice to or filing with, any Government Authority is required for either (i) the pledge or grant by any Loan Party of the Liens purported to be created in favor of Administrative Agent pursuant to any of the Collateral Documents or (ii) the exercise by Administrative Agent of any rights or remedies in respect of any Collateral (whether specifically granted or created pursuant to any of the Collateral Documents or created or provided for by applicable law), except for

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filings or recordings contemplated by subsection 5.16A and except as may be required, in connection with the disposition of any Pledged Collateral, by laws generally affecting the offering and sale of securities.

**C. Absence of Third-Party Filings.** Except such as may have been filed in favor of Administrative Agent as contemplated by subsection 5.16A and to evidence permitted lease obligations and other Liens permitted pursuant to subsection 7.2, (i) no effective UCC financing statement, fixture filing or other instrument similar in effect covering all or any part of the Collateral is on file in any filing or recording office and (ii) no effective filing covering all or any part of the IP Collateral is on file in the PTO.

**D. Margin Regulations.** The pledge of the Pledged Collateral pursuant to the Collateral Documents does not violate Regulation T, U or X of the Board of Governors of the Federal Reserve System.

**E. Information Regarding Collateral.** All information supplied to Administrative Agent by or on behalf of any Loan Party with respect to any of the Collateral (in each case taken as a whole with respect to any particular Collateral) is accurate and complete in all material respects.

**5.17 Disclosure.**

No representation or warranty of Company or any of its Subsidiaries contained in any Loan Document or in any other document, certificate or written statement furnished to Lenders by or on behalf of Company or any of its Subsidiaries for use in connection with the transactions contemplated by this Agreement contains any untrue statement of a material fact or omits to state a material fact (known to Company, in the case of any document not furnished by it) necessary in order to make the statements contained herein or therein not misleading in light of the circumstances in which the same were made. Any projections and pro forma financial information contained in such materials are based upon good faith estimates and assumptions believed by Company to be reasonable at the time made, it being recognized by Lenders that such projections as to future events are not to be viewed as facts and that actual results during the period or periods covered by any such projections may differ from the projected results. There are no facts known (or which should upon the reasonable exercise of diligence be known) to Company (other than matters of a general economic nature) that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect and that have not been disclosed herein or in such other documents, certificates and statements furnished to Lenders for use in connection with the transactions contemplated hereby.

**5.18 Subordinated Indebtedness.**

The Obligations constitute senior indebtedness that is entitled to the benefits of the subordination provisions, if any, of all Indebtedness of Company and its Subsidiaries, including, without limitation, any subordination provisions contained in the Subordination Agreement.

**Section 6. COMPANY'S AFFIRMATIVE COVENANTS**

Company covenants and agrees that, so long as any of the Commitments hereunder shall remain in effect and until payment in full of all of the Loans and other Obligations and the cancellation or expiration of all Letters of Credit, unless Requisite Lenders shall otherwise give prior written consent, Company shall perform, and shall cause each of its Subsidiaries to perform, all covenants in this Section 6.

**6.1 Financial Statements and Other Reports**

Company will maintain, and cause each of its Subsidiaries to maintain, a system of accounting established and administered in accordance with sound business practices to permit preparation of financial statements in conformity with GAAP. Company will deliver to Administrative Agent and Lenders:

(i) Events of Default, etc.: promptly upon any officer of Company obtaining knowledge (a) of any condition or event that constitutes an Event of Default or Potential Event of Default, or becoming aware that any Lender has given any notice (other than to Administrative Agent) or taken any other action with respect to a claimed Event of Default or Potential Event of Default, (b) that any Person has given any notice to Company or any of its Subsidiaries or taken any other action with respect to a claimed default or event or condition of the type referred to in subsection 8.2, or (c) of the occurrence of any event or change that has caused or evidences, either in any case or in the aggregate, a Material Adverse Effect, an Officer's Certificate specifying the nature and period of existence of such condition, event or change, or specifying the notice given or action taken by any such Person and the nature of such claimed Event of Default, Potential Event of Default, default, event or condition, and what action Company has taken, is taking and proposes to take with respect thereto;

(ii) Monthly Financials: as soon as available and in any event within 30 days after the end of each Fiscal Month, the consolidated and consolidating balance sheets of Company and its Subsidiaries as at the end of such Fiscal Month and the related consolidated and consolidating statements of income of Company and its Subsidiaries for such Fiscal Month and for the period from the beginning of the then current Fiscal Year to the end of such Fiscal Month (provided that Company shall be permitted, unless otherwise requested by Administrative Agent, to provide Regional Consolidating Financial Statements in lieu of consolidating statements) setting forth in each case in comparative form the corresponding figures for the corresponding periods of the previous Fiscal Year and the corresponding figures from the Financial Plan for the current Fiscal Year, to the extent prepared for such Fiscal Month, all in reasonable detail;

(iii) Quarterly Financials: as soon as available and in any event within 45 days after the end of each of the first three Fiscal Quarters of each Fiscal Year, (a) the consolidated and consolidating balance sheets of Company and its Subsidiaries as at the end of such Fiscal Quarter and the related consolidated and consolidating statements of

income, stockholders' equity and cash flows of Company and its Subsidiaries for such Fiscal Quarter and for the period from the beginning of the then current Fiscal Year to the end of such Fiscal Quarter, setting forth in each case in comparative form the corresponding figures for the corresponding periods of the previous Fiscal Year and the corresponding figures from the Financial Plan for the current Fiscal Year, all in reasonable detail and certified by the chief financial officer of Company that they fairly present, in all material respects, the financial condition of Company and its Subsidiaries as at the dates indicated and the results of their operations and their cash flows for the periods indicated, subject to changes resulting from audit and normal year-end adjustments, and (b) a narrative report describing the operations of Company and its Subsidiaries in the form prepared for presentation to senior management for such Fiscal Quarter and for the period from the beginning of the then current Fiscal Year to the end of such Fiscal Quarter;

(iv) Year-End Financials: as soon as available and in any event within 90 days after the end of each Fiscal Year, (a) the consolidated and consolidating balance sheets of Company and its Subsidiaries as at the end of such Fiscal Year and the related consolidated and consolidating statements of income, stockholders' equity and cash flows of Company and its Subsidiaries for such Fiscal Year, setting forth in each case in comparative form the corresponding figures for the previous Fiscal Year and the corresponding figures from the Financial Plan for the Fiscal Year covered by such financial statements, all in reasonable detail and certified by the chief financial officer of Company that they fairly present, in all material respects, the financial condition of Company and its Subsidiaries as at the dates indicated and the results of their operations and their cash flows for the periods indicated, (b) a narrative report describing the operations of Company and its Subsidiaries in the form prepared for presentation to senior management for such Fiscal Year, and (c) in the case of such consolidated financial statements, a report thereon of Ernst & Young LLP or other independent certified public accountants of recognized national standing selected by Company and satisfactory to Administrative Agent, which report shall be unqualified, shall express no doubts about the ability of Company and its Subsidiaries to continue as a going concern, and shall state that such consolidated financial statements fairly present, in all material respects, the consolidated financial position of Company and its Subsidiaries as at the dates indicated and the results of their operations and their cash flows for the periods indicated in conformity with GAAP applied on a basis consistent with prior years (except as otherwise disclosed in such financial statements) and that the examination by such accountants in connection with such consolidated financial statements has been made in accordance with generally accepted auditing standards;

(v) Compliance Certificates: together with each delivery of financial statements pursuant to subdivisions (iii) and (iv) above, (a) an Officer's Certificate of Company stating that the signers have reviewed the terms of this Agreement and have made, or caused to be made under their supervision, a review in reasonable detail of the transactions and condition of Company and its Subsidiaries during the accounting period covered by such financial statements and that such review has not disclosed the existence

during or at the end of such accounting period, and that the signers do not have knowledge of the existence as at the date of such Officer's Certificate, of any condition or event that constitutes an Event of Default or Potential Event of Default, or, if any such condition or event existed or exists, specifying the nature and period of existence thereof and what action Company has taken, is taking and proposes to take with respect thereto; and (b) a Compliance Certificate demonstrating in reasonable detail compliance during and at the end of the applicable accounting periods with the restrictions contained in Section 7, in each case to the extent compliance with such restrictions is required to be tested at the end of the applicable accounting period;

(vi) Reconciliation Statements: if, as a result of any change in accounting principles and policies from those used in the preparation of the audited financial statements referred to in subsection 5.3, the consolidated financial statements of Company and its Subsidiaries delivered pursuant to subdivision (ii), (iii), (iv) or (xii) of this subsection 6.1 will differ in any material respect from the consolidated financial statements that would have been delivered pursuant to such subdivisions had no such change in accounting principles and policies been made, then (a) together with the first delivery of financial statements pursuant to subdivision (ii), (iii), (iv) or (xii) of this subsection 6.1 following such change, consolidated financial statements of Company and its Subsidiaries for (y) the current Fiscal Year to the effective date of such change and (z) the two full Fiscal Years immediately preceding the Fiscal Year in which such change is made, in each case prepared on a pro forma basis as if such change had been in effect during such periods, and (b) together with each delivery of financial statements pursuant to subdivision (ii), (iii), (iv) or (xii) of this subsection 6.1 following such change, if required pursuant to subsection 1.2, a written statement of the chief accounting officer or chief financial officer of Company setting forth the differences (including any differences that would affect any calculations relating to the financial covenants set forth in subsection 7.6) which would have resulted if such financial statements had been prepared without giving effect to such change;

(vii) Accountants' Reports: promptly upon receipt thereof (unless restricted by applicable professional standards), copies of all reports submitted to Company by independent certified public accountants in connection with each annual, interim or special audit of the financial statements of Company and its Subsidiaries made by such accountants, including any comment letter submitted by such accountants to management in connection with their annual audit;

(viii) SEC Filings and Press Releases: promptly upon their becoming available, copies of (a) all financial statements, reports, notices and proxy statements sent or made available generally by Company to its security holders or by any Subsidiary of Company to its security holders other than Company or another Subsidiary of Company, (b) all regular and periodic reports and all registration statements (other than on Form S-8 or a similar form) and prospectuses, if any, filed by Company or any of its Subsidiaries with any securities exchange or with the Securities and Exchange Commission or any governmental or private regulatory authority, and (c) all press releases and other

statements made available generally by Company or any of its Subsidiaries to the public concerning material developments in the business of Company or any of its Subsidiaries;

(ix) Litigation or Other Proceedings: (a) promptly upon any Officer of Company obtaining knowledge of (1) the institution of, or non-frivolous threat of, any Proceeding against or affecting Company or any of its Subsidiaries or any property of Company or any of its Subsidiaries not previously disclosed in writing by Company to Lenders or (2) any material development in any Proceeding that, in any case:

(x) if adversely determined, has a reasonable possibility of giving rise to a Material Adverse Effect; or

(y) seeks to enjoin or otherwise prevent the consummation of, or to recover any damages or obtain relief as a result of, the transactions contemplated hereby;

written notice thereof together with such other information as may be reasonably available to Company to enable Lenders and their counsel to evaluate such matters; and (b) within twenty days after the end of each Fiscal Quarter, a schedule of all Proceedings involving an alleged liability of, or claims against or affecting, Company or any of its Subsidiaries equal to or greater than \$5,000,000, and promptly after request by Administrative Agent such other information as may be reasonably requested by Administrative Agent to enable Administrative Agent and its counsel to evaluate any of such Proceedings;

(x) ERISA Events: promptly upon becoming aware of the occurrence of or forthcoming occurrence of any ERISA Event, a written notice specifying the nature thereof, what action Company, any of its Subsidiaries or any of their respective ERISA Affiliates has taken, is taking or proposes to take with respect thereto and, when known, any action taken or threatened by the Internal Revenue Service, the Department of Labor or the PBGC with respect thereto;

(xi) ERISA Notices: with reasonable promptness, copies of (a) all notices received by Company, any of its Subsidiaries or any of their respective ERISA Affiliates from a Multiemployer Plan sponsor concerning an ERISA Event; and (b) copies of such other documents or governmental reports or filings relating to any Employee Benefit Plan as Administrative Agent shall reasonably request;

(xii) Financial Plans: as soon as practicable and in any event no later than 30 days after the beginning of each Fiscal Year, a consolidated and consolidating plan and financial forecast for such Fiscal Year (the "**Financial Plan**" for such Fiscal Year), including (a) a forecasted consolidated balance sheet and forecasted consolidated statements of income and cash flows of Company and its Subsidiaries for such Fiscal Year, together with a pro forma Compliance Certificate for such Fiscal Year and an explanation of the assumptions on which such forecasts are based, (b) forecasted

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consolidated statements of income and cash flows of Company and its Subsidiaries for each Fiscal Quarter of such Fiscal Year, together with an explanation of the assumptions on which such forecasts are based, and (c) such other information and projections as any Lender may reasonably request;

(xiii) Insurance: as soon as practicable after any material change in insurance coverage maintained by Company and its Subsidiaries notice thereof to Administrative Agent specifying the changes and reasons therefor;

(xiv) Governing Body: with reasonable promptness, written notice of any change in the Governing Body of Company;

(xv) New Subsidiaries: promptly upon any Person becoming a Subsidiary of Company or any Subsidiary becoming, or ceasing to be, a Significant Subsidiary, a written notice setting forth with respect to such Person or Subsidiary (a) the date on which such Person or Subsidiary (x) became a Subsidiary of Company or (y) became, or ceased to be, a Significant Subsidiary, as the case may be, and (b) all of the data required to be set forth in Schedule 5.1 annexed hereto with respect to all Subsidiaries of Company (it being understood that such written notice shall be deemed to supplement Schedule 5.1 annexed hereto for all purposes of this Agreement);

(xvi) Good Standing Certificates: upon request by Administrative Agent, good standing certificates as to each Loan Party from its jurisdiction of organization;

(xvii) Borrowing Base Certificates: within ten Business Days after the last day of each Fiscal Month ending after the Closing Date, a Borrowing Base Certificate dated as of the last Business Day of such Fiscal Month, together with any additional schedules and other information as Administrative Agent may reasonably request. In addition to such monthly Borrowing Base Certificates, Company may from time to time, deliver to Administrative Agent and Lenders on any Business Day after the last day of each Fiscal Month an updated Borrowing Base Certificate dated as of such Business Day, together with any additional schedules and other information as Administrative Agent may reasonably request, and the most recent Borrowing Base Certificate described in this clause (xvii) that is delivered to Administrative Agent shall be used in calculating the Borrowing Base as of any date of determination;

(xviii) Subordinated Indebtedness Notices: with reasonable promptness, and in any event within one Business Day of the receipt of any notice of acceleration of the Convertible Subordinated Notes, copies of all notices received by Company from holders of the Convertible Subordinated Notes or the Convertible Series A Preferred Stock; and

(xix) Other Information: with reasonable promptness, such other information and data with respect to Company or any of its Subsidiaries as from time to time may be reasonably requested by any Lender.



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**6.2 Existence, etc.**

Except as permitted under subsection 7.7, Company will, and will cause each of its Significant Subsidiaries to, at all times preserve and keep in full force and effect its existence in the jurisdiction of organization set forth on Schedule 5.1 annexed hereto and all rights and franchises material to its business; provided, however, that neither Company nor any of its Subsidiaries shall be required to preserve its existence or any such right or franchise if the Governing Body of Company or such Subsidiary shall determine that the preservation thereof is no longer desirable in the conduct of the business of Company and its Subsidiaries taken as a whole and that the loss thereof is not disadvantageous in any material respect to Company and its Subsidiaries taken as a whole or Lenders.

**6.3 Payment of Taxes and Claims: Tax**

**A.** Company will, and will cause each of its Subsidiaries to, pay all taxes, assessments and other governmental charges imposed upon it or any of its properties or assets or in respect of any of its income, businesses or franchises before any penalty accrues thereon, and all claims (including claims for labor, services, materials and supplies) for sums that have become due and payable and that by law have or may become a Lien upon any of its properties or assets, prior to the time when any penalty or fine shall be incurred with respect thereto; provided that no such tax, assessment, charge or claim need be paid if it is being contested in good faith by appropriate proceedings promptly instituted and diligently conducted, so long as (i) such reserve or other appropriate provision, if any, as shall be required in conformity with GAAP shall have been made therefor (unless the amount is not material to Company's financial condition) and (ii) in the case of a tax, assessment, charge or claim which has or may become a Lien against any of the Collateral, such proceedings conclusively operate to stay the sale of any material portion of the Collateral to satisfy such charge or claim.

**B.** Company will not, nor will it permit any of its Subsidiaries to, file or consent to the filing of any consolidated income tax return with any Person (other than Company or any of its Subsidiaries).

**6.4 Maintenance of Properties: Insurance: Application of Net Business Interruption Insurance Proceeds**

**A. Maintenance of Properties.** Company will, and will cause each of its Subsidiaries to, maintain or cause to be maintained in good repair, working order and condition, ordinary wear and tear excepted, all material properties used or useful in the business of Company and its Subsidiaries (including all Intellectual Property) and from time to time will make or cause to be made all appropriate repairs, renewals and replacements thereof, except to the extent that any failure to maintain could not reasonably be expected to have a Material Adverse Effect.

**B. Insurance.** Company will maintain or cause to be maintained, with financially sound and reputable insurers, such public liability insurance, third party property damage

insurance, business interruption insurance and casualty insurance with respect to liabilities, losses or damage in respect of the assets, properties and businesses of Company and its Subsidiaries as may customarily be carried or maintained under similar circumstances by corporations of established reputation engaged in similar businesses, in each case in such amounts (giving effect to self-insurance), with such deductibles, covering such risks and otherwise on such terms and conditions as shall be customary for corporations similarly situated in the industry. Each such policy of insurance shall (i) name Administrative Agent for the benefit of Lenders as an additional insured thereunder as its interests may appear, and (ii) contain a loss payable clause or endorsement, satisfactory in form and substance to Administrative Agent, that names Administrative Agent for the benefit of Lenders as the loss payee thereunder for any covered loss and provides for at least 30 days prior written notice to Administrative Agent of any modification or cancellation of such policy.

**C. Application of Net Business Interruption Insurance Proceeds.** Upon receipt by Company or any of its Subsidiaries of any Net Business Interruption Insurance Proceeds, (a) so long as no Event of Default or Potential Event of Default shall have occurred and be continuing, Company or such Subsidiary may retain and apply such Net Business Interruption Insurance Proceeds for working capital purposes, and (b) if an Event of Default or Potential Event of Default shall have occurred and be continuing, Company shall apply an amount equal to such Net Business Interruption Insurance Proceeds to prepay the Loans (and/or the Revolving Loan Commitments shall be reduced) as provided in subsection 2.4A;

#### **6.5 Inspection Rights: Lender Meeting**

**A. Inspection Rights.** Company shall, and shall cause each of its Subsidiaries to, permit any authorized representatives designated by any Lender to visit and inspect any of the properties of Company or of any of its Subsidiaries, to inspect, copy and take extracts from its and their financial and accounting records, and to discuss its and their affairs, finances and accounts with its and their officers and independent public accountants (provided that Company may, if it so chooses, be present at or participate in any such discussion), all upon reasonable notice and at such reasonable times during normal business hours and as often as may reasonably be requested.

**B. Lender Meeting.** Company will, upon the request of Administrative Agent or Requisite Lenders, participate in a meeting of Administrative Agent and Lenders once during each Fiscal Year to be held at Company's principal offices (or at such other location as may be agreed to by Company and Administrative Agent) at such time as may be agreed to by Company and Administrative Agent.

#### **6.6 Compliance with Laws, etc.**

Company shall comply, and shall cause each of its Subsidiaries to comply, with the requirements of all applicable laws, rules, regulations and orders of any Government Authority (including all Environmental Laws), noncompliance with which could reasonably be expected to result in, individually or in the aggregate, a Material Adverse Effect.

**6.7 Environmental Matters.**

**A. Environmental Disclosure.** Company will deliver to Administrative Agent and Lenders:

(i) Environmental Audits and Reports. As soon as practicable following receipt thereof, copies of all environmental audits, investigations, analyses and reports of any kind or character, whether prepared by personnel of Company or any of its Subsidiaries or by independent consultants, governmental authorities or any other Persons, with respect to significant environmental matters at any Facility that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect or with respect to any Environmental Claims that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect;

(ii) Notice of Certain Releases, Remedial Actions, Etc. Promptly upon the occurrence thereof, written notice describing in reasonable detail (a) any Release required to be reported to any federal, state or local governmental or regulatory agency under any applicable Environmental Laws, (b) any remedial action taken by Company or any other Person in response to (1) any Hazardous Materials Activities the existence of which could reasonably be expected to result in one or more Environmental Claims having, individually or in the aggregate, a Material Adverse Effect, or (2) any Environmental Claims that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect, and (c) Company's discovery of any occurrence or condition on any real property adjoining or in the vicinity of any Facility that could cause such Facility or any part thereof to be subject to any material restrictions on the ownership, occupancy, transferability or use thereof under any Environmental Laws.

(iii) Written Communications Regarding Environmental Claims, Releases, Etc. As soon as practicable following the sending or receipt thereof by Company or any of its Subsidiaries, a copy of any and all written communications with respect to (a) any Environmental Claims that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect, (b) any Release required to be reported to any federal, state or local governmental or regulatory agency, and (c) any request for information from any governmental agency that suggests such agency is investigating whether Company or any of its Subsidiaries may be potentially responsible for any Hazardous Materials Activity.

(iv) Notice of Certain Proposed Actions Having Environmental Impact Prompt written notice describing in reasonable detail (a) any proposed acquisition of stock, assets, or property by Company or any of its Subsidiaries that could reasonably be expected to (1) expose Company or any of its Subsidiaries to, or result in, Environmental Claims that could reasonably be expected to result in, individually or in the aggregate, a Material Adverse Effect or (2) affect the ability of Company or any of its Subsidiaries to maintain in full force and effect all material Governmental Authorizations required under any Environmental Laws for their respective operations and (b) any proposed action to be

taken by Company or any of its Subsidiaries to commence manufacturing or other industrial operations or to modify current operations in a manner that could reasonably be expected to subject Company or any of its Subsidiaries to any material additional obligations or requirements under any Environmental Laws that could reasonably be expected to result in, individually or in the aggregate, a Material Adverse Effect.

**B. Company's Actions Regarding Hazardous Materials Activities, Environmental Claims and Violations of Environmental Laws**

(i) Remedial Actions Relating to Hazardous Materials Activities. Company shall, in compliance with all applicable Environmental Laws, promptly undertake, and shall cause each of its Subsidiaries promptly to undertake, any and all investigations, studies, sampling, testing, abatement, cleanup, removal, remediation or other response actions necessary to remove, remediate, clean up or abate any Hazardous Materials Activity on, under or about any Facility that is in violation of any Environmental Laws or that presents a material risk of giving rise to an Environmental Claim, except where the failure could not reasonably be expected to result in, individually or in the aggregate, a Material Adverse Effect.

(ii) Actions with Respect to Environmental Claims and Violations of Environmental Laws. Company shall promptly take, and shall cause each of its Subsidiaries promptly to take, any and all actions necessary to (i) cure any material violation of applicable Environmental Laws by Company or its Subsidiaries that could reasonably be expected to result in, individually or in the aggregate, a Material Adverse Effect and (ii) make an appropriate response to any Environmental Claim against Company or any of its Subsidiaries and discharge any obligations it may have to any Person thereunder where failure to do so could reasonably be expected to result in, individually or in the aggregate, a Material Adverse Effect.

**6.8 Execution of Subsidiary Guaranty and Personal Property Collateral Documents After the Closing Date**

**A. Execution of Subsidiary Guaranty and Personal Property Collateral Documents.** In the event that any Person becomes a Domestic Significant Subsidiary of Company after the date hereof, Company will promptly notify Administrative Agent of that fact and cause such Domestic Significant Subsidiary to execute and deliver to Administrative Agent a counterpart of the Subsidiary Guaranty and Security Agreement and to take all such further actions and execute all such further documents and instruments (including actions, documents and instruments comparable to those described in subsection 4.1I) as may be necessary or, in the opinion of Administrative Agent, desirable to create in favor of Administrative Agent, for the benefit of Lenders, a valid and perfected First Priority Lien on all of the personal and mixed property assets of such Domestic Significant Subsidiary described in the applicable forms of Collateral Documents. In addition, as provided in the Security Agreement, Company shall, or shall cause the Subsidiary that owns the Capital Stock of such Person, to execute and deliver to Administrative Agent a supplement to the Security Agreement and to deliver to Administrative

Agent all certificates representing such Capital Stock of such Person (accompanied by irrevocable undated stock powers, duly endorsed in blank).

**B. Foreign Significant Subsidiaries.** If requested by Administrative Agent, Company shall execute and deliver Foreign Pledge Agreements with respect to 66% of the Capital Stock owned by Company or a Domestic Subsidiary of some or all Foreign Significant Subsidiaries with respect to which Administrative Agent deems a Foreign Pledge Agreement necessary or advisable to perfect or otherwise protect the First Priority Liens granted to Administrative Agent on behalf of Lenders in such Capital Stock, and take all such other actions under the laws of such jurisdictions as Administrative Agent may deem necessary or advisable to perfect or otherwise protect such Liens. In addition, in the event that any Person becomes a Foreign Significant Subsidiary of Company after the date hereof, Company will promptly notify Administrative Agent of that fact and, if requested by Administrative Agent, if such Foreign Significant Subsidiary is directly owned by Company or a Domestic Subsidiary, cause such Foreign Significant Subsidiary to execute and deliver to Administrative Agent such documents and instruments and take such further actions (including actions, documents and instruments comparable to those described above in this subsection 6.8B) as may be necessary, or in the reasonable opinion of Administrative Agent, desirable to create in favor of Administrative Agent, for the benefit of Lenders, a valid and perfected First Priority Lien on 66% of the capital stock of such Foreign Significant Subsidiary.

**C. Subsidiary Organizational Documents, Legal Opinions, Etc.** Company shall deliver to Administrative Agent, together with such Loan Documents, (i) certified copies of such Significant Subsidiary's Organizational Documents, together with, if such Significant Subsidiary is a Domestic Significant Subsidiary, a good standing certificate from the Secretary of State of the jurisdiction of its organization and each other state in which such Person is qualified to do business and, to the extent generally available, a certificate or other evidence of good standing as to payment of any applicable franchise or similar taxes from the appropriate taxing authority of each of such jurisdictions, each to be dated a recent date prior to their delivery to Administrative Agent, (ii) a certificate executed by the secretary or similar officer of such Significant Subsidiary as to (a) the fact that the attached resolutions of the Governing Body of such Significant Subsidiary approving and authorizing the execution, delivery and performance of such Loan Documents are in full force and effect and have not been modified or amended and (b) the incumbency and signatures of the officers of such Significant Subsidiary executing such Loan Documents, (iii) an executed supplement to the Security Agreement evidencing the pledge of the Capital Stock of such Significant Subsidiary by Company or a Significant Subsidiary of Company that owns such Capital Stock, accompanied by certificate evidencing such Capital Stock, together with an irrevocable undated stock powers duly endorsed in blank and satisfactory in form and substance to Administrative Agent, and (iv) a favorable opinion of counsel to such Significant Subsidiary, in form and substance satisfactory to Administrative Agent and its counsel, as to (a) the due organization and good standing of such Significant Subsidiary, (b) the due authorization, execution and delivery by such Significant Subsidiary of such Loan Documents, (c) the enforceability of such Loan Documents against such Significant Subsidiary and (d) such other matters (including matters relating to the creation and perfection of Liens in any Collateral pursuant to such Loan Documents) as Administrative Agent may reasonably

request, all of the foregoing to be satisfactory in form and substance to Administrative Agent and its counsel.

**Section 7. COMPANY'S NEGATIVE COVENANTS**

Company covenants and agrees that, so long as any of the Commitments hereunder shall remain in effect and until payment in full of all of the Loans and other Obligations and the cancellation or expiration of all Letters of Credit, unless Requisite Lenders shall otherwise give prior written consent, Company shall perform, and shall cause each of its Subsidiaries to perform, all covenants in this Section 7.

**7.1 Indebtedness.**

Company shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, create, incur, assume or guaranty, or otherwise become or remain directly or indirectly liable with respect to, any Indebtedness, except:

- (i) Company may become and remain liable with respect to the Obligations;
- (ii) Company and its Subsidiaries may become and remain liable with respect to Contingent Obligations permitted by subsection 7.4 and, upon any matured obligations actually arising pursuant thereto, the Indebtedness corresponding to the Contingent Obligations so extinguished;
- (iii) Company and its Subsidiaries may become and remain liable with respect to Indebtedness in respect of Capital Leases aggregating not in excess of \$1,000,000 at any one time;
- (iv) Company may become and remain liable with respect to Indebtedness to any Subsidiary Guarantor, and any Subsidiary Guarantor may become and remain liable with respect to Indebtedness to Company or any other Subsidiary Guarantor; provided that (a) a Lien on all such intercompany Indebtedness to Company or any Subsidiary Guarantor shall have been granted to Administrative Agent for the benefit of Lenders and (b) if such intercompany Indebtedness to Company or any Subsidiary Guarantor is evidenced by a promissory note or other instrument, such promissory note or instrument shall have been pledged to Administrative Agent pursuant to the Security Agreement;
- (v) Company may become and remain liable with respect to Indebtedness to any Foreign Subsidiary, and any Foreign Subsidiary of Company may become and remain liable with respect to Indebtedness to Company or any Subsidiary Guarantor, in an aggregate principal amount not to exceed \$5,000,000; provided that (a) a Lien on all such intercompany Indebtedness to Company or any Subsidiary Guarantor shall have been granted to Administrative Agent for the benefit of Lenders and (b) if such intercompany Indebtedness to Company or any Subsidiary Guarantor is evidenced by a promissory note or other instrument, such promissory note or instrument shall have been pledged to Administrative Agent pursuant to the Security Agreement;

(vi) Company and its Subsidiaries, as applicable, may remain liable with respect to Indebtedness set forth on Schedule 7.1 annexed hereto, including any Indebtedness that refinances or replaces such Indebtedness;

(vii) Company may remain liable with respect to Indebtedness pursuant to the Convertible Subordinated Notes and the Convertible Series A Preferred Stock;

(viii) Foreign Subsidiaries of Company may become and remain liable with respect to other Indebtedness in an aggregate principal amount not to exceed \$1,000,000 at any time outstanding;

(ix) Company and its Domestic Subsidiaries may become and remain liable with respect to other Indebtedness in an aggregate principal amount not to exceed \$1,000,000 at any time outstanding;

(x) Foreign Subsidiaries may become and remain liable with respect to Indebtedness to any other Foreign Subsidiaries, to the extent incurred in the ordinary course of business and consistent with past practices of such Subsidiaries;

(xi) Company may become and remain liable with respect to Indebtedness secured by the cash surrender value of life insurance policies in an amount not to exceed, at any time, 95% of the aggregate cash surrender value of such policies; and

(xii) Company may become and remain liable with respect to Indebtedness subordinated to the Obligations subject to terms, including, without limitation, subordination provisions, satisfactory in form and substance to Administrative Agent in an aggregate principal amount not to exceed \$20,000,000 at any time outstanding.

## **7.2 Liens and Related Matters.**

**A. Prohibition on Liens.** Company shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, create, incur, assume or permit to exist any Lien on or with respect to any property or asset of any kind (including any document or instrument in respect of goods or accounts receivable) of Company or any of its Subsidiaries, whether now owned or hereafter acquired, or any income or profits therefrom, or file or permit the filing of, or permit to remain in effect, any financing statement or other similar notice of any Lien with respect to any such property, asset, income or profits under the UCC or under any similar recording or notice statute, except:

(i) Permitted Encumbrances; and

(ii) Liens set forth on Schedule 7.2 annexed hereto.

**B. Equitable Lien in Favor of Lenders.** If Company or any of its Subsidiaries shall create or assume any Lien upon any of its properties or assets, whether now owned or hereafter acquired, other than Liens excepted by the provisions of subsection 7.2A, it shall make or cause

to be made effective provision whereby the Obligations will be secured by such Lien equally and ratably with any and all other Indebtedness secured thereby as long as any such Indebtedness shall be so secured; provided that, notwithstanding the foregoing, this covenant shall not be construed as a consent by Requisite Lenders to the creation or assumption of any such Lien not permitted by the provisions of subsection 7.2A.

**C. No Further Negative Pledges.** Neither Company nor any of its Subsidiaries shall enter into any agreement (other than an agreement prohibiting only the creation of Liens securing Subordinated Indebtedness) prohibiting the creation or assumption of any Lien upon any of its properties or assets, whether now owned or hereafter acquired, except with respect to specific property encumbered to secure payment of particular Indebtedness or to be sold pursuant to an executed agreement with respect to an Asset Sale.

**D. No Restrictions on Subsidiary Distributions to Company or Other Subsidiaries.** Company will not, and will not permit any of its Subsidiaries to, create or otherwise cause or suffer to exist or become effective any consensual encumbrance or restriction of any kind on the ability of any such Subsidiary to (i) pay dividends or make any other distributions on any of such Subsidiary's Capital Stock owned by Company or any other Subsidiary of Company, (ii) repay or prepay any Indebtedness owed by such Subsidiary to Company or any other Subsidiary of Company, (iii) make loans or advances to Company or any other Subsidiary of Company, or (iv) transfer any of its property or assets to Company or any other Subsidiary of Company, except (a) as provided in this Agreement and (b) as may be provided in an agreement with respect to an Asset Sale.

### **7.3 Investments; Acquisitions.**

Company shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, make or own any Investment in any Person, including any Joint Venture, or acquire, by purchase or otherwise, all or substantially all the business, property or fixed assets of, or Capital Stock or other ownership interest of any Person, or any division or line of business of any Person except:

- (i) Company and its Subsidiaries may make and own Investments in Cash Equivalents;
- (ii) Company and its Subsidiaries may make intercompany loans to the extent permitted under subsection 7.1;
- (iii) Company and its Subsidiaries may make Consolidated Capital Expenditures permitted by subsection 7.8;
- (iv) Company and its Subsidiaries may continue to own the Investments owned by them and set forth on Schedule 7.3 annexed hereto;
- (v) Company and its Subsidiaries may make additional Investments in their respective Foreign Subsidiaries; provided that the amount of all such Investments constituting equity Investments (other than the conversion to equity of the intercompany



Indebtedness set forth on Schedule 7.1 annexed hereto) does not exceed \$5,000,000 in the aggregate for all such Investments since the Closing Date; and

- (vi) Company and its Subsidiaries may make and own other Investments in an aggregate amount not to exceed at any time \$2,500,000.

#### **7.4 Contingent Obligations**

Company shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, create or become or remain liable with respect to any Contingent Obligation, except:

- (i) Subsidiaries of Company may become and remain liable with respect to Contingent Obligations in respect of the Subsidiary Guaranty;
- (ii) Company and its Subsidiaries, as applicable, may remain liable with respect to Contingent Obligations set forth on Schedule 7.4 annexed hereto; and
- (iii) Company and its Subsidiaries may become and remain liable with respect to other Contingent Obligations; provided that the maximum aggregate liability, contingent or otherwise, of Company and its Subsidiaries in respect of all such Contingent Obligations shall at no time exceed \$2,000,000.

#### **7.5 Restricted Junior Payments.**

Company shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, declare, order, pay, make or set apart any sum for any Restricted Junior Payment; provided that Company may make mandatory payments in respect of the Convertible Subordinated Notes and the Convertible Series A Preferred Stock in accordance with the terms of, and only to the extent required by, and subject to the subordination provisions contained in, the indenture or other agreement pursuant to which such Subordinated Indebtedness was issued, as such indenture or other agreement may be amended from time to time to the extent permitted under subsection 7.13, and the Subordination Agreement, as the case may be; provided, further, that Company may make payments for acquisitions of shares of its common stock from its current or former employees provided that (i) the aggregate amount of any such payments does not exceed \$1,500,000 in any Fiscal Year and (ii) no Event of Default shall have occurred and be continuing or would result after giving effect to any such payment.

#### **7.6 Financial Covenants.**

**A. Minimum Consolidated Fixed Charge Coverage Ratio.** Company shall not permit the ratio of (i) the sum of (a) Consolidated EBITDA for any four Fiscal Quarter period ending on or after July 31, 2003, minus (b) Consolidated Capital Expenditures made during such period, minus (c) income taxes payable for such period to (ii) Consolidated Fixed Charges for such period to be less than 1.40:1.00.

**B. Maximum Consolidated Leverage Ratio.** Company shall not permit the Consolidated Leverage Ratio, as of the last day of any Fiscal Quarter, to exceed 1.50:1.00.

**C. Minimum Consolidated EBITDA.** Company shall not permit Consolidated EBITDA for (i) the three Fiscal Quarter period ended January 31, 2003 to be less than \$12,000,000 and (ii) the four Fiscal Quarter period ended on any of the dates set forth below to be less than the correlative amount indicated:

Period	Minimum Consolidated EBITDA
April 30, 2003	\$ 16,000,000
July 31, 2003	\$ 17,000,000
October 31, 2003	\$ 18,000,000
January 31, 2004	\$ 21,000,000
April 30, 2004	\$ 23,000,000
July 31, 2004 and thereafter	\$ 25,000,000

**D. Minimum Consolidated Quick Ratio.** Company shall not permit the Consolidated Quick Ratio, as of the last day of any Fiscal Quarter, to be less than 1.25:1.00.

**7.7 Restriction on Fundamental Changes: Asset Sales**

Company shall not, and shall not permit any of its Subsidiaries to, alter the corporate, capital or legal structure of Company or any of its Subsidiaries, or enter into any transaction of merger or consolidation, or liquidate, wind-up or dissolve itself (or suffer any liquidation or dissolution), or convey, sell, lease or sub-lease (as lessor or sublessor), transfer or otherwise dispose of, in one transaction or a series of transactions, all or any part of its business, property or assets (including its notes or receivables and Capital Stock of a Subsidiary, whether newly issued or outstanding), whether now owned or hereafter acquired, except:

- (i) any Subsidiary of Company may be merged with or into Company or any Subsidiary Guarantor, or be liquidated, wound up or dissolved, or all or any part of its business, property or assets may be conveyed, sold, leased, transferred or otherwise disposed of, in one transaction or a series of transactions, to Company or any Subsidiary Guarantor; provided that, in the case of such a merger, Company or such Subsidiary Guarantor shall be the continuing or surviving Person;

(ii) Company and its Subsidiaries may sell or otherwise dispose of assets in transactions that do not constitute Asset Sales; provided that the consideration received for such assets shall be in an amount at least equal to the fair market value thereof;

(iii) Company and its Subsidiaries may dispose of obsolete, worn out or surplus property in the ordinary course of business;

(iv) Company and its Subsidiaries may make Asset Sales of assets having a fair market value not in excess of \$1,000,000 provided that (a) the consideration received for such assets shall be in an amount at least equal to the fair market value thereof and (b) the sole consideration received shall be Cash or an Investment permitted by subsection 7.3;

(v) in order to resolve disputes that occur in the ordinary course of business, Company and its Subsidiaries may discount or otherwise compromise for less than the face value thereof, notes or accounts receivable; and

(vi) Company or a Subsidiary may sell or dispose of shares of Capital Stock of any of its Subsidiaries in order to qualify members of the Governing Body of the Subsidiary if required by applicable law.

#### 7.8 Consolidated Capital Expenditures.

Company shall not, and shall not permit its Subsidiaries to, make or incur Consolidated Capital Expenditures, in any Fiscal Year indicated below, in an aggregate amount in excess of the corresponding amount (the "**Maximum Consolidated Capital Expenditures Amount**") set forth below opposite such Fiscal Year:

Fiscal Year	Maximum Consolidated Capital Expenditures
2003	\$ 2,000,000
2004 and thereafter	\$ 6,000,000

#### 7.9 Transactions with Shareholders and Affiliates.

Company shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, enter into or permit to exist any transaction (including the purchase, sale, lease or exchange of any property or the rendering of any service) with any holder of 5% or more of any class of equity Securities of Company or with any Affiliate of Company or of any such holder, on terms that are less favorable to Company or that Subsidiary, as the case may be, than those that might be obtained at the time from Persons who are not such a holder or Affiliate; provided that the foregoing restriction shall not apply to (i) any transaction between Company and any of its

wholly-owned Subsidiaries or between any of its wholly-owned Subsidiaries, (ii) reasonable and customary fees paid to members of the Governing Bodies of Company and its Subsidiaries or (iii) subject to the terms of the Subordination Agreement, any transaction under or contemplated by the documents, instruments or agreements governing or evidencing the Subordinated Indebtedness.

**7.10 Sales and Lease-Backs.**

Company shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, become or remain liable as lessee or as a guarantor or other surety with respect to any lease, whether an Operating Lease or a Capital Lease, of any property (whether real, personal or mixed), whether now owned or hereafter acquired, (i) that Company or any of its Subsidiaries has sold or transferred or is to sell or transfer to any other Person (other than Company or any of its Subsidiaries) or (ii) that Company or any of its Subsidiaries intends to use for substantially the same purpose as any other property that has been or is to be sold or transferred by Company or any of its Subsidiaries to any Person (other than Company or any of its Subsidiaries) in connection with such lease.

**7.11 Sale or Discount of Receivables.**

Company shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, sell with recourse, or discount or otherwise sell for less than the face value thereof, any of its notes or Accounts, except in connection with bona fide efforts to collect Accounts which are past due 120 days or more.

**7.12 Conduct of Business.**

From and after the Closing Date, Company shall not, and shall not permit any of its Subsidiaries to, engage in any business other than the businesses engaged in by Company and its Subsidiaries on the Closing Date and similar or related businesses.

**7.13 Amendments of Documents Relating to Subordinated Indebtedness.**

Company shall not, and shall not permit any of its Subsidiaries to, amend or otherwise change the terms of any Subordinated Indebtedness, or make any payment consistent with an amendment thereof or change thereto, if the effect of such amendment or change is to increase the interest rate on such Subordinated Indebtedness, change (to earlier dates) any dates upon which payments of principal or interest are due thereon, change any event of default or condition to an event of default with respect thereto (other than to eliminate any such event of default or increase any grace period related thereto), change the redemption, prepayment or defeasance provisions thereof, change the subordination provisions thereof (or of any guaranty thereof), or change any collateral therefor (other than to release such collateral).

**7.14 Fiscal Year.**

Company shall not change its Fiscal Year-end from April 30.

**Section 8. EVENTS OF DEFAULT**

If any of the following conditions or events (“**Events of Default**”) shall occur:

**8.1 Failure to Make Payments When Due**

Failure by Company to pay any installment of principal of any Loan when due, whether at stated maturity, by acceleration, by notice of voluntary prepayment, by mandatory prepayment or otherwise; failure by Company to pay when due any amount payable to Issuing Lender in reimbursement of any drawing under a Letter of Credit; or failure by Company to pay any interest on any Loan or any fee or any other amount due under this Agreement within five days after the date due; or

**8.2 Default in Other Agreements**

(i) Failure of Company or any of its Subsidiaries to pay when due (a) any principal of or interest on or any other amount payable in respect of one or more items of Indebtedness (other than Indebtedness referred to in subsection 8.1) or Contingent Obligations in an individual principal amount of \$1,000,000 or more or with an aggregate principal amount of \$1,000,000 or more, in each case beyond the end of any grace period provided therefor, or (b) any dividends on or any other amounts payable in respect of the Convertible Series A Preferred Stock; or

(ii) breach or default by Company or any of its Subsidiaries with respect to any other material term of (a) one or more items of Indebtedness or Contingent Obligations in the individual or aggregate principal amounts referred to in clause (i) above or (b) any loan agreement, mortgage, indenture or other agreement relating to such item(s) of Indebtedness or Contingent Obligation(s), if the effect of such breach or default is to cause, or to permit the holder or holders of that Indebtedness or Contingent Obligation(s) (or a trustee on behalf of such holder or holders) to cause, that Indebtedness or Contingent Obligation(s) to become or be declared due and payable prior to its stated maturity or the stated maturity of any underlying obligation, as the case may be (upon the giving or receiving of notice, lapse of time, both, or otherwise); or

**8.3 Breach of Certain Covenants.**

Failure of Company to perform or comply with any term or condition contained in subsection 2.5 or 6.2 or Section 7 of this Agreement; or

**8.4 Breach of Warranty.**

Any representation, warranty, certification or other statement made by Company or any of its Subsidiaries in any Loan Document or in any statement or certificate at any time given by Company or any of its Subsidiaries in writing pursuant hereto or thereto or in connection herewith or therewith shall be false in any material respect on the date as of which made; or

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**8.5 Other Defaults Under Loan Documents**

Any Loan Party shall default in the performance of or compliance with any term contained in this Agreement or any of the other Loan Documents, other than any such term referred to in any other subsection of this Section 8, and such default shall not have been remedied or waived within 30 days after the earlier of (i) an Officer of Company or such Loan Party becoming aware of such default or (ii) receipt by Company and such Loan Party of notice from Administrative Agent or any Lender of such default; or

**8.6 Involuntary Bankruptcy; Appointment of Receiver, etc.**

(i) A court having jurisdiction in the premises shall enter a decree or order for relief in respect of Company or any of its Significant Subsidiaries in an involuntary case under the Bankruptcy Code or under any other applicable bankruptcy, insolvency or similar law now or hereafter in effect, which decree or order is not stayed; or any other similar relief shall be granted under any applicable federal or state law; or

(ii) an involuntary case shall be commenced against Company or any of its Significant Subsidiaries under the Bankruptcy Code or under any other applicable bankruptcy, insolvency or similar law now or hereafter in effect; or a decree or order of a court having jurisdiction in the premises for the appointment of a receiver, liquidator, sequestrator, trustee, custodian or other officer having similar powers over Company or any of its Subsidiaries, or over all or a substantial part of its property, shall have been entered; or there shall have occurred the involuntary appointment of an interim receiver, trustee or other custodian of Company or any of its Significant Subsidiaries for all or a substantial part of its property; or a warrant of attachment, execution or similar process shall have been issued against any substantial part of the property of Company or any of its Significant Subsidiaries, and any such event described in this clause (ii) shall continue for 60 days unless dismissed, bonded or discharged; or

**8.7 Voluntary Bankruptcy; Appointment of Receiver, etc.**

(i) Company or any of its Significant Subsidiaries shall have an order for relief entered with respect to it or commence a voluntary case under the Bankruptcy Code or under any other applicable bankruptcy, insolvency or similar law now or hereafter in effect, or shall consent to the entry of an order for relief in an involuntary case, or to the conversion of an involuntary case to a voluntary case, under any such law, or shall consent to the appointment of or taking possession by a receiver, trustee or other custodian for all or a substantial part of its property; or Company or any of its Significant Subsidiaries shall make any assignment for the benefit of creditors; or

(ii) Company or any of its Significant Subsidiaries shall be unable, or shall fail generally, or shall admit in writing its inability, to pay its debts as such debts become due; or the Governing Body of Company or any of its Significant Subsidiaries (or any

committee thereof) shall adopt any resolution or otherwise authorize any action to approve any of the actions referred to in clause (i) above or this clause (ii); or

**8.8 Judgments and Attachments.**

Any money judgment, writ or warrant of attachment or similar process involving (i) in any individual case an amount in excess of \$500,000 or (ii) in the aggregate at any time an amount in excess of \$1,000,000 (in either case not adequately covered by insurance as to which a solvent and unaffiliated insurance company has acknowledged coverage) shall be entered or filed against Company or any of its Subsidiaries or any of their respective assets and shall remain undischarged, unvacated, unbonded or unstayed for a period of 60 days (or in any event later than five days prior to the date of any proposed sale thereunder); or

**8.9 Dissolution.**

Any order, judgment or decree shall be entered against Company or any of its Significant Subsidiaries decreeing the dissolution or split up of Company or that Significant Subsidiary and such order shall remain undischarged or unstayed for a period in excess of 30 days; or

**8.10 Employee Benefit Plans.**

There shall occur one or more ERISA Events or similar events in respect of any Foreign Plans, that individually or in the aggregate results in or might reasonably be expected to result in liability of Company, any of its Subsidiaries or any of their respective ERISA Affiliates in excess of \$1,000,000 during the term of this Agreement; or there shall exist an amount of unfunded benefit liabilities (as defined in Section 4001(a)(18) of ERISA) and unfunded liabilities in respect of Foreign Plans, individually or in the aggregate for all Pension Plans (excluding for purposes of such computation any Pension Plans with respect to which assets exceed benefit liabilities), which exceeds \$1,000,000; or

**8.11 Material Adverse Effect.**

Any event or change shall occur that has caused or evidences, either in any case or in the aggregate, a Material Adverse Effect; or

**8.12 Change in Control.**

A Change in Control shall have occurred; or

**8.13 Invalidity of Loan Documents; Failure of Security; Repudiation of Obligations**

At any time after the execution and delivery thereof, (i) any Loan Document or any material provision thereof, for any reason other than the satisfaction in full of all Obligations, shall cease to be in full force and effect (other than in accordance with its terms) or shall be declared to be null and void, (ii) Administrative Agent shall not have or shall cease to have a

valid First Priority Lien in any material Collateral purported to be covered by the Collateral Documents, in each case for any reason other than the failure of Administrative Agent or any Lender to take any action within its control, or (iii) any Loan Party shall contest the validity or enforceability of any Loan Document or any material provision thereof in writing or deny in writing that it has any further liability, including with respect to future advances by Lenders, under any Loan Document or any provision thereof to which it is a party:

**THEN** (i) upon the occurrence of any Event of Default described in subsection 8.6 or 8.7, each of (a) the unpaid principal amount of and accrued interest on the Loans, (b) an amount equal to the maximum amount that may at any time be drawn under all Letters of Credit then outstanding (whether or not any beneficiary under any such Letter of Credit shall have presented, or shall be entitled at such time to present, the drafts or other documents or certificates required to draw under such Letter of Credit), and (c) all other Obligations shall automatically become immediately due and payable, without presentment, demand, protest or other requirements of any kind, all of which are hereby expressly waived by Company, and the obligation of each Lender to make any Loan, the obligation of Administrative Agent to issue any Letter of Credit and the right of any Lender to issue any Letter of Credit hereunder shall thereupon terminate, and (ii) upon the occurrence and during the continuation of any other Event of Default, Administrative Agent shall, upon the written request or with the written consent of Requisite Lenders, by written notice to Company, declare all or any portion of the amounts described in clauses (a) through (c) above to be, and the same shall forthwith become, immediately due and payable, and the obligation of each Lender to make any Loan, the obligation of Administrative Agent to issue any Letter of Credit and the right of any Lender to issue any Letter of Credit hereunder shall thereupon terminate; provided that the foregoing shall not affect in any way the obligations of Revolving Lenders under subsection 3.3C(i).

Any amounts described in clause (b) above, when received by Administrative Agent, shall be held by Administrative Agent pursuant to the terms of the Security Agreement and shall be applied as therein provided.

**Section 9. ADMINISTRATIVE AGENT**

**9.1 Appointment.**

**A. Appointment of Administrative Agent.** Wells Fargo is hereby appointed Administrative Agent hereunder and under the other Loan Documents. Each Lender hereby authorizes Administrative Agent to act as its agent in accordance with the terms of this Agreement and the other Loan Documents. Administrative Agent agrees to act upon the express conditions contained in this Agreement and the other Loan Documents, as applicable. The provisions of this Section 9 are solely for the benefit of Administrative Agent and Lenders and no Loan Party shall have rights as a third party beneficiary of any of the provisions thereof. In performing its functions and duties under this Agreement, Administrative Agent (other than as provided in subsection 2.1D) shall act solely as an agent of Lenders and does not assume and shall not be deemed to have assumed any obligation towards or relationship of agency or trust with or for Company or any other Loan Party.



**B. Appointment of Supplemental Collateral Agents.** It is the purpose of this Agreement and the other Loan Documents that there shall be no violation of any law of any jurisdiction denying or restricting the right of banking corporations or associations to transact business as agent or trustee in such jurisdiction. It is recognized that in case of litigation under this Agreement or any of the other Loan Documents, and in particular in case of the enforcement of any of the Loan Documents, or in case Administrative Agent deems that by reason of any present or future law of any jurisdiction it may not exercise any of the rights, powers or remedies granted herein or in any of the other Loan Documents or take any other action which may be desirable or necessary in connection therewith, it may be necessary that Administrative Agent appoint an additional individual or institution as a separate trustee, co-trustee, collateral agent or collateral co-agent (any such additional individual or institution being referred to herein individually as a “**Supplemental Collateral Agent**” and collectively as “**Supplemental Collateral Agents**”).

In the event that Administrative Agent appoints a Supplemental Collateral Agent with respect to any Collateral, (i) each and every right, power, privilege or duty expressed or intended by this Agreement or any of the other Loan Documents to be exercised by or vested in or conveyed to Administrative Agent with respect to such Collateral shall be exercisable by and vest in such Supplemental Collateral Agent to the extent, and only to the extent, necessary to enable such Supplemental Collateral Agent to exercise such rights, powers and privileges with respect to such Collateral and to perform such duties with respect to such Collateral, and every covenant and obligation contained in the Loan Documents and necessary to the exercise or performance thereof by such Supplemental Collateral Agent shall run to and be enforceable by either Administrative Agent or such Supplemental Collateral Agent, and (ii) the provisions of this Section 9 and of subsections 10.2 and 10.3 that refer to Administrative Agent shall inure to the benefit of such Supplemental Collateral Agent and all references therein to Administrative Agent shall be deemed to be references to Administrative Agent and/or such Supplemental Collateral Agent, as the context may require.

Should any instrument in writing from Company or any other Loan Party be required by any Supplemental Collateral Agent so appointed by Administrative Agent for more fully and certainly vesting in and confirming to him or it such rights, powers, privileges and duties, Company shall, or shall cause such Loan Party to, execute, acknowledge and deliver any and all such instruments promptly upon request by Administrative Agent. In case any Supplemental Collateral Agent, or a successor thereto, shall die, become incapable of acting, resign or be removed, all the rights, powers, privileges and duties of such Supplemental Collateral Agent, to the extent permitted by law, shall vest in and be exercised by Administrative Agent until the appointment of a new Supplemental Collateral Agent.

## **9.2 Powers and Duties: General Immunity.**

**A. Powers; Duties Specified.** Each Lender irrevocably authorizes Administrative Agent to take such action on such Lender’s behalf and to exercise such powers, rights and remedies hereunder and under the other Loan Documents as are specifically delegated or granted to Administrative Agent by the terms hereof and thereof, together with such powers, rights and

remedies as are reasonably incidental thereto. Administrative Agent shall have only those duties and responsibilities that are expressly specified in this Agreement and the other Loan Documents. Administrative Agent may exercise such powers, rights and remedies and perform such duties by or through its agents or employees. Administrative Agent shall not have, by reason of this Agreement or any of the other Loan Documents, a fiduciary relationship in respect of any Lender or Company; and nothing in this Agreement or any of the other Loan Documents, expressed or implied, is intended to or shall be so construed as to impose upon Administrative Agent any obligations in respect of this Agreement or any of the other Loan Documents except as expressly set forth herein or therein.

**B. No Responsibility for Certain Matters.** Administrative Agent shall not be responsible to any Lender for the execution, effectiveness, genuineness, validity, enforceability, collectibility or sufficiency of this Agreement or any other Loan Document or for any representations, warranties, recitals or statements made herein or therein or made in any written or oral statements or in any financial or other statements, instruments, reports or certificates or any other documents furnished or made by Administrative Agent to Lenders or by or on behalf of Company to Administrative Agent or any Lender in connection with the Loan Documents and the transactions contemplated thereby or for the financial condition or business affairs of Company or any other Person liable for the payment of any Obligations, nor shall Administrative Agent be required to ascertain or inquire as to the performance or observance of any of the terms, conditions, provisions, covenants or agreements contained in any of the Loan Documents or as to the use of the proceeds of the Loans or the use of the Letters of Credit or as to the existence or possible existence of any Event of Default or Potential Event of Default. Anything contained in this Agreement to the contrary notwithstanding, Administrative Agent shall not have any liability arising from confirmations of the amount of outstanding Loans or the Letter of Credit Usage or the component amounts thereof.

**C. Exculpatory Provisions.** None of Administrative Agent or any of its officers, directors, employees or agents shall be liable to Lenders for any action taken or omitted by Administrative Agent under or in connection with any of the Loan Documents except to the extent caused by Administrative Agent's gross negligence or willful misconduct. Administrative Agent shall be entitled to refrain from any act or the taking of any action (including the failure to take an action) in connection with this Agreement or any of the other Loan Documents or from the exercise of any power, discretion or authority vested in it hereunder or thereunder unless and until Administrative Agent shall have received instructions in respect thereof from Requisite Lenders (or such other Lenders as may be required to give such instructions under subsection 10.6) and, upon receipt of such instructions from Requisite Lenders (or such other Lenders, as the case may be), Administrative Agent shall be entitled to act or (where so instructed) refrain from acting, or to exercise such power, discretion or authority, in accordance with such instructions. Without prejudice to the generality of the foregoing, (i) Administrative Agent shall be entitled to rely, and shall be fully protected in relying, upon any communication, instrument or document believed by it to be genuine and correct and to have been signed or sent by the proper person or persons, and shall be entitled to rely and shall be protected in relying on opinions and judgments of attorneys (who may be attorneys for Company and its Subsidiaries), accountants, experts and other professional advisors selected by it; and (ii) no Lender shall have

any right of action whatsoever against Administrative Agent as a result of Administrative Agent acting or (where so instructed) refraining from acting under this Agreement or any of the other Loan Documents in accordance with the instructions of Requisite Lenders (or such other Lenders as may be required to give such instructions under subsection 10.6).

**D. Administrative Agent Entitled to Act as Lender.** The agency hereby created shall in no way impair or affect any of the rights and powers of, or impose any duties or obligations upon, Administrative Agent in its individual capacity as a Lender hereunder. With respect to its participation in the Loans and the Letters of Credit, Administrative Agent shall have the same rights and powers hereunder as any other Lender and may exercise the same as though it were not performing the duties and functions delegated to it hereunder, and the term “Lender” or “Lenders” or any similar term shall, unless the context clearly otherwise indicates, include Administrative Agent in its individual capacity. Administrative Agent and its Affiliates may accept deposits from, lend money to, acquire equity interests in and generally engage in any kind of commercial banking, investment banking, trust, financial advisory or other business with Company or any of its Affiliates as if it were not performing the duties specified herein, and may accept fees and other consideration from Company for services in connection with this Agreement and otherwise without having to account for the same to Lenders.

**9.3 Independent Investigation by Lenders; No Responsibility For Appraisal of Creditworthiness.**

Each Lender agrees that it has made its own independent investigation of the financial condition and affairs of Company and its Subsidiaries in connection with the making of the Loans and the issuance of Letters of Credit hereunder and that it has made and shall continue to make its own appraisal of the creditworthiness of Company and its Subsidiaries. Administrative Agent shall have no duty or responsibility, either initially or on a continuing basis, to make any such investigation or any such appraisal on behalf of Lenders or to provide any Lender with any credit or other information with respect thereto, whether coming into its possession before the making of the Loans or at any time or times thereafter, and Administrative Agent shall have no responsibility with respect to the accuracy of or the completeness of any information provided to Lenders.

**9.4 Right to Indemnity.**

Each Lender, in proportion to its Pro Rata Share, severally agrees to indemnify Administrative Agent and its officers, directors, employees, agents, attorneys, professional advisors and Affiliates to the extent that any such Person shall not have been reimbursed by Company, for and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses (including counsel fees and disbursements and fees and disbursements of any financial advisor engaged by Administrative Agent) or disbursements of any kind or nature whatsoever which may be imposed on, incurred by or asserted against Administrative Agent or and other such Persons in exercising the powers, rights and remedies of Administrative Agent or performing duties of Administrative Agent hereunder or under the other Loan Documents or otherwise in its capacity as Administrative Agent in any way relating to or

arising out of this Agreement or the other Loan Documents; provided that no Lender shall be liable for any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of Administrative Agent resulting solely from Administrative Agent's gross negligence or willful misconduct as determined by a final judgment of a court of competent jurisdiction. If any indemnity furnished to Administrative Agent or any other such Person for any purpose shall, in the opinion of Administrative Agent, be insufficient or become impaired, Administrative Agent may call for additional indemnity and cease, or not commence, to do the acts indemnified against until such additional indemnity is furnished.

**9.5 Successor Administrative Agent.**

Administrative Agent may resign at any time by giving 30 days' prior written notice thereof to Lenders and Company. Upon any such notice of resignation, Requisite Lenders shall have the right, upon five Business Days' notice to Company, to appoint a successor Administrative Agent. Upon the acceptance of any appointment as Administrative Agent hereunder by a successor Administrative Agent, that successor Administrative Agent shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring Administrative Agent and the retiring Administrative Agent shall be discharged from its duties and obligations under this Agreement. After any retiring Administrative Agent's resignation hereunder as Administrative Agent, the provisions of this Section 9 shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Administrative Agent under this Agreement.

**9.6 Collateral Documents and Subsidiary Guaranty.**

Each Lender hereby further authorizes Administrative Agent, on behalf of and for the benefit of Lenders, to enter into each Collateral Document as secured party and to be the agent for and representative of Lenders under the Subsidiary Guaranty, and each Lender agrees to be bound by the terms of each Collateral Document and the Subsidiary Guaranty; provided that Administrative Agent shall not (i) enter into or consent to any material amendment, modification, termination or waiver of any provision contained in any Collateral Document or the Subsidiary Guaranty or (ii) release any Collateral (except as otherwise expressly permitted or required pursuant to the terms of this Agreement or the applicable Collateral Document), in each case without the prior consent of Requisite Lenders (or, if required pursuant to subsection 10.6, all Lenders); provided further, however, that, without further written consent or authorization from Lenders, Administrative Agent may execute any documents or instruments necessary to (a) release any Lien encumbering any item of Collateral that is the subject of a sale or other disposition of assets permitted by this Agreement or to which Requisite Lenders have otherwise consented, (b) release any Subsidiary Guarantor from the Subsidiary Guaranty if all of the Capital Stock of such Subsidiary Guarantor is sold to any Person (other than an Affiliate of Company) pursuant to a sale or other disposition permitted hereunder or to which Requisite Lenders have otherwise consented or (c) subordinate the Liens of Administrative Agent, on behalf of Lenders, to any Liens permitted by subsection 7.2; provided that, in the case of a sale of such item of Collateral or stock referred to in subdivision (a) or (b), the requirements of

subsection 10.14 are satisfied. Anything contained in any of the Loan Documents to the contrary notwithstanding, Company, Administrative Agent and each Lender hereby agree that (1) no Lender shall have any right individually to realize upon any of the Collateral under any Collateral Document or to enforce the Subsidiary Guaranty, it being understood and agreed that all powers, rights and remedies under the Collateral Documents and the Subsidiary Guaranty may be exercised solely by Administrative Agent for the benefit of Lenders in accordance with the terms thereof, and (2) in the event of a foreclosure by Administrative Agent on any of the Collateral pursuant to a public or private sale, Administrative Agent or any Lender may be the purchaser of any or all of such Collateral at any such sale and Administrative Agent, as agent for and representative of Lenders (but not any Lender or Lenders in its or their respective individual capacities unless Requisite Lenders shall otherwise agree in writing) shall be entitled, for the purpose of bidding and making settlement or payment of the purchase price for all or any portion of the Collateral sold at any such public sale, to use and apply any of the Obligations as a credit on account of the purchase price for any collateral payable by Administrative Agent at such sale.

**9.7 Administrative Agent May File Proofs of Claim.**

In case of the pendency of any receivership, insolvency, liquidation, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceeding relative to Company or any of the Subsidiaries of Company, Administrative Agent (irrespective of whether the principal of any Loan shall then be due and payable as herein expressed or by declaration or otherwise and irrespective of whether Administrative Agent shall have made any demand on Company) shall be entitled and empowered, by intervention in such proceeding or otherwise

(i) to file and prove a claim for the whole amount of principal and interest owing and unpaid in respect of the Loans and any other Obligations that are owing and unpaid and to file such other papers or documents as may be necessary or advisable in order to have the claims of Lenders and Administrative Agent (including any claim for the reasonable compensation, expenses, disbursements and advances of Lenders and Administrative Agent and their agents and counsel and all other amounts due Lenders and Administrative Agent under subsections 2.3 and 10.2) allowed in such judicial proceeding, and

(ii) to collect and receive any moneys or other property payable or deliverable on any such claims and to distribute the same;

and any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceeding is hereby authorized by each Lender to make such payments to Administrative Agent and, in the event that Administrative Agent shall consent to the making of such payments directly to Lenders, to pay to Administrative Agent any amount due for the reasonable compensation, expenses, disbursements and advances of Administrative Agent and its agents and counsel, and any other amounts due Administrative Agent under subsections 2.3 and 10.2.

Nothing herein contained shall be deemed to authorize Administrative Agent to authorize or consent to or accept or adopt on behalf of any Lender any plan of reorganization, arrangement, adjustment or composition affecting the Obligations or the rights of any Lenders or to authorize Administrative Agent to vote in respect of the claim of any Lender in any such proceeding.

**Section 10. MISCELLANEOUS**

**10.1 Successors and Assigns; Assignments and Participations in Loans and Letters of Credit**

**A. General.** This Agreement shall be binding upon the parties hereto and their respective successors and assigns and shall inure to the benefit of the parties hereto and the successors and assigns of Lenders (it being understood that Lenders' rights of assignment are subject to the further provisions of this subsection 10.1). Neither Company's rights or obligations hereunder nor any interest therein may be assigned or delegated by Company without the prior written consent of all Lenders (and any attempted assignment or transfer by Company without such consent shall be null and void). No sale, assignment or transfer or participation of any Letter of Credit or any participation therein may be made separately from a sale, assignment, transfer or participation of a corresponding interest in the Revolving Loan Commitment and the Revolving Loans of the Revolving Lender effecting such sale, assignment, transfer or participation. Nothing in this Agreement, expressed or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby and, to the extent expressly contemplated hereby, the Affiliates of each of Administrative Agent and Lenders) any legal or equitable right, remedy or claim under or by reason of this Agreement.

**B. Assignments.**

(i) Amounts and Terms of Assignments. Any Lender may assign to one or more Eligible Assignees all or any portion of its rights and obligations under this Agreement; provided that (a), except (1) in the case of an assignment of the entire remaining amount of the assigning Lender's rights and obligations under this Agreement or (2) in the case of an assignment to a Lender or an Affiliate of a Lender or an Approved Fund of a Lender, the aggregate amount of the Revolving Loan Exposure of the assigning Lender and the assignee subject to each such assignment shall not be less than \$2,000,000 unless each of Administrative Agent and, so long as no Event of Default has occurred and is continuing, Company otherwise consents, each such consent not to be unreasonably withheld or delayed), (b) each partial assignment shall be made as an assignment of a proportionate part of all the assigning Lender's rights and obligations under this Agreement with respect to the Loan or the Commitment assigned, (c) the parties to each assignment shall execute and deliver to Administrative Agent an Assignment Agreement, together with a processing and recordation fee of \$3,500 (unless the assignee is an Affiliate or an Approved Fund of the assignor, in which case no fee shall be required), and the Eligible Assignee, if it shall not be a Lender, shall deliver to Administrative Agent information reasonably requested by Administrative Agent, including such forms,

certificates or other evidence, if any, with respect to United States federal income tax withholding matters as the assignee under such Assignment Agreement may be required to deliver to Administrative Agent pursuant to subsection 2.7B(iii) and (d), except in the case of an assignment to another Lender, an Affiliate of a Lender or an Approved Fund of a Lender, Administrative Agent and, if no Event of Default has occurred and is continuing, Company, shall have consented thereto (which consent shall not be unreasonably withheld). Upon such execution, delivery and consent, from and after the effective date specified in such Assignment Agreement, (y) the assignee thereunder shall be a party hereto and, to the extent that rights and obligations hereunder have been assigned to it pursuant to such Assignment Agreement, shall have the rights and obligations of a Lender hereunder and (z) the assigning Lender thereunder shall, to the extent that rights and obligations hereunder have been assigned by it pursuant to such Assignment Agreement, relinquish its rights (other than any rights which survive the termination of this Agreement under subsection 10.9B) and be released from its obligations under this Agreement (and, in the case of an Assignment Agreement covering all or the remaining portion of an assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto; provided that, anything contained in any of the Loan Documents to the contrary notwithstanding, if such Lender is Issuing Lender with respect to any outstanding Letters of Credit such Lender shall continue to have all rights and obligations of Issuing Lender with respect to such Letters of Credit until the cancellation or expiration of such Letters of Credit and the reimbursement of any amounts drawn thereunder). The assigning Lender shall, upon the effectiveness of such assignment or as promptly thereafter as practicable, surrender its Notes, if any, to Administrative Agent for cancellation, and thereupon new Notes shall, if so requested by the assignee and/or the assigning Lender in accordance with subsection 2.1E, be issued to the assignee and/or to the assigning Lender, substantially in the form of Exhibit IV, with appropriate insertions, to reflect the new Commitments and/or outstanding Revolving Loans of the assignee and/or the assigning Lender. Other than as provided in subsection 10.5, any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this subsection 10.1B shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with subsection 10.1C.

(ii) Acceptance by Administrative Agent; Recordation in Register. Upon its receipt of an Assignment Agreement executed by an assigning Lender and an assignee representing that it is an Eligible Assignee, together with the processing and recordation fee referred to in subsection 10.1B(i) and any forms, certificates or other evidence with respect to United States federal income tax withholding matters that such assignee may be required to deliver to Administrative Agent pursuant to subsection 2.7B(iii), Administrative Agent shall, if Administrative Agent and Company have consented to the assignment evidenced thereby (in each case to the extent such consent is required pursuant to subsection 10.1B(i)), (a) accept such Assignment Agreement by executing a counterpart thereof as provided therein (which acceptance shall evidence any required consent of Administrative Agent to such assignment), (b) record the information contained therein in the Register, and (c) give prompt notice thereof to Company.

Administrative Agent shall maintain a copy of each Assignment Agreement delivered to and accepted by it as provided in this subsection 10.1B(ii).

(iii) **Deemed Consent by Company.** If the consent of Company to an assignment or to an Eligible Assignee is required hereunder (including a consent to an assignment which does not meet the minimum assignment thresholds specified in subsection 10.1B(i)), Company shall be deemed to have given its consent five Business Days after the date notice thereof has been delivered by the assigning Lender (through Administrative Agent) unless such consent is expressly refused by Company prior to such fifth Business Day.

**C. Participations.** Any Lender may, without the consent of, or notice to, Company or Administrative Agent, sell participations to one or more Persons (other than a natural Person or Company or any of its Affiliates) in all or a portion of such Lender's rights and/or obligations under this Agreement; provided that (i) such Lender's obligations under this Agreement shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations and (iii) Company, Administrative Agent and Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement. Any agreement or instrument pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement; provided that such agreement or instrument may provide that such Lender will not, without the consent of the Participant, agree to any amendment, modification or waiver directly affecting (i) the extension of the scheduled final maturity date of any Loan allocated to such participation or (ii) a reduction of the principal amount of or the rate of interest payable on any Loan allocated to such participation. Subject to the further provisions of this subsection 10.1C, Company agrees that each Participant shall be entitled to the benefits of subsections 2.6D and 2.7 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to subsection 10.1B. To the extent permitted by law, each Participant also shall be entitled to the benefits of subsection 10.4 as though it were a Lender, provided such Participant agrees to be subject to subsection 10.5 as though it were a Lender. A Participant shall not be entitled to receive any greater payment under subsections 2.6D and 2.7 than the applicable Lender would have been entitled to receive with respect to the participation sold to such Participant unless the sale of the participation to such Participant is made with Company's prior written consent. A Participant that would be a Non-US Lender if it were a Lender shall not be entitled to the benefits of subsection 2.7 unless Company is notified of the participation sold to such Participant and such Participant agrees, for the benefit of Company, to comply with subsection 2.7B(iii) as though it were a Lender.

**D. Pledges and Assignments.** Any Lender may at any time pledge or assign a security interest in all or any portion of its Loans, and the other Obligations owed to such Lender, to secure obligations of such Lender, including, without limitation, any pledge or assignment to secure obligations to any Federal Reserve Bank; provided that (i) no Lender shall be relieved of any of its obligations hereunder as a result of any such assignment or pledge and



(ii) in no event shall any assignee or pledgee be considered to be a "Lender" or be entitled to require the assigning Lender to take or omit to take any action hereunder.

**E. Information.** Each Lender may furnish any information concerning Company and its Subsidiaries in the possession of that Lender from time to time to assignees and participants (including prospective assignees and participants), subject to subsection 10.19.

**F. Agreements of Lenders.** Each Lender listed on the signature pages hereof hereby agrees (i) that it is an Eligible Assignee described in clause (ii) of the definition thereof; (ii) that it has experience and expertise in the making of loans such as the Loans; and (iii) that it will make its Loans for its own account in the ordinary course of its business and without a view to distribution of such Loans within the meaning of the Securities Act or the Exchange Act or other federal securities laws (it being understood that, subject to the provisions of this subsection 10.1, the disposition of such Loans or any interests therein shall at all times remain within its exclusive control). Each Lender that becomes a party hereto pursuant to an Assignment Agreement shall be deemed to agree that the agreements of such Lender contained in Section 2(c) of such Assignment Agreement are incorporated herein by this reference.

## **10.2 Expenses.**

Whether or not the transactions contemplated hereby shall be consummated, Company agrees to pay promptly (i) all reasonable costs and expenses of negotiation, preparation and execution of the Loan Documents and any consents, amendments, waivers or other modifications thereto; (ii) all costs and expenses of furnishing all opinions by counsel for Company (including any opinions requested by Administrative Agent or Lenders as to any legal matters arising hereunder) and of Company's performance of and compliance with all agreements and conditions on its part to be performed or complied with under this Agreement and the other Loan Documents including with respect to confirming compliance with environmental, insurance and solvency requirements; (iii) all reasonable fees, expenses and disbursements of counsel to Administrative Agent (including allocated costs of internal counsel) in connection with the negotiation, preparation, execution and administration of the Loan Documents and any consents, amendments, waivers or other modifications thereto and any other documents or matters requested by Company; (iv) all costs and expenses of creating and perfecting Liens in favor of Administrative Agent on behalf of Lenders pursuant to any Collateral Document, including filing and recording fees, expenses and taxes, stamp or documentary taxes, search fees, title insurance premiums, and reasonable fees, expenses and disbursements of counsel to Administrative Agent and of counsel providing any opinions that Administrative Agent or Requisite Lenders may request in respect of the Collateral Documents or the Liens created pursuant thereto; (v) all costs and expenses incurred by Administrative Agent in connection with the custody or preservation of any of the Collateral; (vi) all other costs and expenses incurred by Administrative Agent in connection with the syndication of the Commitments; (vii) all costs and expenses, including reasonable attorneys' fees (including allocated costs of internal counsel) and fees, costs and expenses of accountants, advisors and consultants, incurred by Administrative Agent and its counsel relating to efforts to (a) evaluate or assess any Loan Party, its business or financial condition and (b) protect, evaluate, assess or dispose of any of the Collateral; and (viii) all costs

and expenses, including reasonable attorneys' fees (including allocated costs of internal counsel), fees, costs and expenses of accountants, advisors and consultants and costs of settlement, incurred by Administrative Agent and Lenders in enforcing any Obligations of or in collecting any payments due from any Loan Party hereunder or under the other Loan Documents (including in connection with the sale of, collection from, or other realization upon any of the Collateral or the enforcement of the Loan Documents) or in connection with any refinancing or restructuring of the credit arrangements provided under this Agreement in the nature of a "work-out" or pursuant to any insolvency or bankruptcy proceedings.

### 10.3 **Indemnity.**

In addition to the payment of expenses pursuant to subsection 10.2, whether or not the transactions contemplated hereby shall be consummated, Company agrees to defend (subject to Indemnitees' selection of counsel), indemnify, pay and hold harmless Administrative Agent and Lenders (including Issuing Lender), and the officers, directors, employees, agents and Affiliates of Administrative Agent and Lenders (collectively called the "**Indemnitees**"), from and against any and all Indemnified Liabilities (as hereinafter defined); provided that Company shall not have any obligation to any Indemnitee hereunder with respect to any Indemnified Liabilities to the extent such Indemnified Liabilities arise solely from the gross negligence or willful misconduct of that Indemnitee as determined by a final judgment of a court of competent jurisdiction.

As used herein, "**Indemnified Liabilities**" means, collectively, any and all liabilities, obligations, losses, damages (including natural resource damages), penalties, actions, judgments, suits, claims (including Environmental Claims), costs (including the costs of any investigation, study, sampling, testing, abatement, cleanup, removal, remediation or other response action necessary to remove, remediate, clean up or abate any Hazardous Materials Activity), expenses and disbursements of any kind or nature whatsoever (including the reasonable fees and disbursements of counsel for Indemnitees in connection with any investigative, administrative or judicial proceeding commenced or threatened by any Person, whether or not any such Indemnitee shall be designated as a party or a potential party thereto, and any fees or expenses incurred by Indemnitees in enforcing this indemnity), whether direct, indirect or consequential and whether based on any federal, state or foreign laws, statutes, rules or regulations (including securities and commercial laws, statutes, rules or regulations and Environmental Laws), on common law or equitable cause or on contract or otherwise, that may be imposed on, incurred by, or asserted against any such Indemnitee, in any manner relating to or arising out of (i) this Agreement or the other Loan Documents or the transactions contemplated hereby or thereby (including Lenders' agreement to make the Loans hereunder or the use or intended use of the proceeds thereof or the issuance of Letters of Credit hereunder or the use or intended use of any thereof, the failure of Issuing Lender to honor a drawing under a Letter of Credit as a result of any act or omission, whether rightful or wrongful, of any present or future de jure or de facto Government Authority, or any enforcement of any of the Loan Documents (including any sale of, collection from, or other realization upon any of the Collateral or the enforcement of the Subsidiary Guaranty)), (ii) the statements contained in the commitment letter delivered by any Lender to Company with respect thereto, or (iii) any Environmental Claim or

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any Hazardous Materials Activity relating to or arising from, directly or indirectly, any past or present activity, operation, land ownership, or practice of Company or any of its Subsidiaries.

To the extent that the undertakings to defend, indemnify, pay and hold harmless set forth in this subsection 10.3 may be unenforceable in whole or in part because they are violative of any law or public policy, Company shall contribute the maximum portion that it is permitted to pay and satisfy under applicable law to the payment and satisfaction of all Indemnified Liabilities incurred by Indemnitees or any of them.

**10.4 Set-Off.**

In addition to any rights now or hereafter granted under applicable law and not by way of limitation of any such rights, upon the occurrence of any Event of Default each Lender is hereby authorized by Company at any time or from time to time, without notice to Company or to any other Person, any such notice being hereby expressly waived, to set off and to appropriate and to apply any and all deposits (general or special, time or demand, provisional or final, including Indebtedness evidenced by certificates of deposit, whether matured or unmatured, but not including trust accounts) and any other Indebtedness at any time held or owing by that Lender or any Affiliate of that Lender to or for the credit or the account of Company and each other Loan Party against and on account of the Obligations of Company or any other Loan Party to that Lender (or any Affiliate of that Lender) or to any other Lender (or any Affiliate of any other Lender) under this Agreement, the Letters of Credit and participations therein and the other Loan Documents, including all claims of any nature or description arising out of or connected with this Agreement, the Letters of Credit and participations therein or any other Loan Document, irrespective of whether or not (i) that Lender shall have made any demand hereunder or (ii) the principal of or the interest on the Loans or any amounts in respect of the Letters of Credit or any other amounts due hereunder shall have become due and payable pursuant to Section 8 and although said obligations and liabilities, or any of them, may be contingent or unmatured.

**10.5 Ratable Sharing.**

Lenders hereby agree among themselves that if any of them shall, whether by voluntary payment (other than a voluntary prepayment of Loans made and applied in accordance with the terms of this Agreement), by realization upon security, through the exercise of any right of set-off or banker's lien, by counterclaim or cross action or by the enforcement of any right under the Loan Documents or otherwise, or as adequate protection of a deposit treated as cash collateral under the Bankruptcy Code, receive payment or reduction of a proportion of the aggregate amount of principal, interest, amounts payable in respect of Letters of Credit, fees and other amounts then due and owing to that Lender hereunder or under the other Loan Documents (collectively, the "**Aggregate Amounts Due**" to such Lender) that is greater than the proportion received by any other Lender in respect of the Aggregate Amounts Due to such other Lender, then the Lender receiving such proportionately greater payment shall (i) notify Administrative Agent and each other Lender of the receipt of such payment and (ii) apply a portion of such payment to purchase assignments (which it shall be deemed to have purchased from each seller of an assignment simultaneously upon the receipt by such seller of its portion of such payment)

of the Aggregate Amounts Due to the other Lenders so that all such recoveries of Aggregate Amounts Due shall be shared by all Lenders in proportion to the Aggregate Amounts Due to them; provided that if all or part of such proportionately greater payment received by such purchasing Lender is thereafter recovered from such Lender upon the bankruptcy or reorganization of Company or otherwise, those purchases shall be rescinded and the purchase prices paid for such assignments shall be returned to such purchasing Lender ratably to the extent of such recovery, but without interest. Company expressly consents to the foregoing arrangement and agrees that any purchaser of an assignment so purchased may exercise any and all rights of a Lender as to such assignment as fully as if that Lender had complied with the provisions of subsection 10.1B with respect to such assignment. In order to further evidence such assignment (and without prejudice to the effectiveness of the assignment provisions set forth above), each purchasing Lender and each selling Lender agree to enter into an Assignment Agreement at the request of a selling Lender or a purchasing Lender, as the case may be, in form and substance reasonably satisfactory to each such Lender.

#### **10.6 Amendments and Waivers.**

No amendment, modification, termination or waiver of any provision of this Agreement or of the Notes, and no consent to any departure by Company therefrom, shall in any event be effective without the written concurrence of Requisite Lenders; provided that no such amendment, modification, termination, waiver or consent shall, without the consent of (a) each Lender, (1) reduce the principal amount of any Loan, (2) increase the maximum aggregate amount of Letters of Credit, (3) postpone the date or reduce the amount of any scheduled payment (but not prepayment) of principal of any Loan, (4) postpone the date on which any interest or any fees are payable, (5) decrease the interest rate borne by any Loan (other than any waiver of any increase in the interest rate applicable to any of the Loans pursuant to subsection 2.2E) or the amount of any fees payable hereunder, (6) reduce the amount or postpone the due date of any amount payable in respect of any Letter of Credit, (7) extend the expiration date of any Letter of Credit beyond the Revolving Loan Commitment Termination Date or (8) change in any manner the obligations of Revolving Lenders relating to the purchase of participations in Letters of Credit; (b) each Lender, (1) change in any manner the definition of "Pro Rata Share" or the definition of "Requisite Lenders" or the definition of "Requisite Lenders" (except for any changes resulting solely from an increase in Commitments approved by Requisite Lenders), (2) change in any manner any provision of this Agreement that, by its terms, expressly requires the approval or concurrence of all Lenders, (3) increase the maximum duration of Interest Periods permitted hereunder, (4) release any Lien granted in favor of Administrative Agent with respect to all or substantially all of the Collateral or more in aggregate fair market value of the Collateral or release all or substantially all of the Subsidiary Guarantors from their obligations under the Subsidiary Guaranty, in each case other than in accordance with the terms of the Loan Documents, or (5) change in any manner or waive the provisions contained in subsection 8.1 or this subsection 10.6. In addition, (i) any amendment, modification, termination or waiver of any of the provisions contained in Section 4 shall be effective only if evidenced by a writing signed by or on behalf of Administrative Agent and Requisite Lenders, (ii) no amendment, modification, termination or waiver of any provision of any Note shall be effective without the written concurrence of the Lender which is the holder of that Note, (iii) no amendment,

modification, termination or waiver of any provision of Section 3 shall be effective without the written concurrence of Administrative Agent and, with respect to the purchase of participations in Letters of Credit, without the written concurrence of Issuing Lender that has issued an outstanding Letter of Credit or has not been reimbursed for a payment under a Letter of Credit, (iv) no amendment, modification, termination or waiver of any provision of Section 9 or of any other provision of this Agreement which, by its terms, expressly requires the approval or concurrence of Administrative Agent shall be effective without the written concurrence of Administrative Agent, and (v) no Commitment of a Lender shall be increased without the consent of such Lender. Administrative Agent may, but shall have no obligation to, with the concurrence of any Lender, execute amendments, modifications, waivers or consents on behalf of that Lender. Any waiver or consent shall be effective only in the specific instance and for the specific purpose for which it was given. No notice to or demand on Company in any case shall entitle Company to any other or further notice or demand in similar or other circumstances. Any amendment, modification, termination, waiver or consent effected in accordance with this subsection 10.6 shall be binding upon each Lender at the time outstanding, each future Lender and, if signed by Company, on Company.

#### **10.7 Independence of Covenants**

All covenants hereunder shall be given independent effect so that if a particular action or condition is not permitted by any of such covenants, the fact that it would be permitted by an exception to, or would otherwise be within the limitations of, another covenant shall not avoid the occurrence of an Event of Default or Potential Event of Default if such action is taken or condition exists.

#### **10.8 Notices; Effectiveness of Signatures**

Unless otherwise specifically provided herein, any notice or other communication herein required or permitted to be given shall be in writing and may be personally served, or sent by telefacsimile or United States mail or courier service and shall be deemed to have been given when delivered in person or by courier service, upon receipt of telefacsimile in complete and legible form, or three Business Days after depositing it in the United States mail with postage prepaid and properly addressed; provided that notices to Administrative Agent and Issuing Lender shall not be effective until received. For the purposes hereof, the address of each party hereto shall be as set forth under such party's name on the signature pages hereof or (i) as to Company and Administrative Agent, such other address as shall be designated by such Person in a written notice delivered to the other parties hereto and (ii) as to each other party, such other address as shall be designated by such party in a written notice delivered to Administrative Agent.

Loan Documents and notices under the Loan Documents may be transmitted and/or signed by telefacsimile. The effectiveness of any such documents and signatures shall, subject to applicable law, have the same force and effect as an original copy with manual signatures and shall be binding on all Loan Parties, Administrative Agent and Lenders. Administrative Agent may also require that any such documents and signature be confirmed by a manually-signed copy

thereof; provided, however, that the failure to request or deliver any such manually-signed copy shall not affect the effectiveness of any facsimile document or signature.

**10.9 Survival of Representations, Warranties and Agreements.**

A. All representations, warranties and agreements made herein shall survive the execution and delivery of this Agreement and the making of the Loans and the issuance of the Letters of Credit hereunder.

B. Notwithstanding anything in this Agreement or implied by law to the contrary, the agreements of Company set forth in subsections 2.6D, 2.7, 10.2, 10.3, 10.4, 10.17 and 10.18 and the agreements of Lenders set forth in subsections 9.2C, 9.4, 10.5 and 10.18 shall survive the payment of the Loans, the cancellation or expiration of the Letters of Credit and the reimbursement of any amounts drawn thereunder, and the termination of this Agreement.

**10.10 Failure or Indulgence Not Waiver; Remedies Cumulative**

No failure or delay on the part of Administrative Agent or any Lender in the exercise of any power, right or privilege hereunder or under any other Loan Document shall impair such power, right or privilege or be construed to be a waiver of any default or acquiescence therein, nor shall any single or partial exercise of any such power, right or privilege preclude other or further exercise thereof or of any other power, right or privilege. All rights and remedies existing under this Agreement and the other Loan Documents are cumulative to, and not exclusive of, any rights or remedies otherwise available.

**10.11 Marshalling; Payments Set Aside**

Neither Administrative Agent nor any Lender shall be under any obligation to marshal any assets in favor of Company or any other party or against or in payment of any or all of the Obligations. To the extent that Company makes a payment or payments to Administrative Agent or Lenders (or to Administrative Agent for the benefit of Lenders), or Administrative Agent or any Lender enforces any security interests or exercises its rights of setoff, and such payment or payments or the proceeds of such enforcement or setoff 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 law, any other state or federal law, common law or any equitable cause, then, to the extent of such recovery, the obligation or part thereof originally intended to be satisfied, and all Liens, rights and remedies therefor or related thereto, shall be revived and continued in full force and effect as if such payment or payments had not been made or such enforcement or setoff had not occurred.

**10.12 Severability.**

In case any provision in or obligation under this Agreement or the Notes shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

**10.13 Obligations Several; Independent Nature of Lenders' Rights; Damage Waiver**

The obligations of Lenders hereunder are several and no Lender shall be responsible for the obligations or Commitments of any other Lender hereunder. Nothing contained herein or in any other Loan Document, and no action taken by Lenders pursuant hereto or thereto, shall be deemed to constitute Lenders, or Lenders and Company, as a partnership, an association, a Joint Venture or any other kind of entity. The amounts payable at any time hereunder to each Lender shall be a separate and independent debt, and each Lender shall be entitled to protect and enforce its rights arising out of this Agreement and it shall not be necessary for any other Lender to be joined as an additional party in any proceeding for such purpose.

To the extent permitted by law, Company shall not assert, and hereby waives, any claim against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with or as a result of this Agreement (including, without limitation, subsection 2.1C hereof), any other Loan Document, any transaction contemplated by the Loan Documents, any Loan or the use of proceeds thereof.

**10.14 Release of Security Interest or Guaranty**

Upon the proposed sale or other disposition of any Collateral that is permitted by this Agreement or to which Requisite Lenders have otherwise consented, or the sale or other disposition of all of the Capital Stock of a Subsidiary Guarantor to any Person (other than an Affiliate of Company) permitted by this Agreement or to which Requisite Lenders have otherwise consented, for which a Loan Party desires to obtain a security interest release or a release of the Subsidiary Guaranty from Administrative Agent, such Loan Party shall deliver an Officer's Certificate (i) stating that the Collateral or the Capital Stock subject to such disposition is being sold or otherwise disposed of in compliance with the terms hereof and (ii) specifying the Collateral or Capital Stock being sold or otherwise disposed of in the proposed transaction. Upon the receipt of such Officer's Certificate, Administrative Agent shall, at such Loan Party's expense, so long as Administrative Agent has no reason to believe that the facts stated in such Officer's Certificate are not true and correct, execute and deliver such releases of its security interest in such Collateral or such Subsidiary Guaranty, as may be reasonably requested by such Loan Party.

**10.15. Applicable Law**

**THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE INTERNAL LAWS OF THE STATE OF CALIFORNIA (INCLUDING SECTION 1646.5 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA), WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES THAT WOULD REQUIRE APPLICATION OF ANOTHER LAW.**

**10.16 Construction of Agreement; Nature of Relationship.**

Each of the parties hereto acknowledges that (i) it has been represented by counsel in the negotiation and documentation of the terms of this Agreement, (ii) it has had full and fair opportunity to review and revise the terms of this Agreement, (iii) this Agreement has been drafted jointly by all of the parties hereto, and (iv) neither Administrative Agent nor any Lender or other Agent has any fiduciary relationship with or duty to Company arising out of or in connection with this Agreement or any of the other Loan Documents, and the relationship between Administrative Agent and Lenders, on one hand, and Company, on the other hand, in connection herewith or therewith is solely that of debtor and creditor. Accordingly, each of the parties hereto acknowledges and agrees that the terms of this Agreement shall not be construed against or in favor of another party.

**10.17 Consent to Jurisdiction and Service of Process**

**ALL JUDICIAL PROCEEDINGS BROUGHT AGAINST COMPANY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT, OR ANY OBLIGATIONS THEREUNDER, MAY BE BROUGHT IN ANY STATE OR FEDERAL COURT OF COMPETENT JURISDICTION IN THE STATE OF CALIFORNIA, COUNTY AND CITY OF LOS ANGELES. BY EXECUTING AND DELIVERING THIS AGREEMENT, COMPANY, FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES, IRREVOCABLY**

**(I) ACCEPTS GENERALLY AND UNCONDITIONALLY THE NONEXCLUSIVE JURISDICTION AND VENUE OF SUCH COURTS;**

**(II) WAIVES ANY DEFENSE OF *FORUM NON CONVENIENS*;**

**(III) AGREES THAT SERVICE OF ALL PROCESS IN ANY SUCH PROCEEDING IN ANY SUCH COURT MAY BE MADE BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO COMPANY AT ITS ADDRESS PROVIDED IN ACCORDANCE WITH SUBSECTION 10.8;**

**(IV) AGREES THAT SERVICE AS PROVIDED IN CLAUSE (III) ABOVE IS SUFFICIENT TO CONFER PERSONAL JURISDICTION OVER COMPANY IN ANY SUCH PROCEEDING IN ANY SUCH COURT, AND OTHERWISE CONSTITUTES EFFECTIVE AND BINDING SERVICE IN EVERY RESPECT;**

**(V) AGREES THAT LENDERS RETAIN THE RIGHT TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR TO BRING PROCEEDINGS AGAINST COMPANY IN THE COURTS OF ANY OTHER JURISDICTION; AND**

**(VI) AGREES THAT THE PROVISIONS OF THIS SUBSECTION 10.17 RELATING TO JURISDICTION AND VENUE SHALL BE BINDING AND**



**ENFORCEABLE TO THE FULLEST EXTENT PERMISSIBLE UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 410.40 OR OTHERWISE.**

**10.18. Waiver of Jury Trial**

**EACH OF THE PARTIES TO THIS AGREEMENT HEREBY AGREES TO WAIVE ITS RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT OR ANY OF THE OTHER LOAN DOCUMENTS OR ANY DEALINGS BETWEEN THEM RELATING TO THE SUBJECT MATTER OF THIS LOAN TRANSACTION OR THE LENDER/BORROWER RELATIONSHIP THAT IS BEING ESTABLISHED. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING CONTRACT CLAIMS, TORT CLAIMS, BREACH OF DUTY CLAIMS AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. EACH PARTY HERETO ACKNOWLEDGES THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO ENTER INTO A BUSINESS RELATIONSHIP, THAT EACH HAS ALREADY RELIED ON THIS WAIVER IN ENTERING INTO THIS AGREEMENT, AND THAT EACH WILL CONTINUE TO RELY ON THIS WAIVER IN THEIR RELATED FUTURE DEALINGS. EACH PARTY HERETO FURTHER WARRANTS AND REPRESENTS THAT IT HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL AND THAT IT KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL. THIS WAIVER IS IRREVOCABLE, MEANING THAT IT MAY NOT BE MODIFIED EITHER ORALLY OR IN WRITING (OTHER THAN BY A MUTUAL WRITTEN WAIVER SPECIFICALLY REFERRING TO THIS SUBSECTION 10.18 AND EXECUTED BY EACH OF THE PARTIES HERETO), AND THIS WAIVER SHALL APPLY TO ANY SUBSEQUENT AMENDMENTS, RENEWALS, SUPPLEMENTS OR MODIFICATIONS TO THIS AGREEMENT OR ANY OF THE OTHER LOAN DOCUMENTS OR TO ANY OTHER DOCUMENTS OR AGREEMENTS RELATING TO THE LOANS MADE HEREUNDER. In the event of litigation, this Agreement may be filed as a written consent to a trial by the court.**

**10.19. Confidentiality**

Each Lender shall hold all non-public information obtained pursuant to the requirements of this Agreement in accordance with such Lender's customary procedures for handling confidential information of this nature, it being understood and agreed by Company that in any event a Lender may make disclosures (a) to its and its Affiliates' directors, officers, employees and agents, including accountants, legal counsel and other advisors (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such information and instructed to keep such information confidential), (b) to the extent requested by any Government Authority, (c) to the extent required by applicable laws or regulations or by any

subpoena or similar legal process, (d) to any other party to this Agreement, (e) in connection with the exercise of any remedies hereunder or any suit, action or proceeding relating to this Agreement or the enforcement of rights hereunder, (f) subject to an agreement containing provisions substantially the same as those of this subsection 10.19, to (i) any Eligible Assignee of or participant in, or any prospective Eligible Assignee of or Participant in, any of its rights or obligations under this Agreement or (ii) any direct or indirect contractual counterparty or prospective counterparty (or such contractual counterparty's or prospective counterparty's professional advisor) to any credit derivative transaction relating to obligations of Company, (g) with the consent of Company, (h) to the extent such information (i) becomes publicly available other than as a result of a breach of this subsection 10.19 or (ii) becomes available to Administrative Agent or any Lender on a nonconfidential basis from a source other than Company or (i) to the National Association of Insurance Commissioners or any other similar organization or any nationally recognized rating agency that requires access to information about a Lender's or its Affiliates' investment portfolio in connection with ratings issued with respect to such Lender or its Affiliates and that no written or oral communications from counsel to Administrative Agent and no information that is or is designated as privileged or as attorney work product may be disclosed to any Person unless such Person is a Lender or a participant hereunder; provided that, unless specifically prohibited by applicable law or court order, each Lender shall notify Company of any request by any Government Authority or representative thereof (other than any such request in connection with any examination of the financial condition of such Lender by such Government Authority) for disclosure of any such non-public information prior to disclosure of such information; and provided, further that in no event shall any Lender be obligated or required to return any materials furnished by Company or any of its Subsidiaries. In addition, Administrative Agent and Lenders may disclose the existence of this Agreement and information about this Agreement to market data collectors, similar service providers to the lending industry, and service providers to Administrative Agent and Lenders.

**10.20. Counterparts; Effectiveness.**

This Agreement and any amendments, waivers, consents or supplements hereto or in connection herewith 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 an original, but all such counterparts together shall constitute but one and the same instrument; signature pages may be detached from multiple separate counterparts and attached to a single counterpart so that all signature pages are physically attached to the same document. This Agreement shall become effective upon the execution of a counterpart hereof by each of the parties hereto.

[Remainder of page intentionally left blank]

