

Draft dated April 11, 2009

DRAFT MODEL INTERCREDITOR AGREEMENT  
(FIRST AND SECOND LIEN LOANS)

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*This Intercreditor Agreement is designed for use in connection with intercreditor arrangements between First and Second Lien Credit Agreement Lenders with First and Second Liens on identical collateral. The draft is based upon an initial form provided by Latham & Watkins LLP solely for use by the Model Intercreditor Agreement Task Force.*

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## **INTERCREDITOR AGREEMENT**

This **INTERCREDITOR AGREEMENT** (“**Agreement**”), is dated as of [DATE], and entered into by and among [NAME OF FIRST LIEN COLLATERAL AGENT] (“\_\_\_\_\_”), in its capacity as collateral agent for the First Lien Claimholders (as defined below), including its successors and assigns from time to time (the “**First Lien Agent**”) and [NAME OF SECOND LIEN COLLATERAL AGENT] (“\_\_\_\_\_”), in its capacity as collateral agent for the Second Lien Claimholders (as defined below), including its successors and assigns from time to time (the “**Second Lien Agent**”) and [\_\_\_\_\_], in its capacity as control agent for the First Lien Agent and the Second Lien Agent, including its successors and assigns from time to time (the “**Control Agent**”) and acknowledged and agreed to by [NAME OF BORROWER] (the “**Borrower**”) and the other Grantors (as defined below)]. Capitalized terms used in this Agreement have the meanings assigned to them in Section 1 below.

### **RECITALS**

The Borrower, [NAME OF HOLDING COMPANY OWNING BORROWER] (“**Holdings**”), the lenders and agents party thereto, and First Lien Agent in its capacity as collateral agent for the holders of the First Lien Obligations (as defined below), have entered into that Credit Agreement dated as of the date hereof providing for a revolving credit facility and term loan (as amended, restated, supplemented, modified, replaced or Refinanced from time to time, the “**First Lien Credit Agreement**”);

The Borrower, Holdings, the lenders and agents party thereto, and Second Lien Agent in its capacity as collateral agent for the holders of the Second Lien Obligations (as defined below), entered into that Credit Agreement dated as of the date hereof providing for a term loan (as amended, restated, supplemented, modified, replaced or Refinanced from time to time, the “**Second Lien Credit Agreement**”);

Pursuant to (i) the Holdings Guaranty dated as of the date hereof, Holdings has agreed to guaranty the First Lien Obligations (the “**First Lien Holdings Guaranty**”); (ii) the First Lien Credit Agreement, Holdings and the Borrower have agreed to cause certain current and future Subsidiaries of Borrower (such current and future Subsidiaries of the Borrower providing a guaranty thereof, the “**Guarantor Subsidiaries**”) to guarantee the First Lien Obligations pursuant to a Subsidiary Guaranty (the “**First Lien Subsidiary Guaranty**”); (iii) the Holdings Guaranty dated as of the date hereof, Holdings has agreed to guaranty the Second Lien Obligations (the “**Second Lien Holdings Guaranty**”), (iv) the Second Lien Credit Agreement, Holdings and the Borrower have agreed to cause the Guarantor Subsidiaries to guarantee the Second Lien Obligations pursuant to a Subsidiary Guaranty (the “**Second Lien Subsidiary Guaranty**”);

The obligations of the Borrower under the First Lien Credit Agreement and any Hedge Agreements with any Hedge Agreement Provider entered into in

connection with the First Lien Obligations, the obligations of Holdings under the First Lien Holdings Guaranty and the obligations of the Subsidiary guarantors under the First Lien Subsidiary Guaranty will be secured on a first priority basis by liens on substantially all the assets of the Borrower, Holdings and the Guarantor Subsidiaries, respectively, pursuant to the terms of the First Lien Collateral Documents;

The obligations of the Borrower under the Second Lien Credit Agreement and any Hedge Agreements with any Hedge Agreement Provider entered into in connection with the Second Lien Obligations, the obligations of Holdings under the Second Lien Holdings Guaranty and the obligations of the Guarantor Subsidiaries under the Second Lien Subsidiary Guaranty will be secured on a second priority basis by liens on substantially all the assets of the Borrower, Holdings and the Guarantor Subsidiaries, respectively, pursuant to the terms of the Second Lien Collateral Documents;

The First Lien Loan Documents and the Second Lien Loan Documents provide, among other things, that the parties thereto shall set forth in this Agreement their respective rights and remedies with respect to the Collateral; and

The First Lien Collateral Agent and the Second Lien Collateral Agent have agreed to the intercreditor and other provisions set forth in this Agreement.

## **AGREEMENT**

In consideration of the foregoing, the mutual covenants and obligations herein set forth and for other good and valuable consideration, the sufficiency and receipt of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

### **SECTION 1. Definitions.**

**1.1 Defined Terms** As used in the Agreement, the following terms shall have the following meanings:

**“Affiliate”** means, with respect to a specified Person, another Person that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the Person specified. For purposes of this definition, a Person shall be deemed to **“control”** or be **“controlled by”** a Person if such Person possesses, directly or indirectly, power to direct or cause the direction of the management or policies of such Person whether through ownership of equity interests, by contract or otherwise.

**“Agreement”** means this Intercreditor Agreement, as amended, restated, renewed, extended, supplemented or otherwise modified from time to time.

**“Asset Sale”** has the meaning assigned to that term in the First Lien Credit Agreement.

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

**“Bankruptcy Law”** means the Bankruptcy Code and any similar federal, state or foreign bankruptcy, insolvency, receivership or similar law affecting creditors' rights generally.

**“Borrower”** has the meaning assigned to that term in the Preamble to this Agreement.

**“Business Day”** means a day other than a Saturday, Sunday or other day on which commercial banks in New York City are authorized or required by law to close.

**“Cash Management Agreement”** means any agreement to provide cash management services, including treasury, depository, overdraft, credit or debit card, electronic funds transfer or other cash management arrangements.

**“Collateral”** means all of the property of any Grantor, whether real, personal or mixed, constituting (or required to constitute) both First Lien Collateral and Second Lien Collateral, including any Liens granted pursuant to Section 6 to secure both First Lien Obligations and Second Lien Obligations.

[ *“Collateral” means, at any time of determination, the First Lien Collateral, and all of the other property of any Grantor, in each case above in which each of the First Lien Agent, on behalf of itself and the First Lien Claimholders, and the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, has, pursuant to the First Lien Collateral Documents and the Second Lien Collateral Documents, respectively, a valid and perfected Lien (which Lien has not been avoided, disallowed, set aside, invalidated or subordinated pursuant to Chapter 5 of the Bankruptcy Code or otherwise) securing payment of First Lien Obligations or Second Lien Obligations, respectively, and, including any Liens granted pursuant to Section 6 to secure both First Lien Obligations and Second Lien Obligations<sup>1</sup> ]*

**“Comparable Second Lien Collateral Document”** means, in relation to any Collateral subject to any Lien created under any First Lien Collateral Document, the

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<sup>1</sup> First and second-lien lenders typically agree not to challenge the priority, perfection, or validity of their respective liens. However, if the First Lien Agent fails to perfect, or maintain perfection, of its lien, Second Lien Lenders will often argue, particularly in negotiated middle-market transactions, that an agreement to continue to treat an unperfected First Lien Lender as being perfected viz a viz the Second Lien Lender converts lien subordination into payment subordination to unsecured indebtedness which is not reflected in the coupon on the Second Lien Obligations. Therefore, Second Lien Lenders and their counsel will often take the position that only collateral in which, at any time, both First and Second Lien Lenders have a valid and perfected security interest not subject to avoidance as a preferential transfer or otherwise by the debtor or a trustee in bankruptcy should be included in the definition of “Collateral” subject to the lien priority provisions. If the parties agree on this position, then this definition of Collateral can be used. A similar result can be obtained by using Alternative Subsection 2.1(d).

Second Lien Loan Document that creates a Lien on the same Collateral, granted by the same Grantor.

**‘Control Agent’** has the meaning set forth in the preamble hereof.

**‘Control Collateral’** means any Collateral consisting of any Certificated Security, Instrument, Investment Property, Deposit Account, Securities Account (each as defined in Article 8 or Article 9 of the UCC), cash and any other Collateral as to which a first priority Lien shall or may be perfected through possession or control by the secured party or any agent therefor.

**‘Controlled Account’** means those certain Deposit Accounts (as defined in the UCC) of any Grantor subject to Liens under the terms of the First Lien Collateral Documents and the Second Lien Collateral Documents and subject to control or a control agreement in favor of the Control Agent.

**‘Creditors’** means, collectively, the First Lien Agent, on behalf of itself and the First Lien Claimholders, and the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, and their respective successors and assigns.

**‘Currency Agreement’** means any foreign exchange contract, currency swap agreement, futures contract, option contract, synthetic cap or other similar agreement or arrangement, each of which is for the purpose of hedging the foreign currency risk associated with the operations of any Grantor.

**‘Designated Cash Management Agreement’** means any Cash Management Agreement to which any Grantor is a party and as to which the applicable counterparty was a First Lien Lender or an Affiliate of a First Lien Lender as of the date hereof or at the time it enters into such Cash Management Agreement (even if such person ceases to be a First Lien Lender or such Person's Affiliate ceases to be a First Lien Lender).

**‘DIP Financing’** has the meaning assigned to that term in Section 6.1.

**‘Discharge of First Lien Obligations’** means, except to the extent otherwise expressly provided in Section 5.5:

(a) payment in full in cash of the principal of and interest (including interest accruing on or after the commencement of any Insolvency Proceeding, whether or not such interest would be allowed in such Insolvency Proceeding)<sup>2</sup>, on all Indebtedness outstanding under the First Lien Loan Documents and constituting First Lien Obligations;

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<sup>2</sup> If the parties agree that the First Lien Lender should not continue to have priority if its lien is not properly perfected, lapses or is avoided in bankruptcy, then the language in parentheses concerning Post-Petition Claims should be deleted

(b) payment in full in cash of all other First Lien Obligations that are due and payable or otherwise accrued and owing at or prior to the time such principal and interest are paid (other than any indemnification obligations for which no claim or demand for payment, whether oral or written, has been made at such time);

(c) termination or expiration of all commitments, if any, to extend credit that would constitute First Lien Obligations [(other than pursuant to Designated Cash Management Agreements or Hedging Obligations in each case as to which satisfactory arrangements have been made with the applicable First Lien Lender or Affiliate thereof)];

(d) termination or cash collateralization (in an amount and manner reasonably satisfactory to the First Lien Agent, but in no event greater than 105% of the aggregate undrawn face amount) of all letters of credit issued under the First Lien Loan Documents and constituting First Lien Obligations;

[(e) termination or cash collateralization (in an amount reasonably satisfactory to the First Lien Agent) of any Hedge Agreements issued or entered into, as the case may be, by any First Lien Claimholder constituting First Lien Obligations]termination of any Hedge Agreement and the payment in full in cash of all Hedging Obligations]

**“Disposition”** has the meaning assigned to that term in Section 4.1(a)(2).

**“Enforcement Action”** means any action under applicable law:

(1) to foreclose, execute or levy on, collect on, take possession of or control of, or sell or otherwise realize upon (judicially or non-judicially) or to lease, license or otherwise dispose of (whether publicly or privately), any Collateral or otherwise to exercise or enforce remedial rights with respect to Collateral under the First Lien Loan Documents or the Second Lien Loan Documents, as applicable, or any other applicable agreement, document or instrument pertaining thereto (including, without limitation, by way of setoff, noticing of any public or private sale or other disposition pursuant to the UCC or other applicable law, notification of account debtors, notification of depository banks under deposit account control agreements or exercise of rights under landlord consents, if applicable),

(2) to solicit bids from third parties to conduct the liquidation or disposition of any Collateral or to engage or retain sales brokers, marketing agents, investment bankers, accountants, appraisers, auctioneers or other third parties for the purposes of valuing, marketing, promoting and selling any Collateral,

(3) to receive a transfer of Collateral in satisfaction of any indebtedness or other obligation secured thereby, or

(4) to otherwise enforce any security interest or exercise any other right or remedy, as a secured creditor or otherwise, pertaining to the Collateral at law, in equity or pursuant to the First Lien Loan Documents or the Second Lien Loan Documents, as applicable, or any other applicable agreement, document or instrument pertaining thereto (including, without limitation, the commencement of any applicable legal proceedings or other actions against or with respect to all or any portion of the Collateral to facilitate the actions described in the immediately preceding clauses (1), (2) and (3), and exercising voting rights in respect of any equity interests comprising Collateral);

provided that ‘Enforcement Action’ shall [not] be deemed to include the commencement of, or joinder in filing of a petition for commencement of, an Insolvency Proceeding against the owner of Collateral.<sup>3</sup>

**‘Equity Interest’** means with respect to any Person, any and all shares, interests, participations or other equivalents, including membership interests (however designated, whether voting or non-voting) of equity of such Person, including, if such Person is a partnership, partnership interests (whether general or limited) or any other interest or participation that confers on a Person the right to receive a share of the profits and losses of, or distributions of assets of, such partnership, but in no event will Equity Interest include any debt securities convertible or exchangeable into equity unless and until actually converted or exchanged.

**‘Event of Default’** means ‘Event of Default’ as defined in the First Lien Credit Agreement and/or ‘Event of Default’ as defined in the Second Lien Credit Agreement.

**‘First Lien Agent’** has the meaning assigned to that term in the Recitals to this Agreement.

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<sup>3</sup> Consider whether the enforcement action concept should, or should not, include commencement of an involuntary bankruptcy proceeding. First Lien Lenders may consider a right to interrupt their efforts to realize on Collateral through filing an insolvency proceeding against the Grantor as inconsistent with the proposition that the Second Lien will defer to the First Lien in such efforts. The Second Lien may argue that they should not be required to forfeit a right that they would have if they were entirely unsecured. In considering how much to value this rights (or to fear it), the parties should note that in order to commence, or join in commencing, an involuntary bankruptcy petition, the Second Lien would likely have to concede that their claims are not fully secured, making this a somewhat unattractive option. A common solution to this issue is to permit the Second Lien Claimholders to commence an involuntary Insolvency Proceeding after the expiration of the Standstill Period, making the remedy similar to that exercisable by unsecured, mezzanine creditors.

**'First Lien Cap'** means \$[\_\_\_\_\_]<sup>4</sup> multiplied by \_\_\_%<sup>5</sup> less (A) the amount of all repayments and prepayments of principal applied to any term loans constituting First Lien Obligations and (B) the amount of all repayments and prepayments of any revolving loans or reimbursement of drawings under letters of credit constituting First Lien Obligations, to the extent accompanied by a corresponding permanent reduction of commitments under the applicable revolving facility or letter of credit commitment amount (excluding reductions in sub-facility commitments not accompanied by a corresponding permanent reduction in the revolving facility or letter of credit commitment amount and reductions under (A) and (B) as a result of a Refinancing), [plus (C) an amount equal to all Second Lien Adequate Protection Payments if and to the extent paid from any DIP Financing or Proceeds of Collateral.<sup>6</sup> [plus (D) in the event of an Insolvency Proceeding, the sum of [\$\_\_\_\_\_]]<sup>7</sup> For avoidance of doubt, it is understood and agreed that (i) any increase in the aggregate principal amount of any loan or letter of credit (on a U.S. Dollar equivalent basis) after the date of incurrence of such loan or issuance of such letter of credit as a result of any fluctuation in the exchange rate of the currency in which such loan or letter of credit is denominated shall be ignored for the purpose of determining whether the First Lien Cap has been exceeded and (ii) any such increase attributable to currency fluctuation shall be included as a First Lien Obligation.

ALTERNATIVE DEFINITION OF FIRST LIEN CAP FOR FIRST LIEN LOANS INVOLVING A BORROWING BASE:

*[“**First Lien Cap**” means the result of (a) the sum of (i) the aggregate principal amount (including the undrawn amount of all letters of credit) of First Lien Obligations up to, but not in excess of, the lesser of (A) \$\_\_\_\_\_, and (B) [110%] of Availability, plus (ii) the aggregate original principal amount of any first lien term loan, minus (b) the sum of (i) the aggregate amount of all payments of the principal of any first lien term loan, and (ii) the amount of all payments of revolving loan or letter of credit obligations under the First Lien Credit Agreement that result in a permanent reduction of the revolving credit commitment or letters of credit commitment amount under the First Lien Credit Agreement (excluding reductions in sub-facility commitments not*

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<sup>4</sup> If the amendment section restricts extending scheduled amortization, consider whether the Borrower should be prohibited from reallocating its term facility to revolving exposure. This form of Agreement assumes that the parties have negotiated a reducing cap as opposed to, for instance, a leverage based incurrence option or a flat, non-reducing cap. If the parties have agreed to a form of non-reducing cap, then appropriate changes will need to be made to the definition of “First Lien Cap”.

<sup>5</sup> In the absence of unusual provisions in the First Lien Credit Agreement (e.g., delayed draw term loans or accordion features), the typical amount of the First Lien Cap at the end of a negotiated transaction would be in the range of 110% to 115% of the aggregate loan amount of the First Lien Obligations, with 110% being the most common percentage used.

<sup>6</sup> Include if Section 6.4(b)(2) permits Second Lien Adequate Protection Payments.

<sup>7</sup> The parties also need to decide whether a separate basket for potential DIP Financing should be included. See also Section 6.1 and notes to that Section.

accompanied by a corresponding permanent reduction in the revolving facility or letters of credit commitment amount and reductions under (A) and (B) as a result of a Refinancing)<sup>8</sup>, plus (c) an amount equal to all Second Lien Adequate Protection Payments if and to the extent paid from any DIP Financing or Proceeds of Collateral.<sup>9</sup>]

ALTERNATIVE DEFINITION OF FIRST LIEN CAP FAVORABLE TO SECOND LIEN LENDERS:

[**“First Lien Cap”** means the sum of:

(a) the excess of (i) the outstanding amount of First Lien Principal Obligations<sup>10</sup> not to exceed in the aggregate [the sum of (x)] \$\_\_\_\_\_ [of term indebtedness plus (y) the lesser of (A) [110]% of [Availability] and (B) \$\_\_\_\_\_ of revolving credit indebtedness [(including the outstanding undrawn amount of, and reimbursement obligations in respect of, letters of credit)] [(calculated, in the case of any such First Lien Principal Obligations issued at a discount, at the aggregate amount due at maturity thereof)] over (ii) the aggregate amount of all repayments of term indebtedness constituting First Lien Principal Obligations and all repayments or reductions of revolving credit indebtedness[, and of reimbursement obligations under letters of credit,] constituting First Lien

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<sup>8</sup> If this alternative definition of “First Lien Cap” is used for a first lien loan with a borrowing base, then the following definition of “Availability” should also be added to Section 1:

**“Availability”** means, at any time, the aggregate amount of the revolving loans, letter of credit accommodations and other credit accommodations available to the Borrower from the First Lien Lenders based on the Borrowing Base (as such term, and the definitions used in such term, are defined in the First Lien Loan Documents as in effect on the date hereof) (determined without regard to any revolving loans, letter of credit accommodations or other credit accommodations then outstanding), and, accordingly, the term “Availability” is used herein to mean the aggregate amount of revolving loans, letter of credit accommodations and other credit accommodations available without any reduction for the amount of revolving loans, letter of credit accommodations or other credit accommodations outstanding.

<sup>9</sup> Include if Section 6.4(b)(2) permits Second Lien Adequate Protection Payments.

<sup>10</sup> If this alternative definition of “First Lien Cap” is used, then the following definitions should also be included in Section 1:

**“Excess First Lien Principal Obligations”** means the amount of First Lien Principal Obligations referred to in clause (a) of the definition of First Lien Cap.

**“Excess Second Lien Principal Obligations”** means Second Lien Principal Obligations in excess of the amount of Second Lien Principal Obligations referred to in clause (a) of the definition of any Second Lien Cap.

**“First Lien Principal Obligations”** means, at any time of determination, the aggregate unpaid principal of the loans outstanding under the First Lien Loan Documents together with the undrawn amount of all outstanding letters of credit under the First Lien Loan Documents.

*Principal Obligations (to the extent effected with a corresponding permanent commitment reduction under the First Lien Financing Agreement), plus*

*(b) accrued but unpaid interest, commitment, facility, utilization and other analogous fees and, if applicable, prepayment premiums on the amount of such First Lien Principal Obligations referred to in clause (a) above [(at [rates][interest rate margins] not in excess of [\_\_] basis points [or \_\_percent] above the [rates][interest rate margins] provided for under the First Lien Credit Agreement as in effect on the date hereof)], plus*

*(c) all fees, expenses, reimbursement obligations and other amounts of a type not referred to in clause (a) or (b) above payable in respect of the amounts referred to in clauses (a) and (b) above, [plus*

*(d) Hedging Obligations in respect of interest on First Lien Principal Obligations referred to in clause (b) above,]*

*in each case above payable pursuant to the First Lien Loan Documents. For purposes of this Agreement, all payments in respect of First Lien Principal Obligations shall be deemed to be applied first to reduce the First Lien Principal Obligations referred to in clause (a)(i) above and thereafter to reduce any Excess First Lien Principal Obligations]*

**“First Lien Claimholders”** means, at any relevant time, the holders of First Lien Obligations at that time, including the First Lien Lenders and the agents under the First Lien Loan Documents.

**“First Lien Collateral”** means all of the assets and property of any Grantor, whether real, personal or mixed, with respect to which a Lien is granted as security for any First Lien Obligations.

**“First Lien Collateral Documents”** means the [Security] [Collateral] Documents (as defined in the First Lien Credit Agreement) and any other agreement, document or instrument pursuant to which a Lien is granted securing any First Lien Obligations.

**“First Lien Credit Agreement”** has the meaning assigned to that term in the Recitals to this Agreement.

**“First Lien Holdings Guaranty”** has the meaning assigned to that term in the Recitals to this Agreement.

**“First Lien Lenders”** means the ‘Lenders’ under and as defined in the First Lien Loan Documents.

**‘First Lien Loan Documents’** means the First Lien Credit Agreement, the Loan Documents (as defined in the First Lien Credit Agreement), the First Lien Collateral Documents (to the extent not included in the definition of Loan Documents in the First Lien Credit Agreement) and each of the other agreements, documents and instruments providing for or evidencing any other First Lien Obligation, and any other

document or instrument executed or delivered at any time in connection with any First Lien Obligations, including any intercreditor or joinder agreement among holders of First Lien Obligations, to the extent such are effective at the relevant time, as each may be amended, restated, supplemented, modified, renewed, Refinanced or extended from time to time in accordance with the provisions of this Agreement; [provided, any such documents or instruments with any First Lien Claimholder in connection with a DIP Financing (other than a DIP Financing deemed consented to by Second Lien Lenders pursuant to Section 6.2) shall not be deemed to be First Lien Loan Documents unless designated in writing by First Lien Agent]<sup>11</sup>.

**“First Lien Mortgages”** means a collective reference to each mortgage, deed of trust and other document or instrument under which any Grantor grants a Lien on real property owned or leased by such Grantor to secure any First Lien Obligations or under which rights or remedies with respect to any such Liens are governed.

**“First Lien Obligations”** means all Obligations of any Grantor outstanding under (i) the First Lien Credit Agreement, (ii) the other First Lien Loan Documents, (iii) any Hedge Agreements entered into by Borrower or any Grantor with any Hedge Agreement Provider (it being understood, for avoidance of doubt, that such obligations shall remain a First Lien Obligation even if the counterparty (or the Affiliate of the counterparty) ceases to be a First Lien Lender), (iv) any Designated Cash Management Agreement and (v) all Guaranty Obligations, fees, expenses, indemnities and other amounts payable from time to time pursuant to the First Lien Loan Documents, in each case whether or not allowed or allowable in an Insolvency Proceeding; provided that the aggregate principal amount, without duplication, of any revolving credit commitments, revolving credit loans, letters of credit, term loans, bonds, debentures, notes or similar instruments or other obligations (excluding, in any event, Hedging Obligations and Obligations in respect of Designated Cash Management Agreements) provided for under the First Lien Credit Agreement or any other First Lien Loan Document (or any Refinancing thereof) in excess of the First Lien Cap shall not constitute First Lien Obligations for purposes of this Agreement. “First Lien Obligations” shall include (x) all interest accrued or accruing (or which would, absent commencement of an Insolvency Proceeding, accrue) in accordance with the rate specified in the relevant First Lien Loan Document and (y) all fees, costs and charges incurred in connection with the First Lien Loan Documents and provided for thereunder, in the case of each of clause (x) and clause (y) whether before or after commencement of an Insolvency Proceeding, and irrespective of whether any claim for such interest, fees, costs or charges is allowed

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<sup>11</sup> Many intercreditor agreements fail to address whether a non-conforming DIP (i.e., one that is not deemed to consented to by the Second Lien Claimholders) would be subject to remaining terms and provisions of the Intercreditor Agreement insofar as the new DIP Financing would likely be, at least in part, a Refinancing of the First Lien Obligations. Second Lien Claimholders may resist this provision as it gives the First Lien Claimholders the benefit of opting into the pro-senior Intercreditor Agreement provisions for a non-conforming DIP Financing.

as a claim in such Insolvency Proceeding. To the extent any payment with respect to the First Lien Obligations (whether by or on behalf of any Grantor, as proceeds of security, enforcement of any right of set-off or otherwise) is declared to be fraudulent or preferential in any respect, set aside or required to be paid to a debtor in possession, trustee, receiver or similar Person, then the obligation or part thereof originally intended to be satisfied shall be deemed to be reinstated and outstanding as if such payment had not occurred.

**ALTERNATIVE DEFINITION OF FIRST LIEN OBLIGATIONS FAVORABLE TO SECOND LIEN LENDERS:**

*[“**First Lien Obligations**”<sup>12</sup> means, at any time of determination, all Obligations of any Grantor that are both (x) secured by a valid and perfected Lien on the Collateral in favor of the First Lien Agent, the First Lien Claimholders or any agent or trustee therefor and (y) outstanding under (i) the First Lien Credit Agreement, (ii) the other First Lien Loan Documents, (iii) any Hedge Agreements entered into by any Grantor with any Hedge Agreement Provider to the extent hedging interest obligation owing under the First Lien Loan Documents (it being understood, for avoidance of doubt, that such obligations shall remain a First Lien Obligation even if the counterparty (or the Affiliate of the counterparty) ceases to be a First Lien Lender), and (iv) any Designated Cash Management Agreement, in each case above except to the extent a claim for such Obligations is not allowed or allowable in an Insolvency Proceeding applicable to the relevant obligor thereon; provided that Obligations under the First Lien Credit Agreement or any other First Lien Loan Document (or any Refinancing thereof) in excess of the First Lien Cap shall not constitute First Lien Obligations for purposes of this Agreement.. To the extent any payment with respect to the First Lien Obligations (whether by or on behalf of any Grantor, as proceeds of security, enforcement of any right of set-off or otherwise) is declared to be fraudulent or preferential in any respect, set aside or required to be paid to a debtor in possession, trustee, receiver or similar Person, then the obligation or part thereof originally intended to be satisfied shall be deemed to be reinstated and outstanding as if such payment had not occurred.]*

**“First Lien Subsidiary Guaranty”** has the meaning assigned to that term in the Recitals to this Agreement.

**“Governmental Authority”** means any federal, state, municipal, national or other government, governmental department, commission, board, bureau, court, agency or instrumentality or political subdivision thereof or any entity or officer

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<sup>12</sup> This alternative definition of “First Lien Obligations” only includes Obligations that are secured and validly perfected and excludes any claim for any Obligation which is not allowed in an Insolvency Proceeding. Although this definition, like the prior definition, excludes from the definition any amount in excess of the First Lien Cap, the prior definition limits that exclusion to principal in excess of the First Lien Cap while this definition excludes all Obligations in excess of the First Lien Cap. This definition of “First Lien Obligations” would typically be used in connection with the alternative definition of “First Lien Cap” and the alternative line priority provisions in Section 2 noted as being more favorable to Second Lien Lenders

exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to any government or any court, in each case whether associated with a state of the United States, the United States, or a foreign entity or government.

**“Grantors”** means the Borrower, Holdings, each of the Guarantor Subsidiaries and each other Person that has or may from time to time hereafter execute and deliver a First Lien Collateral Document or a Second Lien Collateral Document as a ‘grantor’ or ‘pledgor’ (or the equivalent thereof).

**“Guarantor Subsidiaries”** has the meaning set forth in the Recitals to this Agreement.

**‘Guarantors’** means the Guarantor Subsidiaries, Holdings and any other Person that now or hereafter is liable as a guarantor for all or any portion of the First Lien Obligations or the Second Lien Obligations, as applicable.

**‘Hedge Agreement’** means an Interest Rate Agreement or Currency Agreement in either case, to the extent that the incurrence of the obligations in respect thereof was permitted under the First Lien Loan Documents as in effect on the date hereof at the time of the incurrence of such obligation.

**‘Hedge Agreement Provider’** means any Person that is a counterparty to any Hedge Agreement with a Grantor to the extent such Person is a First Lien Lender or any Affiliate thereof at the time the First Lien Credit Agreement or such Hedge Agreement is entered into, as counterparty. The inclusion of Hedging Obligations in the First Lien Obligations shall not create in favor of the applicable Hedge Agreement Provider any rights in connection with the management or release of any Collateral or of the obligations of any Grantor under any First Lien Collateral Document.<sup>13</sup>

**‘Hedging Obligation’** of any Person means any obligation of such Person pursuant to any Hedge Agreement.

**“Holdings”** has the meaning set forth in the Recitals to this Agreement.

**“Indebtedness”** means and includes all Obligations that constitute ‘Indebtedness’ within the meaning of the First Lien Credit Agreement or the Second Lien Credit Agreement, as applicable.

**“Insolvency Proceeding”** means:

(a) any voluntary or involuntary case or proceeding under the Bankruptcy Code with respect to any Grantor;

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<sup>13</sup> If agreed by the parties and applicable to the transaction, the parties may wish to include a parallel definition for a hedge agreement that is provided by a Second Lien Lender or an Affiliate of the Second Lien Lender.

(b) any other voluntary or involuntary insolvency, reorganization or bankruptcy case or proceeding, or any receivership, liquidation, reorganization or other similar case or proceeding with respect to any Grantor or with respect to a material portion of their respective property;

(c) any liquidation, dissolution, reorganization or winding up of any Grantor whether voluntary or involuntary and whether or not involving insolvency or bankruptcy; or

(d) any assignment for the benefit of creditors or any other marshaling of assets and liabilities of any Grantor.

**‘Interest Rate Agreement’** means any interest rate swap agreement, interest rate cap agreement, interest rate collar agreement or other similar agreement or arrangement designed to protect any Grantor against fluctuations in interest rates.

**‘Lender Counterparty’** means Person who at the time such Hedge Agreement was entered into was the administrative agent under the First Lien Credit Agreement, a First Lien Lender, the administrative agent under the Second Lien Credit Agreement, a Second Lien Lender or an Affiliate of any of the foregoing Persons.

**“Lien”** means any lien (including, without limitation judgment liens and liens arising by operation of law), mortgage or deed of trust, pledge, hypothecation, assignment, security interest, charge or encumbrance of any kind (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, and any lease in the nature thereof) and any option, call, trust, UCC financing statement or other preferential arrangement having the practical effect of any of the foregoing, including any right of setoff or recoupment.

**“New Agent”** has the meaning assigned to that term in Section 5.5.

**“Obligations”** means all obligations of every nature of each Grantor from time to time owed to the First Lien Agent, the Second Lien Agent, the First Lien Claimholders, the Second Lien Claimholders or any of them or their respective Affiliates under the First Lien Loan Documents, the Second Lien Loan Documents, Designated Cash Management Agreements or Hedge Agreements, whether for principal, interest or payments for early termination of Designated Cash Management Agreements or Hedge Agreements, fees, expenses, indemnification or otherwise and all guarantees of any of the foregoing, whether absolute or contingent, due or to become due, now existing or hereafter arising and including interest and fees that accrue after the commencement by or against any Person or any Affiliate thereof of any proceeding under any Bankruptcy Law naming such Person as the debtor in such proceeding, regardless of whether such interest and fees are allowed claims in such proceeding.

**“Obligor”** means the Borrower, each Guarantor and any other Person that now or hereafter is, or whose assets now or hereafter are, liable for all or any portion of the First Lien Obligations or the Second Lien Obligations, as applicable.

**“Person”** means any natural person, corporation, limited liability company, trust, business trust, joint venture, association, company, partnership, Governmental Authority or other entity.

**“Pledged Collateral”** has the meaning set forth in Section 5.4.

**‘Post-Petition Claims’** means interest, fees, costs, expenses and other charges that pursuant to the First Lien Credit Agreement or the Second Lien Credit Agreement, continue to accrue after the commencement of any Insolvency Proceeding, whether or not such interest, fees, expenses and other charges are allowed or allowable under the Bankruptcy Law or in any such Insolvency Proceeding.

**‘Proceeds’** means (a) all ‘Proceeds’ as defined in Article 9 of the UCC with respect to the Collateral, and (b) whatever is recoverable or recovered when Collateral is sold, exchanged, collected, or disposed of, whether voluntarily or involuntarily, [including any payment of property received in an Insolvency Proceeding on account of any "secured claim" (within the meaning of Section 506(b) of the Bankruptcy Code or similar Bankruptcy Law).<sup>14</sup>]

**‘Purchase Event’** means the occurrence of any of the following events: (a) an acceleration of the First Lien Obligations in accordance with the terms of the First Lien Credit Agreement, (b) a payment default under the First Lien Credit Agreement that has not been cured or waived by the First Lien Claimholders within 60 days of the occurrence thereof or (c) the commencement of any Insolvency Proceeding.

**“Recovery”** has the meaning set forth in Section 6.5.

**“Refinance”** means, in respect of any Indebtedness, to refinance, replace, refund or repay, or to issue other indebtedness, in exchange or replacement for, such Indebtedness in whole or in part, whether with the same or different lenders, agents, or arrangers. **“Refinanced”** and **“Refinancing”** shall have correlative meanings.

**“Second Lien Adequate Protection Payments”** has the meaning set forth in Section 6.4(b)(iv).

**“Second Lien Agent”** has the meaning set assigned to that term in the Preamble of this Agreement.

**“Second Lien Claimholders”** means, at any relevant time, the holders of Second Lien Obligations at that time, including the Second Lien Lenders and the agents under the Second Lien Loan Documents.

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<sup>14</sup> Consider whether this additional is necessary or should be used in lieu of negotiated provisions regarding bankruptcy distributions in Section 6.7.

**“Second Lien Collateral”** means all of the assets and property of any Grantor, whether real, personal or mixed, with respect to which a Lien is granted as security for any Second Lien Obligations.

**“Second Lien Collateral Documents”** means the [Security] [Collateral] Documents (as defined in the Second Lien Credit Agreement) and any other agreement, document or instrument pursuant to which a Lien is granted securing any Second Lien Obligations.

**“Second Lien Credit Agreement”** has the meaning assigned to that term in the Recitals to this Agreement.

**“Second Lien Holdings Guaranty”** has the meaning assigned to that term in the Recitals to this Agreement.

**“Second Lien Loan Documents”** means the Second Lien Credit Agreement, the Loan Documents (as defined in the Second Lien Credit Agreement), , the Second Lien Collateral Documents (to the extent not included in the definition of Loan Documents in the Second Lien Credit Agreement) and each of the other agreements, documents and instruments providing for or evidencing any other Second Lien Obligation, and any other document or instrument executed or delivered at any time in connection with any Second Lien Obligations, including any intercreditor or joinder agreement among holders of Second Lien Obligations to the extent such are effective at the relevant time, as each may be amended, restated, supplemented, modified, renewed, Refinanced or extended from time to time in accordance with the provisions of this Agreement.

**“Second Lien Mortgages”** means a collective reference to each mortgage, deed of trust and any other document or instrument under which any Lien on real property owned or leased by any Grantor is granted to secure any Second Lien Obligations or under which rights or remedies with respect to any such Liens are governed.

**“Second Lien Obligations”** means all Obligations of any Grantor outstanding under the Second Lien Credit Agreement and the other Second Lien Loan Documents, including Hedge Agreements entered into with the administrative agent under the Second Lien Credit Agreement, any Second Lien Lender (or any of their Affiliates) but only to the extent such administrative agent, Second Lien Lender (or such Affiliate) is not also a First Lien Lender or administrative agent under the First Lien Credit Agreement provided that the aggregate principal amount, without duplication, of any term loans, bonds, debentures, notes or similar instruments or other obligations (excluding, in any event, Hedging Obligations and Obligations in respect of Designated Cash Management Agreements) provided for under the Second Lien Credit Agreement or any other Second Lien Loan Document (or any Refinancing thereof) in excess of any

Second Lien Cap <sup>15</sup> shall not constitute Second Lien Obligations for purposes of this Agreement. “Second Lien Obligations” shall include all interest accrued or accruing (or which would, absent commencement of an Insolvency Proceeding, accrue) after commencement of an Insolvency Proceeding in accordance with the rate specified in the relevant Second Lien Loan Document whether or not the claim for such interest is allowed as a claim in such Insolvency Proceeding. To the extent any payment with respect to the Second Lien Obligations (whether by or on behalf of any Grantor, as proceeds of security, enforcement of any right of set-off or otherwise) is declared to be fraudulent or preferential in any respect, set aside or required to be paid to a debtor in possession, trustee, receiver or similar Person, then the obligation or part thereof originally intended to be satisfied shall be deemed to be reinstated and outstanding as if such payment had not occurred.

“**Second Lien Lenders**” means the “Lenders” under and as defined in the Second Lien Credit Agreement.

“**Second Lien Principal Obligations**” means, at any time of determination, means, at any time of determination, the aggregate unpaid principal of the loans outstanding under the Second Lien Loan Documents together with the undrawn amount of all outstanding letters of credit under the Second Lien Loan Documents.

“**Second Lien Subsidiary Guaranty**” has the meaning assigned to that term in the Recitals to this Agreement.

“**Standstill Period**” has the meaning set forth in Section 3.1.

“**Subsidiary**” means, with respect to any Person, 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 Person or Persons (whether directors, managers, trustees or other Persons performing similar functions) having the power to direct or cause the direction of the management and policies thereof 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.

“**UCC**” means the Uniform Commercial Code (or any similar or equivalent legislation) as in effect in any applicable jurisdiction.

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<sup>15</sup> Second Lien Caps are less common than First Lien Caps. If a Second Lien Cap is included as part of the transaction, the following definition should be added to Section 1:

“**Second Lien Cap**” means the result of (a) \$\_\_\_\_\_, minus (b) the aggregate amount of all payments of the principal of the term loan obligations under the Second Lien Credit Agreement (other than payments of such term loan obligations in connection with a Refinancing thereof).

**1.2** Terms Generally. The definitions of terms in this Agreement shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation.” The word “will” shall be construed to have the same meaning and effect as the word “shall.” Unless the context requires otherwise:

(a) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, restated, supplemented, modified, renewed or extended;

(b) any reference herein to any Person shall be construed to include such Person’s permitted successors and assigns;

(c) the words “herein,” “hereof” and “hereunder,” and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof;

(d) all references herein to Sections shall be construed to refer to Sections of this Agreement; and

(e) the words “asset” and “property” shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and general intangibles.

## **SECTION 2. Lien Priorities.**

**2.1** Relative Priorities. Notwithstanding the date, time, method, manner or order of grant, attachment or perfection of any Liens securing the Second Lien Obligations granted on the Collateral or of any Liens securing the First Lien Obligations granted on the Collateral and notwithstanding any provision of the UCC, or any other applicable law or the Second Lien Loan Documents, the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, hereby agrees that:

(a) any Lien on the Collateral securing any First Lien Obligations now or hereafter held by or on behalf of the First Lien Agent or any First Lien Claimholders or any agent or trustee therefor, regardless of how acquired, whether by grant, possession, statute, operation of law, subrogation or otherwise, shall be senior in all respects and prior to any Lien on the Collateral securing any Second Lien Obligations; and

(b) any Lien on the Collateral securing any Second Lien Obligations now or hereafter held by or on behalf of the Second Lien Agent, any Second Lien Claimholders or any agent or trustee therefor regardless of how acquired, whether by grant, possession, statute, operation of law, subrogation or otherwise, shall be junior and subordinate in all respects to all Liens on the Collateral securing any First Lien Obligations.

(c) All Liens on the Collateral securing any First Lien Obligations shall be and remain senior in all respects and prior to all Liens on the Collateral securing any Second Lien Obligations for all purposes, notwithstanding any defect or deficiencies in, or failure to perfect or lapse in perfection of, the Liens securing the First Lien Obligations the subordination of any Lien on the Collateral securing any First Lien Obligations to any Lien securing any other obligation of the Borrower, any Grantor or any other Person, the avoidance, invalidation or lapse of any Lien on the Collateral securing any First Lien Obligations or any defect or deficiencies in the Liens securing the First Lien Obligations or any other circumstance whatsoever.

ALTERNATIVE SUBSECTION 2.1 FAVORABLE TO SECOND LIEN LENDERS:

[ 2.1 Relative Priorities. *Notwithstanding the date, time, method, manner or order of grant, attachment or perfection of any Liens securing the Second Lien Obligations granted on the Collateral or of any Liens securing the First Lien Obligations granted on the Collateral and notwithstanding any provision of the UCC or any other applicable law or the provisions of the Second Lien Loan Documents, each of the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, and the First Lien Agent, on behalf of itself and the First Lien Claimholders, hereby agrees that:*

(a) *all Liens on the Collateral granted under or pursuant to the First Lien Collateral Documents in favor of the First Lien Agent, the First Lien Claimholders or any agent or trustee therefor securing the First Lien Obligations up to but not exceeding the First Lien Cap Amount shall, so long as such Liens are valid and perfected, be and remain senior in all respects and prior to all Liens on the Collateral that are held by the Second Lien Agent, the Second Lien Claimholders or any agent or trustee therefor, whether obtained by grant, possession, operation of law, subrogation or otherwise, securing any Second Lien Obligations;*

(b) *all Liens on the Collateral that are held from time to time by the Second Lien Agent, the Second Lien Claimholders or any agent or trustee therefor, whether obtained by grant, possession, operation of law, subrogation or otherwise, securing any Second Lien Obligations shall be and remain junior and subordinate in all respects to all Liens on the Collateral granted under or pursuant to the First Lien Collateral Documents in favor of the First Lien Agent, the First Lien Claimholders or any agent or trustee therefor securing First Lien Obligations up to but not exceeding the First Lien Cat, so long as such Liens under or pursuant to the First Lien Collateral Documents are valid and perfected.]*

**2.2** Prohibition on Contesting Liens. Second Lien Agent, for itself and on behalf of each Second Lien Claimholder, and the First Lien Agent, for itself and on behalf of each First Lien Claimholder, agrees that it will not (and hereby waives any right to) contest or support any other Person in contesting, in any proceeding (including any Insolvency Proceeding), the validity, enforceability, perfection or priority (as set forth in Section 2.1) of a Lien held by or on behalf of any of the First Lien Claimholders in the First Lien Collateral or by or on behalf of any of the Second Lien Claimholders in the Second Lien Collateral, as the case may be; provided that nothing in this Agreement shall be construed to prevent or impair the rights of the First Lien Agent or any First Lien Claimholder or of the Second Lien Agent or any Second Lien Claimholder to enforce this Agreement, including the provisions of this Agreement relating to the priority of the Liens securing the First Lien Obligations and Second Lien Obligations as provided in Section 2.1 and the provisions related to enforcement in Section 3.1.

ALTERNATIVE SUBSECTION 2.2 FAVORABLE TO SECOND LIEN LENDERS:

**2.2** [Prohibition on Contesting Liens] *Second Lien Agent, for itself and on behalf of each Second Lien Claimholder, and the First Lien Agent, for itself and on behalf of each First Lien Claimholder, agrees that it will not (and hereby waives any right to) contest or support any other Person in contesting, in any proceeding (including any Insolvency Proceeding), the validity, perfection, priority (as set forth in Section 2.1) or enforceability of the Liens of the other Creditor granted, in the case of the First Lien Obligations, pursuant to the First Lien Collateral Documents or, in the case of the Second Lien Obligations, pursuant to the Second Lien Collateral Documents, upon the property of the Grantors that is Collateral, and that as between First Lien Agent and First Lien Claimholders and the Second Lien Agent and Second Lien Claimholders, the terms of this Agreement shall govern the priority of their respective valid and perfected Liens referred to above on or in the Collateral securing the First Lien Obligations or Second Lien Obligations, respectively; provided that nothing in this Agreement shall be construed to prevent or impair the rights of the First Lien Agent or any First Lien Claimholder or of the Second Lien Agent or any Second Lien Claimholder to enforce this Agreement, including the provisions of this Agreement relating to the priority of the Liens securing the First Lien Obligations and Second Lien Obligations as provided in Section 2.1 and the provisions related to enforcement in Section 3.1. For avoidance of doubt, the parties confirm that the assertion in any proceeding (including an Insolvency Proceeding) or otherwise by one party (Party A) of the invalidity or nonperfection of the other party's (Party B's) security interest as a defense to a claim or assertion by Party B against Party A for or alleging breach of this Agreement arising out of Party A's exercise or assertion of claims or other rights or enforcement of remedies under this Agreement or any First Lien Loan Documents or Second Lien Loan Documents, as applicable, shall not be deemed to be a "contest" for purposes of this Section 2.2. In the event that Second Lien Agent or any Second Lien Claimholder believes, in good faith, that the Lien in favor of First Lien Agent or any First Lien Claimholder in any property of a Grantor is invalid or unperfected, prior to the commencement by Second Lien Agent or any Second Lien Claimholder of any such exercise or assertion of claims or other rights or enforcement of*

*remedies which would violate this Agreement but for such invalidity or nonperfection of the First Lien Agent's or any First Lien Claimholder's Lien, the Second Lien Agent or Second Lien Claimholder will furnish to the First Lien Agent not less than five Business Days' prior written notice of the contemplated commencement of such exercise, assertion or enforcement, which notice shall identify the basis for the belief by the Second Lien Agent or Second Lien Claimholder, as the case may be, that such invalidity or nonperfection exists. In any event, none of the First Lien Agent, First Lien Claimholders, Second Lien Agent or Second Lien Claimholders shall assert or support any claim which challenges the perfection or validity of any Lien or indebtedness of any of the others of such parties if such claim is based on (a) allegations of fraudulent conveyance, unlawful payment of distributions to equity holders or other like allegations, or (b) any allegation which could be asserted with comparable merit against the Liens, interests or rights of the party making such allegation.]*

### **2.3 No New Liens**

(a) Limitation on other Collateral for First Lien Claimholders. So long as the Discharge of First Lien Obligations has not occurred, whether or not any Insolvency Proceeding has been commenced by or against the Borrower or any other Grantor, the parties hereto agree that: (i) neither the First Lien Agent nor any First Lien Claimholder shall acquire or hold any Lien on any property of any Grantor securing any First Lien Obligations which property are not also subject to the Lien of the Second Lien Agent under the Second Lien Collateral Documents, and (ii) the Borrower shall not, and shall not permit any other Grantor to, grant any Lien on any of its property, or permit any of its Subsidiaries to grant a Lien on any of its property, in favor of the First Lien Agent or the First Lien Claimholders to secure the First Lien Obligations unless it, or such Subsidiary, has granted (or offered to grant with a reasonable opportunity for such Lien to be accepted) a corresponding Lien on such property in favor of the Second Lien Agent or the Second Lien Claimholders; provided, however, notwithstanding clauses (i) and (ii) above, the refusal of the Second Lien Agent or the Second Lien Claimholders to accept a Lien on any property of any Grantor shall not prohibit the taking of a Lien on such property by the First Lien Agent or the First Lien Claimholders. If the First Lien Agent or any First Lien Claimholder shall (nonetheless and in breach hereof) acquire any Lien on any property of any Grantor or any of their respective Subsidiaries securing any First Lien Obligations which property are not also subject to the Lien of the Second Lien Agent under the Second Lien Collateral Documents, then the First Lien Agent (or the relevant First Lien Claimholder), shall, without the need for any further consent of any other Person and notwithstanding anything to the contrary in any other First Lien Loan Document (x) hold and be deemed to have held such Lien and security interest for the benefit of the Second Lien Agent as security for the Second Lien Obligations, or (y) release such Lien.

(b) Limitation on other Collateral for Second Lien Claimholders. So long as the Discharge of First Lien Obligations has not occurred, whether or not any Insolvency Proceeding has been commenced by or against the Borrower or any other Grantor, the parties hereto agree that: (i) after the date hereof, neither the Second Lien Agent nor any Second Lien Claimholder shall acquire or hold any Lien on any property of any

Borrower, any Guarantor or any of their respective Subsidiaries securing any Second Lien Obligations which property are not also subject to the Lien of the First Lien Agent under the First Lien Collateral Documents, and (ii) the Borrower shall not, and shall not permit any other Grantor to, grant any Lien on any of its property, or permit any of its Subsidiaries to grant a Lien on any of its property, in favor of the Second Lien Agent or the Second Lien Claimholders to secure the Second Lien Obligations unless it, or such Subsidiary, has granted (or offered to grant with a reasonable opportunity for such Lien to be accepted) a corresponding Lien on such property in favor of the First Lien Agent or the First Lien Claimholders; provided, however, notwithstanding clauses (i) and (ii) above, the refusal of the First Lien Agent or the First Lien Claimholders to accept a Lien on any property of any Grantor shall not prohibit the taking of a Lien on such property by the Second Lien Agent or the Second Lien Claimholders. If the Second Lien Agent or any Second Lien Claimholder shall (nonetheless and in breach hereof) acquire any Lien on any property of any Grantor or any of their respective Subsidiaries securing any Second Lien Obligations which property are not also subject to the Lien of the First Lien Agent under the First Lien Collateral Documents, then the Second Lien Agent (or the relevant Second Lien Claimholder), shall, without the need for any further consent of any other Person and notwithstanding anything to the contrary in any other Second Lien Loan Document (x) hold and be deemed to have held such Lien and security interest for the benefit of the First Lien Agent as security for the First Lien Obligations, or (y) release such Lien.

**2.4 Similar Liens and Agreements.** The parties hereto agree that it is their intention that the First Lien Collateral and the Second Lien Collateral be identical. In furtherance of the foregoing and of Section 8.9, the parties hereto agree, subject to the other provisions of this Agreement:

(a) upon request by the First Lien Agent or the Second Lien Agent, to cooperate in good faith (and to direct their counsel to cooperate in good faith) from time to time in order to determine the specific items included in the First Lien Collateral and the Second Lien Collateral and the steps taken to perfect their respective Liens thereon and the identity of the respective parties obligated under the First Lien Loan Documents and the Second Lien Loan Documents; and

(b) that the documents and agreements creating or evidencing the First Lien Collateral and the Second Lien Collateral and guarantees for the First Lien Obligations and the Second Lien Obligations, subject to Section 5.3(d), shall be in all material respects the same forms of documents other than with respect to the first lien and the second lien nature of the Obligations thereunder.

**2.5 No Payment Subordination.**<sup>16</sup> The subordination of all Liens on the Collateral securing any Second Lien Obligations to all Liens on the Collateral

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<sup>16</sup> The typical intercreditor agreement between First and Second Lien Lenders involves only a subordination of lien interests and not a subordination of payment.

securing any First Lien Obligations as set forth in this Agreement is with respect to only the priority of the Liens held by or on behalf of First Lien Claimholders to the extent set forth in Section 2.1 and shall not constitute a subordination of the Second Lien Obligations to the First Lien Obligations.

## **2.6** Nature of First Lien and Second Lien Obligations.

(a) Subject to any limitations on the aggregate principal amount of First Lien Obligations set forth in the definition of ‘First Lien Obligations’ and the limitations in Section 5.3, the Second Lien Agent acknowledges that, (i) a portion of the First Lien Obligations are revolving in nature, (ii) the amount thereof that may be outstanding at any time or from time to time may be increased or reduced and subsequently reborrowed, (iii) the terms of the First Lien Obligations may be modified, extended or amended from time to time, and (iv) the aggregate amount of the First Lien Obligations may be increased or Refinanced, in either event, without notice to or consent by the Second Lien Claimholders and without affecting the provisions hereof.

(b) Subject to any limitations on the aggregate principal amount of Second Lien Obligations set forth in the definition of ‘Second Lien Obligations’ and the limitation in Section 5.3, the First Lien Agent acknowledges that (i) the terms of the Second Lien Obligations may be modified, extended or amended from time to time, and (ii) the aggregate amount of the Second Lien Obligations may be increased or Refinanced, in either event, without notice to or consent by the First Lien Claimholders and without affecting the provisions hereof.

(c) Subject to any limitations on the aggregate principal amount of First Lien Obligations set forth in the definition of ‘First Lien Obligations’, any limitations on the aggregate principal amount of Second Lien Obligations set forth in the definition of ‘Second Lien Obligations’ and the limitation in Section 5.3, the lien priorities provided in Sections 2.1 and 2.2 shall not be altered or otherwise affected by any such amendment, modification, supplement, extension, repayment, reborrowing, increase, replacement, renewal, restatement or Refinancing of either the First Lien Obligations or the Second Lien Obligations, or any portion thereof.

**2.7** Limitations on Duties and Obligations. Each of the Second Lien Agent, for itself and on behalf of each Second Lien Claimholder, and the First Lien Agent, for itself and on behalf of each First Lien Claimholder, agrees that, except in the case of (i) the obligations of the First Lien Agent under Section 5.4 as bailee and agent for perfection for the Second Lien Agent and (ii) the obligations of the Second Lien Agent under Section 5.4 as bailee and agent for perfection for the First Lien Agent, each of the First Lien Agent (on behalf of the First Lien Claimholders) and the Second Lien Agent (on behalf of the Second Lien Claimholders) shall be solely responsible for perfecting and maintaining the perfection of its Lien in and to each item constituting the Collateral in which the First Lien Agent (on behalf of the First Lien Claimholders) or the Second Lien Agent (on behalf of the Second Lien Claimholders) has been granted a Lien. The foregoing provisions of this Agreement are intended solely to govern the respective Lien priorities as between the Creditors and shall not impose on either the First Lien

Agent (on behalf of the First Lien Claimholders) or the Second Lien Agent (on behalf of the Second Lien Claimholders) any obligations in respect of the disposition of proceeds of foreclosure on any Collateral that would conflict with prior perfected claims therein in favor of any other Person or any order or decree of any court or other Governmental Authority or any applicable law.

**2.8 Priority with respect to Liens securing Excess First Lien Obligations**<sup>17</sup>. *Without prejudice to, or waiver of, any default or event of default that may occur or exist under the Second Lien Loan Documents as a result of (x) the incurrence of Obligations under or pursuant to the First Lien Loan Documents in excess of the First Lien Cap and (y) the Liens granted pursuant to the First Lien Collateral Documents on any Collateral securing any such excess amounts or the right of the Second Lien Agent or Second Lien Claimholders to exercise (subject to the limitations in Section 3 thereof) any rights and remedies under the Second Lien Loan Documents as a result thereof, [and subject to Section 2.1:*

(a) *All Liens on the Collateral granted under or pursuant to the Second Lien Collateral Documents in favor of the Second Lien Agent, the Second Lien Claimholders or any agent or trustee therefor securing the Second Lien Obligations [up to but not exceeding any Second Lien Cap] shall, be and remain senior in all respects and prior to all Liens on the Collateral that are held by the First Lien Agent, the First Lien Claimholders or any agent or trustee therefor, whether obtained by grant, possession, operation of law, subrogation or otherwise, securing any Excess First Lien Obligations (but only with respect to such excess amounts); and*

(b) *All Liens on the Collateral that are held from time to time by the First Lien Agent, the First Lien Claimholders or any agent or trustee therefor, whether obtained by grant, possession, operation of law, subrogation or otherwise, securing any Excess First Lien Obligations shall be and remain junior and subordinate in all respects to all Liens on the Collateral granted under or pursuant to the Second Lien Collateral Documents in favor of the Second Lien Agent, the Second Lien Claimholders or any agent or trustee therefor securing Second Lien Obligations [up to but not exceeding any Second Lien Cap]; and*

(c) *The First Lien Agent and First Lien Claimholders shall have, as holders of a junior and subordinate Lien to the extent provided in Section 2.1(a), mutatis mutandis,*

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<sup>17</sup> If Section 2.8 dealing with Excess First Lien Obligations is included, then the following definition should be added to Section 1:

**“Excess First Lien Obligations”** means the sum of (a) the portion of the principal amount of the loans outstanding under the First Lien Loan Documents, the undrawn amount of all outstanding letters of credit under the First Lien Loan Documents, [and the outstanding amount of Hedging Obligations], that is in excess of the First Lien Cap, [plus (b) the portion of interest and fees on account of such portion of the loans, letters of credit, and Hedging Obligations described in clause (a) of this definition.

*with respect to the Excess First Lien Obligations, and to Collateral held or received therefor (including proceeds), analogous obligations (other than the obligations in respect to the Standstill Period), and hereby grant analogous rights and waivers, to the Second Lien Agent and Second Lien Claimholders under this Agreement in respect of the Second Lien Obligations not in excess of any Second Lien Cap as the Second Lien Agent and Second Lien Claimholders have, or have granted, under this Agreement in favor of the First Lien Agent and First Lien Claimholders with respect to the First Lien Obligations not in excess of the First Lien Cap and the Collateral (including proceeds) therefor, and*

*(d) The Second Lien Agent and Second Lien Claimholders shall have, as holders of a senior and priority lien to the extent provided in Section 2.7(c), mutatis mutandis, the same duties, and limitations on responsibilities, duties and liability, in respect of the First Lien Agent and the First Lien Claimholders and the Collateral (including proceeds) held or received by the Second Lien Agent or the Second Lien Claimholders or any agent or trustee therefor, as the First Lien Agent and First Lien Claimholders or any agent or trustee therefor have under this Agreement as holders of a senior and priority Lien with respect to the Second Lien Agent and Second Lien Claimholders, as holders of a junior and subordinate Lien, and the Collateral (including proceeds).]*

### **SECTION 3. Enforcement.**

#### **3.1 Exercise of Remedies.**

(a) Until the Discharge of First Lien Obligations has occurred, whether or not any Insolvency Proceeding has been commenced by or against the Borrower or any other Grantor, the Second Lien Agent and the Second Lien Claimholders:

(1) will not take any Enforcement Action with respect to any Lien held by it under the Second Lien Collateral Documents or any other Second Lien Loan Document or otherwise; provided, however, that the Second Lien Agent may take Enforcement Action at any time after a period of [120-180] days has elapsed since the date on which the First Lien Agent shall have received written notice from the Second Lien Agent of the existence of any Event of Default under the Second Lien Credit Agreement and the Second Lien Obligations are currently due and payable in full as a result of acceleration or otherwise (the “**Standstill Period**”); provided, in no event shall the Second Lien Agent or any Second Lien Claimholder take any Enforcement Action with respect to any Lien held by it under the Second Lien Collateral Documents or any other Second Lien Loan Document or otherwise if, notwithstanding the expiration of the Standstill Period, (i) the First Lien Agent or First Lien Claimholders shall have commenced and are diligently pursuing an Enforcement Action with respect to all or any material portion of the Collateral or shall be diligently attempting to vacate any stay or prohibition against such exercise (prompt written notice of the initial commencement of such exercise to be given to the Second Lien Agent

provided , that the First Lien Agent shall incur no liability for, and the rights of the First Lien Agent hereunder or in respect of the Collateral shall be unaffected by, the failure of the First Lien Agent to give any such notice); or *[(ii) at any time any Grantor is then a debtor under or with respect to (or otherwise subject to) any Insolvency Proceeding]* or (iii) if the acceleration of the Second Lien Obligations (if any) is rescinded in accordance with the terms of the Second Lien Credit Agreement or otherwise;<sup>18</sup>

(2) will not contest, protest or object to any Enforcement Action brought by the First Lien Agent or any First Lien Claimholder or any other exercise by the First Lien Agent or any First Lien Claimholder of any rights and remedies relating to the Collateral under the First Lien Loan Documents or otherwise so long as the Liens granted to secure the Second Lien Obligations of the Second Lien Claimholders attach to the Proceeds thereof subject to the relative priorities described in Section 2.1; and

(3) subject to their rights under clause (a)(1) above, will not contest, protest or object to (and waive any and all claims with respect to) the forbearance by the First Lien Agent or the First Lien Claimholders from bringing or pursuing any Enforcement Action so long as the Liens granted to secure the Second Lien Obligations of the Second Lien Claimholders attach to the Proceeds thereof subject to the relative priorities described in Section 2.1.

(b) Until the Discharge of First Lien Obligations has occurred, whether or not any Insolvency Proceeding has been commenced by or against the Borrower or any other Grantor, but subject to the first proviso of Section 3.1(a)(1), the First Lien Agent and the First Lien Claimholders shall have the exclusive right to enforce rights and remedies with respect to the Collateral, commence, and if applicable, maintain an Enforcement Action (including set-off and the right to credit bid their debt) and, subject to Section 5.1, to make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the consent of the Second Lien Agent or any Second Lien Claimholder. In exercising rights and remedies with respect to the Collateral and Enforcement Actions with respect to the Collateral, the First Lien Agent and the First Lien Claimholders may enforce the provisions of the First Lien Loan Documents and exercise remedies thereunder, all in such order and in such manner as they may determine in the exercise of their sole discretion. Such exercise and enforcement shall include the rights of an agent appointed by them to sell or otherwise dispose of Collateral upon foreclosure, to incur expenses in connection with such sale or disposition, and to exercise all the rights and remedies of a secured creditor under the UCC and of a secured creditor under Bankruptcy Laws of any applicable jurisdiction.

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<sup>18</sup> Second Lien Claimholders will likely take the position that the bankruptcy section should dictate what rights the First and Second Lien Claimholders have if an Insolvency Proceeding is commenced, and that a blanket prohibition on remedies is not appropriate.

(c) Notwithstanding the foregoing, the Second Lien Agent and any Second Lien Claimholder may:

(1) file a claim or statement of interest with respect to the Second Lien Obligations in any Insolvency Proceeding commenced by or against the Borrower or any other Grantor;

(2) take any action (not adverse to the priority status of Liens on the Collateral securing the First Lien Obligations, or the rights of any First Lien Agent or the First Lien Claimholders to exercise remedies in respect thereof) in order to create, perfect, preserve or protect its Lien on the Collateral;

(3) file any necessary responsive or defensive pleadings in opposition to any motion, claim, adversary proceeding or other pleading made by any person objecting to or otherwise seeking the disallowance of the claims of the Second Lien Claimholders, including any claims secured by the Collateral, if any, in each case in accordance with the terms of this Agreement;

(4) vote on any plan of reorganization (including, without limitation, vote to accept or reject any plan of partial or complete liquidation, reorganization, arrangement, composition or extension), file any proof of claim, make other filings and make any arguments and motions that are, in each case, in accordance with the terms of this Agreement, with respect to the Second Lien Obligations and the Collateral;

(5) exercise any of its rights or remedies with respect to the Collateral after the termination of the Standstill Period to the extent permitted by Section 3.1(a)(1); and

(6) join (but not exercise any control with respect to) any judicial foreclosure proceeding or other judicial lien enforcement proceeding with respect to the Collateral initiated by the First Lien Agent to the extent that any such action could not reasonably be expected, in any material respect, to restrain, hinder, limit, delay for any material period or otherwise interfere with the Enforcement Action by the First Lien Agent (it being understood that neither the Second Lien Agent nor any Second Lien Claimholder shall be entitled to receive any proceeds thereof unless otherwise expressly permitted herein).

The Second Lien Agent, on behalf of itself and the Second Lien Claimholders, agrees that it will not take or receive any Collateral or any Proceeds of Collateral in connection with any Enforcement Action against any Collateral in its capacity as a creditor, unless and until the Discharge of First Lien Obligations has occurred, except in connection with any Enforcement Action expressly permitted by Section 3.1(a)(1) to the extent the Second Lien Agent and Second Lien Claimholders are permitted to retain the Proceeds thereof in accordance with Section 4.2 of this Agreement. Without limiting the generality of the foregoing, unless and until the Discharge of First Lien Obligations has occurred, except as expressly provided in

Sections 3.1(a), 6.4(b) and this Section 3.1(c), the sole right of the Second Lien Agent and the Second Lien Claimholders with respect to the Collateral is to hold a Lien on the Collateral pursuant to the Second Lien Collateral Documents for the period and to the extent granted therein and to receive a share of the proceeds thereof, if any, after the Discharge of First Lien Obligations has occurred in accordance with the terms of the Second Lien Loan Documents and applicable law.

(d) Subject to Sections 3.1(a) and (c) and Section 6.4(b):

(1) the Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, agrees that the Second Lien Agent and the Second Lien Claimholders will not take any action that would hinder any exercise of remedies under the First Lien Loan Documents or is otherwise prohibited hereunder, including any sale, lease, exchange, transfer or other disposition of the Collateral, whether by foreclosure or otherwise;

(2) the Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, hereby waives any and all rights it or the Second Lien Claimholders may have as a junior lien creditor or otherwise to object to the manner in which the First Lien Agent or the First Lien Claimholders seek to enforce or collect the First Lien Obligations or the Liens securing the First Lien Obligations granted in any of the First Lien Collateral undertaken in accordance with this Agreement, regardless of whether any action or failure to act by or on behalf of the First Lien Agent or First Lien Claimholders is adverse to the interest of the Second Lien Claimholders; and

(3) the Second Lien Agent hereby acknowledges and agrees that no covenant, agreement or restriction contained in the Second Lien Collateral Documents or any other Second Lien Document (other than this Agreement) shall be deemed to restrict in any way the rights and remedies of the First Lien Agent or the First Lien Claimholders with respect to the Collateral as set forth in this Agreement and the First Lien Loan Documents.

(e) Except as specifically set forth in Sections 3.1(a) and (d), the Second Lien Agent and the Second Lien Claimholders may exercise rights and remedies as unsecured creditors against the Borrower or any other Grantor that has guaranteed or granted Liens to secure the Second Lien Obligations in accordance with the terms of the Second Lien Loan Documents and applicable law; provided that in the event that any Second Lien Claimholder becomes a judgment lien creditor in respect of Collateral as a result of its enforcement of its rights as an unsecured creditor with respect to the Second Lien Obligations, such judgment lien shall be subject to the terms of this Agreement for all purposes (including in relation to the First Lien Obligations) as the other Liens securing the Second Lien Obligations are subject to this Agreement.

*ALTERNATIVE SUBSECTION 3.1(e) FAVORABLE TO SECOND LIEN*

(e) *Notwithstanding any other provision of this Agreement, [other than as specifically set forth in Sections \_\_\_\_\_], <sup>19</sup> the Second Lien Agent and the Second Lien Claimholders may exercise rights and remedies that could be exercised by unsecured creditors generally against the Borrower or any other Grantor that has guaranteed or granted Liens to secure the Second Lien Obligations in accordance with the terms of the Second Lien Loan Documents and applicable law; provided that in the event that any Second Lien Claimholder becomes a judgment lien creditor in respect of Collateral as a result of its enforcement of its rights as an unsecured creditor with respect to the Second Lien Obligations, such judgment lien shall be subject to the terms of this Agreement for all purposes (including in relation to the First Lien Obligations) as the other Liens securing the Second Lien Obligations are subject to this Agreement.*

(f) Except as specifically set forth in Sections 3.1(a) and (d), nothing in this Agreement shall prohibit the receipt by the Second Lien Agent or any Second Lien Claimholders of the required payments of interest, principal and other amounts owed in respect of the Second Lien Obligations so long as such receipt is not the direct or indirect result of any Enforcement Action by the Second Lien Agent or any Second Lien Claimholders of rights or remedies as a secured creditor in contravention of this Agreement of any Lien held by any of them. Nothing in this Agreement impairs or otherwise adversely affects any rights or remedies the First Lien Agent or the First Lien Claimholders may have with respect to the First Lien Collateral.

**3.2 Actions Upon Breach.** If any Second Lien Claimholder, in contravention of the terms of this Agreement, in any way takes, attempts to or threatens to take or participate in any Enforcement Action with respect to the Collateral, or fails to take any action required by this Agreement, the First Lien Agent or the Grantors may obtain relief against such Second Lien Claimholder by injunction, specific performance and/or other appropriate equitable relief, it being understood and agreed by the Second Lien Agent on behalf of each Second Lien Claimholder that (i) the First Lien Claimholders' damages from its actions may at that time be difficult to ascertain and may be irreparable, and (ii) each Second Lien Claimholder waives any defense that the Grantors and/or the First Lien Claimholders cannot demonstrate damage and/or be made whole by the awarding of damages.

**3.3 Commercially Reasonable Dispositions; Notice of Exercise.** First Lien Agent agrees that any Enforcement Action by First Lien Agent with respect to Collateral subject to Article 9 of the UCC shall be conducted by First Lien Collateral Agent in a commercially reasonable manner. Second Lien Agent agrees that any Enforcement Action by Second Lien Collateral Agent with respect to Collateral subject to Article 9 of the UCC shall be conducted by Second Lien Agent in a commercially reasonable manner. First Lien Agent shall provide reasonable prior notice to Second Lien Collateral Agent of its initial material Enforcement Action. Second Lien Agent

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<sup>19</sup> Consider specifying provisions precluding objections to claims, Liens, other agreed provisions.

shall provide reasonable prior notice to First Lien Collateral Agent of its initial material Enforcement Action.

#### **SECTION 4. Payments.**

**4.1 Application of Proceeds.** So long as the Discharge of First Lien Obligations has not occurred, whether or not any Insolvency Proceeding has been commenced by or against the Borrower or any other Grantor, except as otherwise provided in Section 2.1, any Collateral or Proceeds thereof received in connection with the sale or other disposition of, or collection on, such Collateral upon the exercise of remedies in connection with any Enforcement Action shall be applied: (a) first, to the payment in full or cash collateralization of the First Lien Obligations in such order as specified in the relevant First Lien Loan Documents or as otherwise determined by the First Lien Claimholders [*and*] (b) second, upon the Discharge of First Lien Obligations, to the payment in full of the Second Lien Obligations in such order as specified in the Second Lien Collateral Documents or as a court of competent jurisdiction may otherwise direct [, (c) *third, to the payment in full of the Excess First Lien Obligations, and (d) fourth, to the payment in full of the Excess Second Lien Obligations*]<sup>20</sup>.

**4.2 Payment Turnover.** So long as the Discharge of First Lien Obligations has not occurred, whether or not any Insolvency Proceeding has been commenced by or against the Borrower or any other Grantor, any Collateral or Proceeds thereof (including property or Proceeds subject to Liens referred to in the final sentence of Section 2.3) received by the Second Lien Agent or any Second Lien Claimholders in connection with in connection with the exercise of any right or remedy (including set-off or recoupment) relating to the Collateral, including any Enforcement Action relating to the Collateral shall be segregated and held in trust and forthwith paid over to the First Lien Agent for the benefit of the First Lien Claimholders in the same form as received, with any necessary endorsements or as a court of competent jurisdiction may otherwise direct. The First Lien Agent is hereby authorized to make any such endorsements as agent for the Second Lien Agent or any such Second Lien Claimholders. This authorization is coupled with an interest and is irrevocable until the Discharge of First Lien Obligations.

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<sup>20</sup> Intercreditor Agreements typically do not address the consequences of the First Lien Lender exceeding the First Lien Cap or the Second Lien Lender exceeding any applicable Second Lien Cap. In the absence of an agreement between the parties as to the effect of the First Lien Lender exceeding the First Lien Cap, the Second Lender might argue that the breach by the First Lien Lender of the Intercreditor Agreement should preclude it from enforcing the Intercreditor Agreement. One alternative for addressing this issue is to provide in the Intercreditor Agreement that any Excess First Lien Obligations (i.e. obligations in excess of the First Lien Cap) will be given a priority immediately after the Second Lien Obligations and that any Excess Second Lien Obligations will be ranked last after payment of Excess First Lien Obligations. See Optional Section 2.8.

## **SECTION 5. Other Agreements.**

### **5.1 Releases.**

(a) If, in connection with:

(i) an Enforcement Action by the First Lien Agent; or

(ii) any Asset Sale (as defined in the First Lien Credit Agreement), sale, lease, exchange, transfer or other disposition of any Collateral permitted under the terms of the First Lien Loan Documents other than an Enforcement Action (whether or not an event of default thereunder, and as defined therein, has occurred and is continuing) (a 'Disposition'); or

(iii) any release of Liens on the property of any Grantor when the Lien on all of the Equity Interest in such Grantor is being released pursuant to any other provision of this Section 5.1(a);

the First Lien Agent, for itself or on behalf of any of the First Lien Claimholders, releases any of its Liens on any part of the Collateral, or releases any Grantor from its obligations under its guaranty of the First Lien Obligations, then the Liens, if any, of the Second Lien Agent, for itself or for the benefit of the Second Lien Claimholders, on such Collateral, and the obligations of such Grantor under its guaranty of the Second Lien Obligations, shall be automatically, unconditionally and simultaneously released (the "Second Lien Release") and the Second Lien Agent, for itself or on behalf of any such Second Lien Claimholders, promptly shall execute and deliver to the First Lien Agent or such Grantor such termination statements, releases and other documents as the First Lien Agent or such Grantor may request to effectively confirm such release; provided, however, that the Second Lien Release shall not occur without the consent of the Second Lien Agent (x) in the case of an Enforcement Action, as to any Collateral the net proceeds of the disposition of which will not be applied to repay (and, to the extent applicable, to reduce permanently commitments with respect to) the First Lien Obligations, or (y), in the case of a Disposition, if the Disposition is prohibited by any provision of the Second Lien Credit Agreement other than solely as the result of the existence of a default or an event of default under the Second Lien Loan Documents.

(b) Until the Discharge of First Lien Obligations occurs, the Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, hereby irrevocably constitutes and appoints the First Lien Agent and any officer or agent of the First Lien Agent, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Second Lien Agent or such holder or in the First Lien Agent's own name, from time to time in the First Lien Agent's discretion, for the limited purpose of carrying out the terms of this Section 5.1, to take any and all reasonable and

appropriate action and to execute any and all documents and instruments which may be necessary to accomplish the purposes of this Section 5.1, including any endorsements or other instruments of transfer or release. This authorization is coupled with an interest and is irrevocable until such time as this Agreement is terminated in accordance with its terms.

(c) Until the Discharge of First Lien Obligations occurs, to the extent that the First Lien Agent for itself and on behalf of the First Lien Claimholders (i) has released any Lien on Collateral or any Grantor from its obligation under its guaranty and any such Liens or guaranty are later reinstated or (ii) obtains any new Liens or additional guaranties from Grantors, then the Second Lien Agent for itself and on behalf of the Second Lien Claimholders shall be granted a Lien on any such Collateral and an additional guaranty, as the case may be, subject to the priorities set forth in Section 2.

**5.2 Insurance.** The First Lien Agent and the Second Lien Agent shall be named as additional insureds and/or loss payees, as applicable, and the Control Agent shall be named as first loss payee (on behalf of the First Lien Agent, the First Lien Claimholders, the Second Lien Agent and the Second Lien Claimholders)] under any insurance policies maintained from time to time by any Grantor. Unless and until the Discharge of First Lien Obligations has occurred, the First Lien Agent and the First Lien Claimholders shall have the sole and exclusive right, subject to the rights of the Grantors under the First Lien Loan Documents, to adjust settlement for any insurance policy covering the Collateral in the event of any loss thereunder and to approve any award granted in any condemnation or similar proceeding (or any deed in lieu of condemnation) affecting the Collateral. Unless and until the Discharge of First Lien Obligations has occurred, and subject to the rights of the Grantors under the First Lien Loan Documents, all Proceeds of any such policy and any such award (or any payments with respect to a deed in lieu of condemnation) if in respect to the Collateral shall be paid to the First Lien Agent for the benefit of the First Lien Claimholders pursuant to the terms of the First Lien Loan Documents (including for purposes of cash collateralization of letters of credit) and thereafter, to the extent no First Lien Obligations are outstanding, and, subject to the rights of the Grantors under the Second Lien Loan Documents, to the Second Lien Agent for the benefit of the Second Lien Claimholders to the extent required under the Second Lien Collateral Documents and then, to the extent no Second Lien Obligations are outstanding, to the owner of the subject property, such other Person as may be entitled thereto or as a court of competent jurisdiction may otherwise direct. Until the Discharge of First Lien Obligations has occurred, if the Second Lien Agent or any Second Lien Claimholders shall, at any time, receive any Proceeds of any such insurance policy or any such award or payment in contravention of this Agreement, it shall segregate and hold in trust and forthwith pay such Proceeds over to the First Lien Agent in accordance with the terms of Section 4.2.

**5.3** Amendments to First Lien Loan Documents and Second Lien Loan Documents<sup>21</sup>. The First Lien Loan Documents may be amended, supplemented or otherwise modified in accordance with their terms and the First Lien Credit Agreement may be Refinanced<sup>22</sup>, in each case, without the consent of, or prior notice to the Second Lien Agent or the Second Lien Claimholders, all without affecting the lien subordination or other provisions of this Agreement; provided, however, that (x) the holders of such Refinancing debt (or the agent for such holders) bind themselves in a writing addressed to the Second Lien Agent and the Second Lien Claimholders to the terms of this Agreement and (y) any such amendment, supplement, modification or Refinancing shall not, without the consent of the Second Lien Agent:<sup>23</sup>

(1) increase the aggregate principal amount of, without duplication, loans, letters of credit, bankers acceptances, bonds, debentures, notes or similar instruments or other similar extensions of credit [*(but excluding Hedging Obligations and Obligations in respect of Designated Treasury Management Agreements)*] or commitments therefor so that the aggregate principal amount of such loans, letters of credit, bankers acceptances, bonds, debentures, notes or similar instruments or other similar extensions of credit is in excess of the First Lien Cap;

(2) modify the method of computing interest or increase the interest rate (including by any increase in the “applicable margin” or similar component of the interest rate) or yield provisions applicable to the First Lien Obligations or any letter of credit fee, commitment fee, facility fee, utilization fee, or similar fee so that the

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<sup>21</sup> As with the other provisions in the model agreement, the scope of restrictions on amendments is highly negotiated and varies depending on the market in question. The “laundry list” approach set forth below is frequently encountered in middle market transactions. Larger syndicated loan transaction and bond second lien deals often have fewer restrictions on the first lien claimholders. Additionally, the restrictions in this Section may be largely addressed in the applicable loan documents as obligations of the Borrower rather than in the intercreditor agreement.

<sup>22</sup> The definition of “Refinance” in the model agreement includes any partial refinancing. There may be situations where it may make sense to limit the definition to require that the indebtedness in question be incurred pursuant to documentation that replaces the First Lien Credit Agreement then in effect in its entirety.

<sup>23</sup> Since the First and Second Lien Agents are parties to the Intercreditor Agreement, and the First and Second Lien Lenders are not, the First and Second Lien Credit Agreements should (i) contain provisions pursuant to which each lender thereunder agrees to be bound by the terms of the Intercreditor Agreement and expressly authorizes the Agent thereunder to enter into the Intercreditor Agreement on behalf of the lenders and to exercise all rights and perform and comply with all obligations specified for such Agent under the Intercreditor Agreement, and (ii) specify whether or to what extent and by what percentage vote Lender direction or authorization is required to provide the applicable Agent with the authority to agree to any consent or waiver, or to take or refrain from taking any other action, contemplated as being within the Agent's discretion under the Intercreditor Agreement.

combined interest rate and fees are increased by more than [\_\_\_\_\_] % per annum<sup>24</sup> in the aggregate [*at any level of pricing*] (excluding increases resulting from (A) increases in the underlying reference rate not caused by any amendment, supplement, modification, or Refinancing of the First Lien Credit Agreement, (B) accrual of interest at the Default Rate (as defined in the First Lien Credit Agreement as of the date hereof or at a rate that corresponds to such Default Rate in the case of any Refinancing), or (C) application of the pricing grid set forth in the First Lien Credit Agreement);

(3) Extend any scheduled amortization payments (other than payments due at the final maturity date) or the scheduled final maturity of the First Lien Credit Agreement or any Refinancing thereof to a date later than the scheduled final maturity date of the Second Lien Credit Agreement or any Refinancing thereof;

(4) modify (or have the effect of a modification of) the mandatory prepayment provisions of the First Lien Credit Agreement in a manner [*prohibited by the Second Lien Credit Agreement*][*that reduces amounts which would be otherwise required to be used to prepay the First Lien Obligations in a manner that allows such amounts to be retained by the Grantors to an amount greater than that permitted under the Second Lien Credit Agreement*];

(5) increase (or have the effect of increasing) the amount of, or the type of, dispositions of Collateral, the proceeds of which are not required to be used to prepay the First Lien Obligations and which may be retained by the Grantors to an amount greater than that permitted under the Second Lien Credit Agreement;

(6) modify or add any covenant or event of default under the First Lien Credit Documents which directly restricts one or more Grantors from making payments under the Second Lien Credit Documents which would otherwise be permitted under the First Lien Credit Documents as in effect on the date hereof; or

#### ADDITIONAL PROVISION FOR ASSET-BASED LENDING TRANSACTION:

[ (7) *increase the advance rate applicable to the Borrowing Base (other than, in the event such advance rate is decreased after the date hereof, increases in such advance rate to a rate no higher than that existing on the date hereof) or make amendments or modifications to the definitions of “Borrowing Base”, “Eligible Account”, “Eligible Inventory” or “Reserves” contained in the First Lien Credit Agreement as in effect on the date hereof that have the effect of increasing the amount of credit available to the Borrower; provided, that the First Lien Collateral Agent’s discretion to establish additional*

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<sup>24</sup> The amount of any permitted percentage increase in the interest rate is subject to negotiation between the parties. An increase not to exceed two percent (2%) per annum is a typical agreed-upon amount.

*Reserves, to release Reserves and to determine eligibility shall not be affected or limited in any manner.]*

In the event the First Lien Loan Documents are so amended, supplemented or otherwise modified or Refinanced, the First Lien Agent shall provide notice of such amendment, supplement, modification or Refinancing to the Second Lien Agent within ten (10) Business Days after the effective date of such amendment, supplement, modification or Refinancing and, if requested by the Second Lien Agent, shall promptly provide copies thereof; provided that (i) the failure to give such notice or copies shall not affect the effectiveness or validity thereof or of this Agreement, (ii) this sentence is not intended to impose any liability on the First Lien Agent or First Lien Claimholders, and (iii) such notice and copies shall not be required to the extent the Borrower or the applicable Obligor has provided the same to the Second Lien Agent .

(b) The Second Lien Loan Documents may be amended, supplemented or otherwise modified in accordance with their terms, and the First Lien Credit Agreement may be Refinanced, in each case, without the consent of, or prior notice to the First Lien Agent or the First Lien Claimholders, all without affecting the lien subordination or other provisions of this Agreement; provided, however, that (x) the holders of such Refinancing debt (or the agent for such holders) bind themselves in a writing addressed to the First Lien Agent and the First Lien Claimholders to the terms of this Agreement and (y) any such amendment, supplement, modification or Refinancing shall not, without the consent of the First Lien Agent:

(1) increase the aggregate principal amount of loans, letters of credit, bankers acceptances or other similar extensions of credit under the Second Lien Loan Documents [*(excluding Hedging Obligations and Obligations in respect of Designated Treasury Management Agreements and any increase resulting from payment of interest in kind permitted under the existing Second Lien Credit Agreement as in effect on the date hereof)*] or commitments therefor so that the aggregate principal amount of such loans, letters of credit, bankers acceptances, similar extensions of credit and commitments is in excess of the [*amount permitted under the First Lien Credit Agreement*][*Second Lien Cap (if any)*];

(2) modify the method of computing interest or increase the interest rate (including by any increase in the “applicable margin” or similar component of the interest rate) or yield provisions applicable to the Second Lien Obligations or any letter of credit fee, commitment fee, facility fee, utilization fee, or similar fee so that the combined interest rate and fees are increased by more than [\_\_\_\_\_] per annum in the aggregate [*at any level of pricing*] (excluding increases resulting from (A) increases in the underlying reference rate not caused by any amendment, supplement, modification or Refinancing of the Second Lien Credit Agreement, (B) accrual of interest at the Default Rate (as defined in the Second Lien Credit Agreement as of the date hereof) or at a rate that corresponds to such Default Rate in the case of any Refinancing, or (C) application of the

pricing grid set forth in the Second Lien Credit Agreement as in effect on the date hereof);

(3) change any covenants, defaults or events of default (including the addition of defaults or events of default not contained in the Second Lien Loan Documents as of the date hereof) in any manner that makes them more restrictive, in any material respect, as to any Grantor except to make conforming changes to match changes made to the First Lien Loan Documents so as to preserve, in connection with any amendments to the First Lien Loan Documents, on substantially similar economic terms, the differential (if any) that exists on the date hereof between such covenants, defaults or events of defaults in the First Lien Loan Documents and such covenants, defaults or events of default in the Second Lien Loan Documents;

(4) change to earlier dates any dates upon which payments of principal or interest are due thereon or otherwise alter any provisions that decrease the weighted average life to maturity;

(5) change the prepayment, redemption, or defeasance provisions thereof if the effect of such change is to require any new payment or accelerate the payment date any existing payment obligation; or

(6) change or amend any other term of the Second Lien Loan Documents if such change or amendment would result in a default under the First Lien Credit Agreement, increase the obligations of any Grantor or confer additional material rights on any Second Lien Claimholder in a manner adverse in any material respect to any of the First Lien Claimholders.

In the event the Second Lien Loan Documents are so amended, supplemented or otherwise modified or Refinanced, the Second Lien Agent shall provide notice of such amendment, supplement, modification or Refinancing to the First Lien Agent within ten (10) Business Days after the effective date of such amendment, supplement, modification or Refinancing and, if requested by the First Lien Agent, shall promptly provide copies thereof; provided that (i) the failure to give such notice or copies shall not affect the effectiveness or validity thereof or of this Agreement, (ii) this sentence is not intended to impose any liability on the Second Lien Agent or Second Lien Claimholders, and (iii) such notice and copies shall not be required to the extent the Borrower or the applicable Obligor has provided the same to the First Lien Agent.

(c) The Borrower agrees that each Second Lien Collateral Document shall include the following language (or language to similar effect approved by the First Lien Agent):

‘Notwithstanding anything herein to the contrary, the lien and security interest granted to the Second Lien Agent pursuant to this Agreement and the exercise of any right or remedy by the Second Lien Agent hereunder

are subject to the provisions of the Intercreditor Agreement, dated as of [\_\_\_\_\_] (as amended, restated, supplemented or otherwise modified from time to time, the “**Intercreditor Agreement**”), among [\_\_\_\_\_] \_\_\_\_\_, as First Lien Agent and Control Agent and \_\_\_\_\_, as Second Lien Agent and the Grantors (as defined therein) from time to time a party thereto and certain other persons party or that may become party thereto from time to time. In the event of any conflict between the terms of the Intercreditor Agreement and this Agreement, the terms of the Intercreditor Agreement shall govern and control.”

In addition, the Borrower agrees that each Second Lien Mortgage covering any Collateral shall contain such other language as the First Lien Agent may reasonably request to reflect the subordination of such Second Lien Mortgage to the First Lien Collateral Document covering such Collateral.

(d) In the event the First Lien Agent or the First Lien Claimholders and the relevant Grantor enter into any amendment, waiver or consent in respect of any of the First Lien Collateral Documents for the purpose of adding to, or deleting from, or waiving or consenting to any departures from any provisions of, any First Lien Collateral Document or changing in any manner the rights of the First Lien Agent, such First Lien Claimholders, the Borrower or any other Grantor thereunder, then such amendment, waiver or consent shall apply automatically to any comparable provision of the comparable Second Lien Collateral Document without the consent of the Second Lien Agent or the Second Lien Claimholders and without any action by the Second Lien Agent, the Borrower or any other Grantor, provided, that:

(1) no such amendment, waiver or consent shall have the effect of:

(A) removing or releasing property subject to the Lien of the Second Lien Collateral Documents, except to the extent that a release of such Lien is permitted or required by Section 5.1 and provided that there is a corresponding release of the Liens securing the First Lien Obligations;

(B) imposing duties on the Second Lien Agent without its consent;

(C) permitting other Liens on the Collateral not permitted under the terms of the Second Lien Loan Documents or Section 6; or

[(D) *[being prejudicial to the interest of the Second Lien Claimholders to a greater extent than the First Lien Claimholders (other than by virtue of their relative priorities and rights and obligations hereunder)]*].

(2) notice of such amendment, waiver or consent shall have been given to the Second Lien Agent within ten (10) Business Days after the effective date of such amendment, waiver or consent and, if requested by the Second Lien Agent, copies thereof; provided that (i) the failure to give such notice or copies shall not affect the effectiveness or validity thereof or of this Agreement, (ii) this paragraph is intended solely to set forth provisions by which the Second Lien Collateral Documents shall be automatically affected by amendments, waivers and consents given by the First Lien Agent and First Lien Claimholders under the First Lien Credit Agreement and the First Lien Collateral Documents and is not intended to impose any liability on the First Lien Agent or First Lien Claimholders, and (iii) such notice and copies shall not be required to the extent the Borrower or the applicable Obligor has provided the same to the Second Lien Agent.

(e) If any amendment, supplement or other modification of any provision of the First Lien Loan Documents has the effect of imposing on any Grantor any representations, warranties, covenants, events of default or remedies that are more restrictive or burdensome to such Grantor than the terms and provisions of such First Lien Credit Documents as in effect on the date of this Agreement, or altering any definitions to effect any of the foregoing, (i) the Second Lien Lenders shall be entitled to require that a substantially similar amendment be made to the comparable Second Lien Loan Documents, and (ii) each Grantor hereby irrevocably and unconditionally agrees that at least three (3) Business Days prior to effecting any such amendment, supplement or other modification of any provision of such First Lien Loan Documents, each Grantor, as applicable, shall, with respect to the applicable Second Lien Loan Documents, provide to the Second Lien Collateral Agent and the other Second Lien Claimholders an amendment or amendments (the "Corresponding Amendment") that amends the applicable Second Lien Loan Documents to effect such modifications on equivalent terms. The Second Lien Claimholders, at their sole discretion, may accept or decline any Corresponding Amendment. If the Second Lien Claimholders accept any Corresponding Amendment, Borrower, on behalf of itself and each other Grantor, by consenting to the terms and conditions of this Agreement hereby irrevocably and unconditionally agrees to effect the Corresponding Amendment substantially concurrently with the related amendment, supplement or modification of the First Lien Loan Documents.

(f) Except as otherwise expressly set forth in any First Lien Collateral Document, no Person who obtains the benefit of the provisions of this Agreement or any Collateral by virtue of the provisions hereof or any First Lien Collateral Document shall have any right to notice of any amendment of this Agreement or any action or to consent to, direct or object to any action hereunder or under any First Lien Collateral Document in respect of the Collateral (including the release or impairment of any Collateral) other than in its capacity as a First Lien Lender and, in such case, only to the extent expressly provided in the First Lien Loan Documents. Notwithstanding any other provision of this Agreement to the contrary, the First Lien Agent shall be required to verify the payment of, or that other satisfactory arrangements have been made with respect to, First Lien Obligations arising under Designated Cash Management Agreements or Hedge Agreement only if the First Lien Agent has received written notice of such Obligations,

together with such supporting documentation as the First Lien Agent may request, from the applicable Person.

**5.3 Gratuitous Bailee for Perfection.** The First Lien Agent agrees to hold that part of the Collateral that is in its possession or control (or in the possession or control of its agents or bailees) to the extent that possession or control thereof is taken to perfect a Lien thereon under the UCC (such Collateral being the **“Pledged Collateral”**) as collateral agent for the First Lien Claimholders and as gratuitous bailee and agent for perfection for the Second Lien Agent (such bailment and agency for perfection being intended, among other things, to satisfy the requirements of Sections 8-106(d)(3), 8-301(a)(2) and 9-313(c) of the UCC) and any assignee solely for the purpose of perfecting the security interest granted under the First Lien Loan Documents and the Second Lien Loan Documents, respectively, subject to the terms and conditions of this Section 5.4. Solely with respect to any deposit accounts under the control (within the meaning of Section 9-104 of the UCC) of the First Lien Agent, the First Lien Agent agrees to also hold control over such deposit accounts as gratuitous agent for the Second Lien Agent, subject to the terms and conditions of this Section 5.4.

(b) The First Lien Agent shall have no obligation whatsoever to the First Lien Claimholders, the Second Lien Agent or any Second Lien Claimholder to ensure that the Pledged Collateral is genuine or owned by any of the Grantors or to preserve rights or benefits of any Person except as expressly set forth in this Section 5.4. The duties or responsibilities of the First Lien Agent under this Section 5.4 shall be limited solely to holding the Pledged Collateral as bailee (and with respect to deposit accounts, agent) in accordance with this Section 5.4 and delivering the Pledged Collateral upon a Discharge of First Lien Obligations as provided in paragraph (d) below.

(c) The First Lien Agent shall not have by reason of the First Lien Collateral Documents, the Second Lien Collateral Documents, this Agreement or any other document a fiduciary relationship in respect of the First Lien Claimholders, the Second Lien Agent or any Second Lien Claimholder and the Second Lien Agent and the Second Lien Claimholders hereby waive and release the First Lien Agent from all claims and liabilities arising pursuant to the First Lien Agent's role under this Section 5.4 as gratuitous bailee and gratuitous agent with respect to the Common Collateral. It is understood and agreed that the interests of the First Lien Agent and the Second Lien Agent may differ and the First Lien Agent shall be fully entitled to act in its own interest without taking into account the interests of the Second Lien Agent or Second Lien Claimholders.

(d) Upon the Discharge of First Lien Obligations under the First Lien Loan Documents to which the First Lien Agent is a party, the First Lien Agent shall deliver the remaining Pledged Collateral in its possession (if any) together with any necessary endorsements (such endorsement shall be without recourse and without any representation or warranty), first, to the Second Lien Agent to the extent Second Lien Obligations remain outstanding, and second, to the Borrower to the extent no First Lien Obligations or Second Lien Obligations remain outstanding (in each case, so as to allow

such Person to obtain possession or control of such Pledged Collateral). The First Lien Agent further agrees to take all other action reasonably requested by the Second Lien Agent at the expense of the Second Lien Agent or the Borrower in connection with the Second Lien Agent obtaining a first-priority interest in the Collateral or as a court of competent jurisdiction may otherwise direct.

**5.4** When Discharge of First Lien Obligations Deemed to Not Have Occurred. If, at any time after the Discharge of First Lien Obligations has occurred, the Borrower thereafter enters into any Refinancing of any First Lien Loan Document evidencing a First Lien Obligation which Refinancing is permitted hereby and by the Second Lien Loan Documents, then such Discharge of First Lien Obligations shall automatically be deemed not to have occurred for all purposes of this Agreement (other than with respect to any actions taken as a result of the occurrence of such first Discharge of First Lien Obligations), and, from and after the date on which the New First Lien Debt Notice is delivered to the Second Lien Agent in accordance with the next sentence, the obligations under such Refinancing of the First Lien Loan Document shall automatically be treated as First Lien Obligations for all purposes of this Agreement, including for purposes of the Lien priorities and rights in respect of Collateral set forth herein, and the First Lien Agent under such First Lien Loan Documents shall be the First Lien Agent for all purposes of this Agreement. Upon receipt of a notice (the “**New First Lien Debt Notice**”) stating that the Borrower has entered into a new First Lien Loan Document (which notice shall include the identity of the new first lien collateral agent, such agent, the “**New Agent**”), the Second Lien Agent shall promptly (a) enter into such documents and agreements (including amendments or supplements to this Agreement) as the Borrower or such New Agent shall reasonably request in order to provide to the New Agent the rights contemplated hereby, in each case consistent in all material respects with the terms of this Agreement and (b) deliver to the New Agent any Pledged Collateral held by it together with any necessary endorsements (or otherwise allow the New Agent to obtain control of such Pledged Collateral). The New Agent shall agree in a writing addressed to the Second Lien Agent and the Second Lien Claimholders to be bound by the terms of this Agreement. If the new First Lien Obligations under the new First Lien Loan Documents are secured by property of the Grantors constituting Collateral that do not also secure the Second Lien Obligations, then the Second Lien Obligations shall be secured at such time by a second priority Lien on such property to the same extent provided in the Second Lien Collateral Documents and this Agreement.

**5.5** Purchase Right. (a) Without prejudice to the enforcement of remedies by the First Lien Claimholders, the Second Lien Claimholders shall have the right (but not the obligation) to purchase by way of assignment (and shall thereby also assume all funding commitments and obligations of the First Lien Claimholders under the First Lien Loan Documents), at any time during the Exercise Period (as hereinafter defined), all, but not less than all, of the First Lien Obligations, including all principal of all First Lien Obligations outstanding at the time of purchase and all accrued and unpaid interest, fees and expenses in respect of all First Lien Obligations outstanding at the time of purchase as provided in Section 5.5 (c) below. Such election shall occur by delivery of a notice (a “Purchase Notice”) to the First Lien Agent during the Exercise Period, which Purchase Notice shall be signed by the Second Lien Claimholders offering to make such purchase

(the “Purchasing Creditors”) and indicate the percentage of the First Lien Obligations to be purchased by each such Purchasing Creditor (which must equal 100 percent when added to the percentage of First Lien Obligations to be purchased by all other Purchasing Creditors) and (ii) state that (A) it is a Purchase Notice delivered pursuant to Section 5.5 of this Agreement, (B) the Purchasing Creditors are thereby irrevocably offering to purchase all of the First Lien Obligations at the Purchase Price in accordance with this Section 5.5, and (C) the date on which such purchase shall occur (the “Purchase Date”), which date shall not be less than 5 Business Days, nor more than [15] Business Days, after the receipt by the First Lien Agent of the Purchase Notice. This right will be allocated among the Purchasing Creditors in the proportion they mutually agree upon, or, in the absence of agreement, in the ratio that each of the Purchasing Creditor’s percentage share of the Second Lien Obligations bears to the aggregate percentage shares of the Second Lien Obligations held by all Purchasing Creditors.

(b) The right to purchase the First Lien Obligations as described in this Section 5.5 may be exercised by giving the Purchase Notice at any time during the period (the “Exercise Period”) commencing on the occurrence of a Purchase Event and ending on the [60<sup>th</sup>] day thereafter or, if earlier, the date that the occurrence giving rise to the Purchase Event is waived, cured or otherwise ceases to exist.

#### ALTERNATIVE FAVORABLE TO SECOND LIEN LENDERS

[ (b) *The right to purchase the First Lien Obligations as described in this Section 5.5 may be exercised by giving the Purchase Notice at any time during the period (the “Exercise Period”) following the occurrence of, and during the continuance of, any Purchase Event.*]

(c) Any purchase pursuant to this Section 5.5 shall be made on the following terms and conditions:

(1) The purchase shall be for (x) a purchase price (the “Purchase Price”) equal to the sum of (A) in the case of all loans, advances or other similar extensions of credit that constitute First Lien Obligations (including unreimbursed amounts drawn in respect of letters of credit, but excluding the undrawn amount of then outstanding letters of credit), 100% of the principal amount thereof and all accrued and unpaid interest thereon through the date of purchase ([including] [excluding] any acceleration prepayment penalties or premiums), (B) in the case of any Hedge Agreement constituting a First Lien Loan Document, the net aggregate amount then owing thereunder to each Hedge Agreement Provider pursuant to the terms of the respective Hedge Agreement, including without limitation all amounts owing to such Hedge Agreement Provider as a result of the termination (or early termination) thereof (C) in the case of any Designated Cash Management Agreement constituting a First Lien Loan Document, the net aggregate amount then owing to each creditor under the Designated Cash Management Agreement (a “Treasury Management Creditor”) pursuant to the terms of the respective Designated Cash Management Agreement, including without limitation all amounts owing to such Treasury Management Creditor as a result of the termination (or early termination)

thereof, (D) all accrued and unpaid fees, expenses, [indemnities] and other amounts through the date of purchase; and (E) an obligation on the part of the respective Purchasing Creditors (which shall be expressly provided in the assignment documentation described below) to reimburse each issuing lender (or any First Lien Claimholder required to pay same) for all amounts thereafter drawn with respect to any letters of credit constituting First Lien Obligations which remain outstanding after the date of any purchase pursuant to this Section 5.5, together with all facing fees and other amounts which may at any future time be owing to the respective issuing lender with respect to such letters of credit;

(2) The Purchase Price shall be payable in cash on the date of purchase against transfer to the respective Purchasing Creditor or Purchasing Creditors; provided that the Purchase Price in respect of any outstanding letter of credit that remains undrawn on the date of purchase shall be payable in cash as and when such letter of credit is drawn upon (i) first, from the cash collateral account described in clause (c)(3) below, until the amounts contained therein have been exhausted, and (ii) thereafter, directly by the respective Purchasing Creditor or Purchasing Creditors;

(3) The Purchase Price shall be accompanied by a deposit of cash collateral under the sole dominion and control of the First Lien Agent or its designee in an amount equal to [105%] of the sum of the aggregate undrawn amount of all then outstanding letters of credit pursuant to the First Lien Loan Documents and the aggregate facing and similar fees which will accrue thereon through the stated maturity of the letters of credit (assuming no drawings thereon before stated maturity), as security for the respective Purchasing Creditor's or Purchasing Creditors' obligation to pay amounts as provided in preceding clause (c)(1)(y), it being understood and agreed that (x) at the time any facing or similar fees are owing to an issuer with respect to any letter of credit, the First Lien Agent may apply amounts deposited with it as described above to pay same and (y) upon any drawing under any letter of credit, the First Lien Agent shall apply amounts deposited with it as described above to repay the respective unpaid drawing and any customary fees charged by the issuer in connection with such draws. After giving effect to any payment made as described above in this clause (3), those amounts (if any) then on deposit with the First Lien Agent as described in this clause (3) which exceed [105%] of the sum of the aggregate undrawn amount of all then outstanding letters of credit and the aggregate facing and similar fees (to the respective issuers) which will accrue thereon through the stated maturity of the then outstanding letters of credit (assuming no drawings thereon before stated maturity), shall be returned to the respective Purchasing Creditor or Purchasing Creditors (as their interests appear). Furthermore, at such time as all letters of credit have been cancelled, expired or been fully drawn, as the case may be, and after all applications described above have been made, any excess cash collateral deposited as described above in this clause (3) (and not previously applied or released as provided above) shall be returned to the respective Purchasing Creditor or Purchasing Creditors, as their interests appear;

(4) The Purchase Price shall be accompanied by a waiver by the Second Lien Agent (on behalf of itself and the other Second Lien Claimholders) of all claims arising

out of this Agreement and the transactions contemplated hereby as a result of exercising the purchase option contemplated by this Section 5.5;

(5) All amounts payable to the various First Lien Claimholders in respect of the assignments described above shall be distributed to them by the First Lien Agent in accordance with their respective holdings of the various First Lien Obligations;

(6) Such purchase and sale shall be made without recourse and without representation or warranty of any kind by the First Lien Claimholders as to the First Lien Obligations or otherwise, except for representations and warranties as to the following: (a) the amount of the First Lien Obligations being purchased (including as to the principal of and accrued and unpaid interest on such First Lien Obligations, fees and expenses thereof), (b) that the First Lien Claimholders own the First Lien Obligations free and clear of any Liens and (c) each First Lien Claimholder has the full right and power to assign its First Lien Obligations and such assignment has been duly authorized by all necessary corporate action by such First Lien Claimholder.

ALTERNATIVE SUBSECTION (6) MORE FAVORABLE TO FIRST LIEN LENDERS:

[ (6) *Such purchase and sale shall be made without recourse and without any representation or warranty whatsoever by the First Lien Claimholders, whether as to the enforceability of any First Lien Obligation or the validity, enforceability, perfection, priority or sufficiency of any Lien securing, or guarantee or other supporting obligation for, any First Lien Obligation or as to any other matter whatsoever, except the representation and warranty that the transferor owns free and clear of all Liens and encumbrances (other than participation interests not prohibited by the First Lien Credit Agreement, in which case the Purchase Price shall be appropriately adjusted so that the Purchasing Creditor or Purchasing Creditors do not pay amounts represented by any participation interest which remains in effect), and has the right to convey, whatever claims and interests it may have in respect of the First Lien Obligations.*]

(7) Such purchase and sale shall be made pursuant to [the Assignment Agreement (as such term is defined in the First Lien Credit Agreement)] or [an Assignment Agreement substantially in the form attached hereto as Exhibit A (the bracketed provisions therein to be appropriately modified to reflect the terms of the First Lien Documents and the then existing First Lien Obligations)] or [assignment documentation in form and substance reasonably satisfactory to, and prepared by counsel for, the First Lien Agent (with the cost of such counsel to be paid by the respective Purchasing Creditor or Purchasing Creditors)]; it being understood and agreed that the First Lien Agent and each other First Lien Claimholder shall retain all rights to indemnification as provided in the relevant First Lien Loan Documents for all periods prior to any assignment by them pursuant to the provisions of this Section 5.5. If for any reason (other than the gross negligence or willful misconduct of the First Lien Agent), the amount of cash collateral held by the First Lien Agent or its designee pursuant to

preceding clause (a)(3) is at any time less than the full amounts owing with respect to any letter of credit described above (including facing and similar fees) then the respective Purchasing Creditor or Purchasing Creditors shall promptly reimburse the First Lien Agent (who shall pay the respective issuing bank) the amount of deficiency.

(d) The right to exercise the purchase option described in Section 5.5(c) above shall be exercisable and legally enforceable upon at least seven Business Days' prior written notice of exercise (which notice, once given, shall be irrevocable and fully binding on the respective Purchasing Creditor or Purchasing Creditors) given to the First Lien Agent by an Purchasing Creditor. Neither the First Lien Agent nor any other First Lien Claimholder shall have any disclosure obligation to any Purchasing Creditor, the Second Lien Agent or any other Second Lien Claimholder in connection with any exercise of such purchase option.

(e) The obligations of the First Lien Claimholders to sell their respective First Lien Obligations under this Section 5.5 are several and not joint and several. To the extent any First Lien Claimholder (a "Defaulting Creditor") breaches its obligation to sell its First Lien Obligations under this Section 5.5, nothing in this Section 5.5 shall be deemed to require the First Lien Agent or any other First Lien Claimholder to purchase such Defaulting Creditor's First Lien Obligations for resale to the holders of Second Lien Obligations and in all cases, the First Lien Agent and each First Lien Claimholder complying with the terms of this Section 5.5 shall not be deemed to be in default of this Agreement or otherwise be deemed liable for any action or inaction of any Defaulting Creditor; provided that nothing in this clause (e) shall require any Purchasing Creditor to purchase less than all of the First Lien Obligations.

(f) Each Grantor irrevocably consents to any assignment effected to one or more Purchasing Creditors pursuant to this Section 5.5 for purposes of all First Lien Loan Documents and hereby agrees that no further consent from such Grantor shall be required.

(g) If the Second Lien Claimholders elect not to exercise their purchase right under this Section 5.5 (or do not so irrevocably provide notice of such exercise within the required timeframe or close the purchase within the Purchase Period, unless such failure is to due solely to breach by the First Lien Claimholders of this Agreement), the First Lien Claimholders shall have no further obligations pursuant to this Section 5.5 .

(h) The First Lien Claimholders shall not commence any Enforcement Action during the Purchase Period; provided, if , upon expiration of the Purchase Period, the parties have not closed the transaction, the First Lien Claimholders may commence any Enforcement Action in their sole discretion in accordance with the First Lien Credit Documents and this Agreement.

(i) The Purchasing Creditors shall have the right, but not the obligation, to require the First Lien Agent to immediately resign as administrative agent and, if

applicable, collateral agent under the First Lien Loan Document upon the closing of such purchase. Upon such resignation, a new administrative agent and, if applicable, a new collateral agent shall be elected or appointed in accordance with the provisions of the First Lien Loan Documents.

#### ALTERNATIVE SHORT FORM OF PURCHASE RIGHT PROVISION

5.5 Purchase Right. *Without prejudice to the enforcement of the First Lien Claimholders remedies, the First Lien Claimholders agree at any time following a Purchase Event, the First Lien Claimholders will offer the Second Lien Claimholders the option to purchase the entire aggregate amount of outstanding First Lien Obligations (including unfunded commitments under the First Lien Credit Agreement at par, plus, to the extent not included in the definition of “First Lien Obligations” (x) accrued interest, fees and expenses ([including] [excluding] any acceleration prepayment penalties or premiums) and (y) the provision of cash collateral in an amount equal to the undrawn amount of all outstanding letters of credit and similar instruments issued under the First Lien Loan Documents and the prepayment of letter of credit or similar fees to accrue through expiration on all such letters of credit and similar instruments, without warranty or representation or recourse (except for representations and warranties required to be made by assigning lenders pursuant to the Assignment Agreement (as such term is defined in the First Lien Credit Agreement). Such election shall occur by delivery of a notice (a “Purchase Notice”) to the First Lien Agent during the Exercise Period, which Purchase Notice shall be signed by the Second Lien Claimholders offering to make such purchase (the “Purchasing Creditors”) and indicate the percentage of the First Lien Obligations to be purchased by each such Purchasing Creditor (which must equal 100 percent when added to the percentage of First Lien Obligations to be purchased by all other Purchasing Creditors) and (ii) state that (A) it is a Purchase Notice delivered pursuant to Section 5.5 of this Agreement, (B) the Purchasing Creditors are thereby irrevocably offering to purchase all of the First Lien Obligations at the Purchase Price in accordance with this Section 5.5, and (C) the date on which such purchase shall occur (the “Purchase Date”), which date shall not be less than 5 Business Days, nor more than [15] Business Days, after the receipt by the First Lien Agent of the Purchase Notice. This right will be allocated among the Purchasing Creditors in the proportion they mutually agree upon, or, in the absence of agreement, in the ratio that each of the Purchasing Creditor’s percentage share of the Second Lien Obligations bears to the aggregate percentage shares of the Second Lien Obligations held by all Purchasing Creditors. The right to purchase the First Lien Obligations as described in this Section 5.5 may be exercised by giving the Purchase Notice at any time during the period (the “Exercise Period”) commencing on the occurrence of a Purchase Event and ending on the [60<sup>th</sup>] day thereafter or, if earlier, the date that the occurrence giving rise to the Purchase Event is waived, cured or otherwise ceases to exist. Such purchase and sale shall be made pursuant to the Assignment Agreement (as such term is defined in the First Lien Credit Agreement). If the Second Lien Claimholders elect not to exercise their purchase right under this Section 5.5 (or do not so irrevocably provide notice of such exercise within the required timeframe or close the purchase within the Purchase Period, unless such failure is to due solely to breach by the First Lien Claimholders of this Agreement),*

*the First Lien Claimholders shall have no further obligations pursuant to this Section 5.5. The First Lien Claimholders shall not commence any Enforcement Action during the Purchase Period; provided, if , upon expiration of the Purchase Period, the parties have not closed the transaction, the First Lien Claimholders may commence any Enforcement Action in their sole discretion in accordance with the First Lien Credit Documents and this Agreement.*

## **SECTION 6. Insolvency Proceedings.**

### **6.1 Use of Cash Collateral and DIP Financing.**

(a) Until the Discharge of First Lien Obligations has occurred, if the Borrower or any other Grantor shall be subject to any Insolvency Proceeding, the Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, in its capacity as the holder of a Lien on the Collateral, shall not contest, protest or object to, and shall be deemed to have consented to, any use, sale or lease of "cash collateral" (as defined in Section 363(a) of the Bankruptcy Code) if First Lien Agent has<sup>25</sup> consented in writing to such use, sale or lease, provided that (i) Second Lien Agent otherwise retains<sup>26</sup> its Lien on the Collateral, (ii) Second Lien Claimholders shall have the right to seek adequate protection permitted by Section 6.4 and if such adequate protection is not granted, Second Lien Agent shall have the right to object under this Section 6.1 solely on such basis, [and (iii) after taking into account the use of cash collateral on any date, the sum of the then outstanding principal amount of any First Lien Obligations and any DIP Financing shall not exceed the First Lien Cap on such date]<sup>27</sup>. Upon written request from First Lien Agent, Second Lien Agent, in its capacity as the holder of a Lien on the Collateral, shall join any objection to the use, sale or lease of cash collateral if and to the extent such objection is asserted by First Lien Agent<sup>28</sup>.

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<sup>25</sup> See note to Section 6.2 below.

<sup>26</sup> First Lien Claimholders will want no interference with the use of cash collateral, but Second Lien Claimholders will not want to have their other interests "primed" or have their Liens stripped, by reason of the broad concept of "use" of Collateral.

<sup>27</sup> This clause is applicable when the First Lien Cap is tied to a Borrowing Base concept. Consideration should be given as to whether cash collateral objections could be asserted by Second Lien Agent in the event of an amount of collateral diminution which, when added to the First Lien Obligations, would exceed the First Lien Cap.

<sup>28</sup> The market has developed to generally give the First Lien Claimholders the power to compel the Second Lien Claimholders to consent to the diminution of Collateral, in the form of use of cash collateral or permitting additional secured financing even if the First Lien Obligations are sufficiently oversecured that the First Lien Claimholders are otherwise not motivated to police the excess use of

(b) Until the Discharge of First Lien Obligations has occurred, if the Borrower or any other Grantor shall be subject to any Insolvency Proceeding, the Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, in its capacity as the holder of a Lien on the Collateral, shall not contest, protest or object to, and shall be deemed to have consented to, the Borrower or any other Grantor obtaining credit or incurring debt secured by Liens on the Collateral pursuant to Section 364 of the Bankruptcy Code (or similar Bankruptcy Law) (each, a "DIP Financing") if First Lien Agent has consented in writing to such DIP Financing, provided that (i) Second Lien Agent otherwise retains<sup>29</sup> its Lien on the Collateral, and (ii) Second Lien Claimholders shall have the right to seek adequate protection permitted by Section 6.4, and if such adequate protection is not granted, Second Lien Agent shall have the right to object under this Section 6.1 solely on such basis<sup>30</sup>, and (iii) after taking into account the principal amount of such DIP Financing (after giving effect to any Refinancing of First lien Obligations) on any date, the sum of the then outstanding principal amount of any First Lien Obligation and any DIP Financing shall not exceed the First Lien Cap.<sup>31</sup> Upon

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cash collateral or DIP Financing. On the other hand, the market has not similarly developed to give First Lien Claimholders the ability to use the Second Lien Claimholders' rights of adequate protection in order to more effectively prevent the diminution of Collateral. This draft proposes both sets of rights in favor of the First Lien Claimholders.

<sup>29</sup> First Lien Claimholders will want no interference with the use of cash collateral, but Second Lien Claimholders will not want to have their other interests "primed" or have their Liens stripped.

<sup>30</sup> A number of middle-market Intercreditor Agreements include an additional clause that requires that the economic terms of any such DIP Financing are commercially reasonable (typical language might require as a condition to the Second Lien Lenders' consent to the DIP Financing that "the interest rate, fees, advance rates, lending limits and sublimits are commercially reasonable under the circumstances"). In our view this imposes a standard that may be stricter than that imposed by the Bankruptcy Code, and has the potential to create delay and uncertainty. An alternative standard to "commercial reasonableness" is that the DIP Financing must be found to be a proper exercise of the applicable debtor's business judgment. Where unsecured rights are preserved generally, an objection based on an improper exercise of business judgment would be permitted as an objection that could be asserted generally by unsecured creditors and otherwise permitted by Section 6.1 in any case. This would not, however, provide a basis for the Second Lien Lenders to refuse to consent to be primed or to permit the use of cash collateral.

<sup>31</sup> As noted above in the definition of "First Lien Cap", it may be desirable to formulate the cap differently in the context of a DIP Financing. Common approaches include (i) an incremental cushion in the case of a DIP Financing, or (ii) a cap that is the lesser of the First Lien Cap and some cushion over outstanding First Lien Obligations at the commencement of the case.

written request from First Lien Agent, Second Lien Agent, in its capacity as the holder of a Lien on the Collateral, shall join any objection to the use, sale or lease of cash collateral if and to the extent such objection is asserted by First Lien Agent.

(c) [The amount of any customary "carve-out" or other similar administrative priority expense or claim consented to in writing by First Lien Agent to be paid prior to the Discharge of First Lien Obligations (i) shall be deemed to be, for purposes of Section 6.1(a), a use of cash Collateral at the time consented to by First Lien Agent and (ii) shall not be deemed to be, for purposes of Section 6.1(b), a principal amount of DIP Financing at the time consented to by First Lien Agent<sup>32</sup>].

(d) No Second Lien Claimholder may, directly or indirectly, seek to provide DIP Financing to any Borrower or other Grantor secured by Liens equal or senior in priority to the Liens securing any First Lien Obligations [; provided, that if one or more of the First Lien Claimholders do not offer to provide a DIP Financing to the extent permitted under Section 6.1(b), then Second Lien Claimholder may seek to provide such amount of DIP Financing permitted under Section 6.1(b), secured by Liens equal or senior in priority to the Liens securing any First Lien Obligations, and First Lien Claimholders may object thereto.]<sup>33</sup>

(e) [Notwithstanding the foregoing, nothing in this Section 6.1 shall limit or impair the right of the Second Lien Agent to object to (i) any proposed motion regarding DIP Financing or cash collateral to the extent such objection could be asserted in such Insolvency Proceeding of any Grantor by unsecured creditors generally [so long as such objections are not inconsistent with any other term or provision of this Section 6.1 and are not based on the status of Second Lien Agent or any other Second Lien Creditor as the holder of a Lien], or (ii) any DIP Financing (including a DIP Financing

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<sup>32</sup> Some intercreditor agreements attempt to restrict the First Lien Claimholders from consenting to the subordination of the Lien securing First Lien Obligations and, in turn, such agreement often exclude DIP Financing from the scope of such restriction. However, the treatment of "carve-outs" is often omitted or not considered the same as if the First Lien Agent made advances to fund retainers for professionals. This form treats carve-outs the use of Collateral, but not as though they are the same as if being incurred or used as of the date such "carve-out" obligations are incurred. An alternative approach would be to treat administrative carveouts as if they were extensions of credit that will need to be capped. If this approach is taken, additional consideration should be given to the First Lien Cap and the inclusion of additional, incremental amounts in the event of an Insolvency Proceeding, and to the need to reflect clear dollar limits on administrative carveouts in the DIP orders.

<sup>33</sup> First Lien Claimholders may want an absolute bar on Second Lien Claimholders attempting to provide "priming" DIP Financing, while Second Lien Claimholders will generally resist any limitation against DIP Financing due to the ability of third parties to propose the same. A compromise position is bracketed.

proposed by one or more First Lien Claimholders), to the extent that the terms thereof do not meet the requirements of Section 6.1.<sup>34]</sup>

**6.2 Sale of Collateral.** In its capacity as the holder of Lien on the Collateral, the Second Lien Agent on behalf of the Second Lien Claimholders, shall not contest, protest or object to, and shall be deemed to have consented to pursuant to Section 363(f) of the Bankruptcy Code (or similar Bankruptcy Law), a sale, lease, exchange, transfer or other disposition (a "Disposition") of any Collateral free and clear of its Liens or other interests under Section 363 of the Bankruptcy Code (or similar Bankruptcy Law), if the First Lien Agent has consented in writing to such Disposition, provided that (i) the Liens of the Second Lien Claimholders attach to any net proceeds of such Disposition with the same priority and validity as the Liens held by the Second Lien Claimholders on the assets disposed of in such Disposition, and any such Liens shall remain subject to the terms of this Agreement, [(ii) the net cash proceeds of such Disposition that are applied to First Lien Obligations or Second Lien Obligations are applied to permanently reduce the First Lien Obligations pursuant to Section 4.1,<sup>35</sup> or, if not so applied, shall be subject to the objection of Second Lien Agent as to any further use notwithstanding Section 6.1(a), and (iii) the Second Lien Agent and the Second Lien Claimholders shall not be deemed to have waived any right to bid in connection with such Dispositions, and [shall retain] *[not be deemed to have waived]*<sup>36</sup> their rights to credit bid on the Collateral in any such Disposition in accordance with Section 363(k).]<sup>37</sup>

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<sup>34</sup> : The Second Lien Claimholders may seek to preserve unsecured creditor objections to a DIP Financing, which the First Lien Claimholders may expect that the Second Lien Claimholders will not object in any capacity so long as a DIP Financing satisfies the parameters specified in the Intercreditor Agreement. Discuss alternative permitted objections to DIP Financing or cash collateral orders such as: (a) provisions that purport to bind parties to a plan, (b) provisions that compel the sale of Collateral and (c) provisions that are otherwise inconsistent with the Intercreditor Agreement and priorities of the Liens.]

<sup>35</sup> Second Lien Claimholders may seek to preserve rights to object to any proposed sale where liabilities of Grantors are assumed (given that this permits trade debt to leapfrog the Second Lien in terms of priority) or where proceeds are not solely applied to repay First Lien Obligations or Second Lien Obligations. Provisions of this kind may present impediments to sales, present complexities and require careful negotiation and drafting. For example, cure payments in connection with the assumptions and assignment of contracts would need to be carved out, as do DIP Financings (if not included in "First Lien Obligations") and administrative claims entitled to a "carve out" under any adequate protection arrangements.

<sup>36</sup> Second Lien Claimholders may want assurances that they will be permitted to credit bid their claims in any bankruptcy sale. First Lien Claimholders will want the language to merely preserve any rights that the Second Lien Claimholders may have, not assure that they have such rights.

<sup>37</sup> It may be desirable to include a provision that specifies that any credit bid must respect the priorities set forth in the intercreditor agreement, i.e., any credit bid of Second Lien Obligations must contemplate the payment in full in cash of First Lien Obligations (other than Excess First Lien Obligations) on closing of any resulting Disposition. It may also be desirable to include in the Second Lien Credit Agreement or Collateral Documents a provision that gives the Second Lien Agent the right, acting at the direction of the Required Second Lien Lenders, to credit bid the Second Lien Obligations and to designate an entity to receive the assets so acquired, whose equity

Notwithstanding the foregoing, Second Lien Claimholders may raise objections to any Disposition of Collateral that could be raised in an Insolvency Proceeding of a Grantor by unsecured creditors generally *[so long as not otherwise inconsistent with the terms of this Agreement].*<sup>38</sup> *[Upon the First Lien Agent's request, Second Lien Agent, solely in its capacity as the holder of a Lien on Collateral, shall join any objection to any sale of Collateral during an Insolvency Proceeding if and to the extent such objection has been asserted by First Lien Agent.]*<sup>39 40</sup>

**6.3 Relief from the Automatic Stay.** Until the Discharge of First Lien Obligations has occurred, the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, agrees that none of them shall, *[during any Standstill Period,<sup>41</sup>]* seek (or

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is issued to the Second Lien Claimholders or their designees pro rata (subject to a provision effectuating any waterfall of payments, e.g., Second Lien Agent expenses first, etc.)

<sup>38</sup> Second Lien Lenders will generally expect to be permitted to assert any rights they may have to object to dispositions of Collateral that would be available to unsecured creditors in a Bankruptcy proceeding. First Lien Lenders may seek to restrict such rights, or to condition the exercise of such rights on there having been a concession or determination that all or a portion of the Second Lien Obligations are unsecured, arguing that Second Lien Claimholders have the ability to protect themselves through exercise of their buyout rights and that a price for the priority the Second Lien Claimholders enjoy over other creditors is that they must give up all any rights to interfere with Collateral dispositions that the First Lien Claimholders support. The requirement that any such objections must be otherwise consistent with the terms of the intercreditor agreement may be resisted by Second Lien Lenders, particularly where an agreement contains general prohibitions against the Second Lien Lenders interfering with the First Lien Agent's realization on Collateral. An alternative approach is to rely solely on a provision like Section 3.1(e), which generally preserves unsecured creditor rights. This approach can be favorable to the Second Lien, depending on how written, since it then applies to all aspects of the agreement that are not expressly carved out. The First Lien may expect that certain waivers by the Second Lien Claimholders will be unqualified, such as waivers of objections to DIP Financings supported or provided by the First Lien, objections to Liens or claims of the First Lien Claimholders and, where commencement of an involuntary bankruptcy is included in the term "Enforcement Action", the right to initiate or join in an involuntary bankruptcy.

<sup>39</sup> First Lien Lenders may seek to require the Second Lien Agent to actually support objections that the First Lien may have to sales of Collateral and other matters in an Insolvency Proceeding. This is not a usual provision, and many Second Lien Lenders would resist it. To the extent that it is insisted upon, Second Lien Claimholders should consider limiting this undertaking to withholding consent to the applicable disposition of Collateral or filing a pleading indicating support for the First Lien Agent's objections, and also including a requirement that the Second Lien Claimholders be indemnified for any expenses or other losses incurred in complying with this requirement (and that any reimbursement by First Lien Claimholders not add to the amount of priority First Lien Obligations).

<sup>40</sup> In split collateral arrangements (where the first Agent has priority on specified assets, and the second Agent has priority over other specified assets), parties should consider agreeing on a methodology to allocate value received in a Disposition between the different categories of assets.

<sup>41</sup> Second Lien Lenders may seek to retain the right to take action following the Standstill Period (which would then be modified such that it does not extend indefinitely in bankruptcy). First Lien Lenders and Borrowers would generally resist this.

support any other Person seeking) *[during any Standstill Period]* relief from the automatic stay or any other stay in any Insolvency Proceeding in respect of the Collateral, without the prior written consent of the First Lien Agent, *[except to the extent that [any of the First Lien Claimholders (in their capacities as such)] [First Lien Agent] seeks or obtains relief from or modification of the automatic stay or any other stay in any Insolvency Proceeding in respect of Collateral ]**[or unless a motion for adequate protection permitted under Section 6.4 has been denied by the Bankruptcy Court],*<sup>42</sup> *[or oppose any request by First Lien Agent for relief from the automatic stay or any other stay in any Insolvency Proceeding.]*<sup>43</sup>

#### **6.4** Adequate Protection.

(a) The Second Lien Agent, on behalf of itself and the Second Lien Claimholders, agrees that none of them shall contest, protest or object to (or support any other Person contesting or objecting to) (i) any request by the First Lien Agent or the First Lien Claimholders for "adequate protection" (within the meaning of the Bankruptcy Code or any similar Bankruptcy Law); or (ii) any objection by the First Lien Agent or the First Lien Claimholders to any motion, relief, action or proceeding based on the First Lien Agent or the First Lien Claimholders claiming a lack of adequate protection.

(b) Notwithstanding the foregoing provisions in this Section 6.4, in any Insolvency Proceeding:

(i) except as permitted in this Section 6.4, the Second Lien Claimholders may not seek or request adequate protection and may not seek relief from the automatic stay imposed by Section 362 of the Bankruptcy Code (or similar Bankruptcy Law) or other relief based upon a lack of adequate protection<sup>44</sup>;

(ii) *[if the First Lien Claimholders (or any subset thereof) are granted adequate protection in the form of additional Collateral in connection with any motion described in Section 6.1<sup>45</sup>, then]* the Second Lien Agent, on

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<sup>42</sup> First Lien Lenders would prefer the agreement not to seek relief from stay to be unqualified.

<sup>43</sup> Many agreements only require that Second Lien Claimholders not seek relief themselves. More First Lien favorable provisions would go on to preclude the Second Lien Claimholders from opposing relief sought by the First Lien. This clause would operate in conjunction with Section 6.4(a)(2) and could be provided for there as well.

<sup>44</sup> A pro-Second Lien provision would eliminate a general restriction against seeking adequate protection and limit the waivers to cash collateral, DIP Financing and asset sales.

<sup>45</sup> **[Note: Discuss deleting this condition. While common in the marketplace, query why this should be a condition to Second Lien Claimholders obtaining junior replacement Liens on Collateral.]**

behalf of itself and the Second Lien Claimholders, may seek or request adequate protection in the form of a Lien on such additional or replacement Collateral, which Lien will be subordinated to the Liens at any time securing the First Lien Obligations and any DIP Financing (and all Obligations relating thereto) on the same basis as the other Liens securing the Second Lien Obligations are so subordinated to the First Lien Obligations under this Agreement; [and]

(iii) any claim of the Second Lien Claimholders under Section 507(b) of the Bankruptcy Code (or similar Bankruptcy Law) shall be subordinate in right of payment to any claim of the First Lien Claimholders under Section 507(b) of the Bankruptcy Code (or similar Bankruptcy Law); provided, that, subject to Section 6.7, the Second Lien Claimholders shall be deemed to have agreed pursuant to Section 1129(a)(9) of the Bankruptcy Code (or any similar Bankruptcy Law) that any such junior claims may be paid under any plan of reorganization in any form, having a value on the effective date of such plan equal to the allowed amount of such claims<sup>46</sup>]; and

(iv) [so long as the First Lien Agent, on behalf of the First Lien Claimholders, is receiving payment in cash of [all] Post-Petition Claims [consisting of all interest at the applicable rate under the First Lien Loan Documents], the Second Lien Agent, for the benefit of the Second Lien Claimholders may seek and, subject to the terms hereof, retain Post-Petition Claims [consisting of interest at the [non-default][applicable] rate<sup>47</sup>] under the Second Lien Loan Documents (“Second Lien Adequate Protection Payments”). If any Second Lien Secured Party receives Second Lien Adequate Protection Payments and the Discharge of First Lien Obligations has not occurred upon the effective date of any plan or the conclusion or dismissal of any Insolvency Proceeding, then each Second Lien Claimholders shall pay over to the First Lien Agent pursuant to Section 4.2 an amount equal to the lesser of (i) the Second Lien Adequate Protection Payments received by such Second Lien Claimholders and (ii) the amount necessary to cause the Discharge of First Lien Obligations.

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<sup>46</sup> The parties should consider whether the payment of administrative claims arising under Section 507(b) should be paid over to the First Lien Agent as Proceeds of Collateral and be applied to permanently reduce the First Lien Obligations. In the event the First Lien Claimholders seek confirmation of a plan, the right of the Second Lien Claimholders to assert a claim under Section 507(b) may preclude confirmation of a plan. The text sets forth a remedy that would permit the confirmation of the plan so long as the Second Lien Claimholders' 507(b) claim would otherwise be satisfied under a "cram-down"-type test. The parties may wish to consider alternative treatment for 507(b) claims which may include being silent (pro-Second) or subordinating the right to assert 507(b) claims in their entirety until the Discharge of First Lien Obligations.

<sup>47</sup> Second Lien Adequate Protection Payments could include any or all Post-Petition Claims, or other amounts as may be negotiated between the parties.

[Notwithstanding anything herein to the contrary, the First Lien Claimholders shall [not] be deemed to have consented to, and expressly [waive][retain] their rights to object to the payment of Second Lien Adequate Protection Payments.]

**6.5** No Waiver. Subject to Sections 3.1(a) and (d), nothing contained herein shall prohibit or in any way limit the First Lien Agent or any First Lien Claimholder from objecting in any Insolvency Proceeding or otherwise to any action taken by the Second Lien Agent or any of the Second Lien Claimholders, including the seeking by the Second Lien Agent or any Second Lien Claimholders of adequate protection or the asserting by the Second Lien Agent or any Second Lien Claimholders of any of its rights and remedies under the Second Lien Loan Documents or otherwise.

*ALTERNATIVE SUBSECTION 6.5 FAVORABLE TO SECOND LIEN:*

*6.5* No Waiver. *Subject to Section 3.1(c), nothing contained herein shall prohibit or in any way limit the First Lien Agent or any First Lien Claimholder from objecting in any Insolvency Proceeding or otherwise to any action taken by the Second Lien Agent or any of the Second Lien Claimholders, including the seeking by the Second Lien Agent or any Second Lien Claimholders of adequate protection (other than adequate protection permitted under Section 6.4(b)) or the asserting by the Second Lien Agent or any Second Lien Claimholders of any of its rights and remedies under the Second Lien Loan Documents or otherwise.*

**6.6** Avoidance Issues. To the extent any First Lien Claimholder receives payment or any property on account of any First Lien Obligations and such transfer is subsequently invalidated, avoided, declared to be fraudulent or preferential, set aside or otherwise required to be transferred to a trustee, receiver, or the estate of any Borrower or other Grantor (a “**Recovery**”), then, to the extent of such Recovery, such First Lien Obligations intended to have been satisfied by such transfer shall be reinstated as First Lien Obligations from and after the date of such Recovery and the Discharge of First Lien Obligations shall be deemed not to have occurred for all purposes hereunder. If this Agreement shall have been terminated prior to such Recovery, this Agreement shall be reinstated in full force and effect, and such prior termination shall not diminish, release, discharge, impair or otherwise affect the obligations of the parties hereto from such date of reinstatement. [Collateral or proceeds thereof received by the Second Lien Agent or any Second Lien Claimholder after a Discharge of First Lien Obligations and prior to the reinstatement of such First Lien Obligations shall be delivered to the First Lien Agent upon such reinstatement in accordance with Section 4.2.<sup>48</sup>][The Second Lien Claimholders agree that none of them shall be entitled to benefit from any Recovery and that any distribution made to any of them as a result of any Recovery shall be paid over to

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<sup>48</sup> Optional sentence. Second Lien Claimholders will oppose disgorgement of Proceeds of Collateral received at a time when the Discharge of First Lien Obligations had occurred. The parties may negotiate a middle ground where disgorgement is applicable only if demanded within a set time period after payment is received by the Second Lien Claimholders.

First Lien Agent for application to the First Lien Obligations in accordance with Section 4.2.<sup>49]</sup>

**6.7 Reorganization Securities.** Nothing in this Agreement shall in any way prohibit or limit the right of any Second Lien Claimholder to receive and retain any debt or equity securities that are issued by any reorganized debtor pursuant to any plan of reorganization or similar dispositive restructuring plan in connection with any Insolvency Proceeding [; provided, however, that any debt securities received by Second Lien Claimholders on account of any Second Lien Obligations that constitute a "secured claim" within the meaning of Section 506(b) of the Bankruptcy Code (or similar Bankruptcy Law) shall be paid over or otherwise transferred to First Lien Agent for application in accordance with Section 4.2 unless such distribution is made under a plan that is consented to by the affirmative vote of all classes composed of the secured claims of First Lien Claimholders]. If, in any Insolvency Proceeding, debt obligations of the reorganized debtor secured by Liens upon any property of the reorganized debtor are distributed pursuant to a plan of reorganization or similar dispositive restructuring plan, both on account of First Lien Obligations and on account of Second Lien Obligations, then, to the extent the debt obligations distributed on account of the First Lien Obligations and on account of the Second Lien Obligations are secured by Liens upon the same property, the provisions of this Agreement will survive the distribution of such debt obligations pursuant to such plan and will apply with like effect to the Liens securing such debt obligations.<sup>50</sup>

**6.8 Post-Petition Claims.** (a) Neither the Second Lien Agent nor any Second Lien Claimholder shall oppose or seek to challenge any claim by the First Lien Agent or any First Lien Claimholder for allowance or payment in any Insolvency Proceeding of First Lien Obligations consisting of Post-Petition Claims [to the extent of the value of any Collateral securing the First Lien Obligations without regard to the existence of the Lien securing the Second Lien Obligations<sup>51</sup>.]

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<sup>49</sup> Optional sentence. Second Lien Claimholders will object to a pro rata disgorgement of avoidance action proceeds on the grounds that general unsecured creditors would have the right to share in such payments, and that the lien subordination should only pertain to the receipt of Proceeds of Collateral.

<sup>50</sup> There is a hypothetical issue with the fact that this provision covers all debt securities issued with respect to the Second Lien Obligations, in that it is possible that the Second Lien Obligations could be bifurcated into a secured and unsecured component, and that secured debt obligations could be issued with respect to the unsecured component. To the extent that other unsecured creditors also receive the same type of security or the same security, the obligations issued to the Second Lien Claimholders could be treated differently because of this provision. Consider whether this potential should be addressed by carving out debt obligations to the extent issued to any unsecured claim held by the Second Lien Claimholders and, potentially, to the extent such debt obligations are also issued to other creditors holding unsecured claims.

<sup>51</sup> The bracketed language, common in many intercreditor agreement, can be regarded as generally inconsistent with the notion that the parties to the Intercreditor

(b) Neither the First Lien Agent nor any other First Lien Claimholder shall oppose or seek to challenge any claim by the Second Lien Agent or any Second Lien Claimholder for allowance [and any payment permitted under Section 6.4] in any Insolvency Proceeding of Second Lien Obligations consisting of Post-Petition Claims [to the extent of the value of any Collateral securing the Second Lien Obligations after taking into account the amount of the First Lien Obligations.]

**6.9** Waiver. The Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, waives any claim it may hereafter have against any First Lien Claimholder arising out of the election of any First Lien Claimholder of the application of Section 1111(b)(2) of the Bankruptcy Code, and/or out of any cash collateral or financing arrangement or out of any grant of a security interest in connection with the Collateral in any Insolvency Proceeding.

*ALTERNATIVE SUBSECTION 6.9:*

*6.9. Additional Waivers. The Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, waives any claim it may hereafter have against any First Lien Claimholder arising out of the election of any First Lien Claimholder of the application of Section 1111(b)(2) of the Bankruptcy Code. The First Lien Agent, for itself and on behalf of the First Lien Claimholders, waives any claim it may hereafter have against any Second Lien Claimholder arising out of the election of any Second Lien Claimholder of the application of Section 1111(b)(2) of the Bankruptcy Code. The Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, waives any right to assert or enforce any claim under Section 506(c) of the Bankruptcy Code (or similar Bankruptcy Law) as against the First Lien Claimholders or any of the Collateral to the extent securing the First Lien Obligations.*

**6.10** Separate Grants of Security and Separate Classification. The Second Lien Agent, for itself and on behalf of the Second Lien Claimholders, and the First Lien Agent for itself and on behalf of the First Lien Claimholders, acknowledges and agrees that (i) the grants of Liens pursuant to the First Lien Collateral Documents and the Second Lien Collateral Documents constitute two separate and distinct grants of Liens and (ii) because of, among other things, their differing rights in the Collateral, the Second Lien Obligations, to the extent deemed to be "secured claims" within the meaning of Section 506(b) of the Bankruptcy Code (or any similar Bankruptcy Law), are fundamentally different from the First Lien Obligations and must be separately classified in any plan of reorganization in an Insolvency Proceeding. The Second Lien Claimholders shall not seek in any Insolvency Proceeding to be treated as part of the same class of creditors as the First Lien Claimholders and shall not oppose or contest any

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Agreement should not interfere with each others' respective claims against the Grantors.

pleading by the First Lien Claimholders seeking separate classification of their respective secured claims<sup>52</sup>.

**6.11 Effectiveness in Insolvency Proceedings.** This Agreement, which the parties hereto expressly acknowledge is a “subordination agreement” under Section 510(a) of the Bankruptcy Code, shall be effective before, during and after the commencement of an Insolvency Proceeding. All references in this Agreement to any Grantor shall include such Person as a debtor-in-possession and any receiver or trustee for such Person in any Insolvency Proceeding.

OPTIONAL PROVISION FAVORABLE TO FIRST LIEN LENDERS:

[ 6.12 Expense Claims. ]

**SECTION 7. Reliance; Waivers; Etc.**

**7.1 Reliance.** Other than any reliance on the terms of this Agreement, the First Lien Agent, on behalf of itself and the First Lien Claimholders under its First Lien Loan Documents, acknowledges that it and such First Lien Claimholders have, independently and without reliance on the Second Lien Agent or any Second Lien Claimholders, and based on documents and information deemed by them appropriate, made their own credit analysis and decision to enter into such First Lien Loan Documents and be bound by the terms of this Agreement and they will continue to make their own credit decision in taking or not taking any action under the First Lien Loan Documents or this Agreement. The Second Lien Agent, on behalf of itself and the Second Lien Claimholders, acknowledges that it and the Second Lien Claimholders have, independently and without reliance on the First Lien Agent or any First Lien Claimholder, and based on documents and information deemed by them appropriate, made their own credit analysis and decision to enter into each of the Second Lien Loan Documents and be bound by the terms of this Agreement and they will continue to make their own credit decision in taking or not taking any action under the Second Lien Loan Documents or this Agreement.

**7.2 No Warranties or Liability.** The First Lien Agent, on behalf of itself and the First Lien Claimholders under the First Lien Loan Documents, acknowledges and agrees that each of the Second Lien Agent and the Second Lien

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<sup>52</sup> Many intercreditor agreements contain extensive provisions relating to the treatment of distributions in the event that the secured claims of the First Lien Claimholders and the Second Lien Claimholders are classified in the same class. The Task Force believes that those provisions are generally unnecessary when the Liens are granted pursuant to separate granting clauses and are often set forth in separate security documents. Consideration should be given to additional language in the event that the Liens are granted under the same loan documents and may not be set forth as separate granting clauses. **[insert suggested additional language?]**

Claimholders have made no express or implied representation or warranty, including with respect to the execution, validity, legality, completeness, collectibility or enforceability of any of the Second Lien Loan Documents, the ownership of any Collateral or the perfection or priority of any Liens thereon. Except as otherwise provided herein, the Second Lien Claimholders will be entitled to manage and supervise their respective loans and extensions of credit under the Second Lien Loan Documents in accordance with law and as they may otherwise, in their sole discretion, deem appropriate. Except as otherwise provided herein, the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, acknowledges and agrees that the First Lien Agent and the First Lien Claimholders have made no express or implied representation or warranty, including with respect to the execution, validity, legality, completeness, collectibility or enforceability of any of the First Lien Loan Documents, the ownership of any Collateral or the perfection or priority of any Liens thereon. Except as otherwise provided herein, the First Lien Claimholders will be entitled to manage and supervise their respective loans and extensions of credit under their respective First Lien Loan Documents in accordance with law and as they may otherwise, in their sole discretion, deem appropriate. The Second Lien Agent and the Second Lien Claimholders shall have no duty to the First Lien Agent or any of the First Lien Claimholders, and the First Lien Agent and the First Lien Claimholders shall have no duty to the Second Lien Agent or any of the Second Lien Claimholders, to act or refrain from acting in a manner which allows, or results in, the occurrence or continuance of an Event of Default or default under any agreements with the Borrower or any other Grantor (including the First Lien Loan Documents and the Second Lien Loan Documents), regardless of any knowledge thereof which they may have or be charged with.

### **7.3 No Waiver of Lien Priorities.**

(a) No right of the First Lien Claimholders, the First Lien Agent, the Control Agent or any of them to enforce any provision of this Agreement or any First Lien Loan Document shall at any time in any way be prejudiced or impaired by any act or failure to act on the part of the Borrower or any other Grantor or by any act or failure to act by any First Lien Claimholder or the First Lien Agent, or the Control Agent, or by any noncompliance by any Person with the terms, provisions and covenants of this Agreement, any of the First Lien Loan Documents or any of the Second Lien Loan Documents, regardless of any knowledge thereof which the First Lien Agent or the First Lien Claimholders, or the Control Agent, or any of them, may have or be otherwise charged with.

(b) Without in any way limiting the generality of the foregoing paragraph (but subject to the rights of the Borrower and the other Grantors under the First Lien Loan Documents and subject to the provisions of Section 5.3(a)), the First Lien Claimholders, the First Lien Agent the Control Agent, and any of them may, at any time and from time to time in accordance with the First Lien Loan Documents and/or applicable law, without the consent of, or notice to, the Second Lien Agent or any Second Lien Claimholders, without incurring any liabilities to the Second Lien Agent or any Second Lien Claimholders and without impairing or releasing the Lien priorities and other benefits provided in this Agreement (even if any right of subrogation or other right or remedy of

the Second Lien Agent or any Second Lien Claimholders is affected, impaired or extinguished thereby) do any one or more of the following:

(1) change the manner, place or terms of payment or change or extend the time of payment of, or amend, renew, exchange, increase or alter, the terms of any of the First Lien Obligations or any Lien on any First Lien Collateral or guaranty thereof or any liability of the Borrower or any other Grantor, or any liability incurred directly or indirectly in respect thereof (including any increase in or extension of the First Lien Obligations, without any restriction as to the tenor or terms of any such increase or extension) or otherwise amend, renew, exchange, extend, modify or supplement in any manner any Liens held by the First Lien Agent or any of the First Lien Claimholders, the First Lien Obligations or any of the First Lien Loan Documents; provided that any such increase in the First Lien Obligations shall not increase the sum of the Indebtedness constituting principal under the First Lien Credit Agreement and the face amount of any letters of credit issued under the First Lien Credit Agreement and not reimbursed to an amount in excess of the First Lien Cap;

(2) sell, exchange, release, surrender, realize upon, enforce or otherwise deal with in any manner and in any order any part of the First Lien Collateral or any liability of the Borrower or any other Grantor to the First Lien Claimholders or the First Lien Agent, or any liability incurred directly or indirectly in respect thereof;

(3) settle or compromise any First Lien Obligation or any other liability of the Borrower or any other Grantor or any security therefor or any liability incurred directly or indirectly in respect thereof and apply any sums by whomsoever paid and however realized to any liability (including the First Lien Obligations) in any manner or order; and

(4) exercise or delay in or refrain from exercising any right or remedy against the Borrower or any security or any other Grantor or any other Person, elect any remedy and otherwise deal freely with the Borrower, any other Grantor or any First Lien Collateral and any security and any guarantor or any liability of the Borrower or any other Grantor to the First Lien Claimholders or any liability incurred directly or indirectly in respect thereof.

OPTIONAL ADDITIONS TO SECTION 7.3(b):

*[(5) take or fail to take any Lien securing the First Lien Obligations or any other collateral security for any First Lien Obligations or take or fail to take any action which may be necessary or appropriate to ensure that any Lien securing First Lien Obligations or any other Lien upon any property is duly enforceable or perfected or entitled to priority as against any other Lien or to ensure that any Proceeds of any property subject to any Lien are applied to the payment of any First Lien Obligation or any Obligation secured thereby;] or*

*[(6) otherwise release, discharge or permit the lapse of any or all Liens securing the First Lien Obligations or any other Liens upon any property at any time securing any First Lien Obligations.]*

(c) Except as otherwise expressly provided herein, the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, also agrees that the Control Agent, First Lien Claimholders and the First Lien Agent shall have no liability to the Second Lien Agent or any Second Lien Claimholders, and the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, hereby waives all claims against any First Lien Claimholder or the First Lien Agent, arising out of any and all actions which the First Lien Claimholders or the First Lien Agent may take or permit or omit to take with respect to:

- (1) the First Lien Loan Documents;
- (2) the collection of the First Lien Obligations; or
- (3) the foreclosure upon, or sale, liquidation or other disposition of, any First Lien Collateral.

The Second Lien Agent, on behalf of itself and the Second Lien Claimholders, agrees that the Control Agent, the First Lien Claimholders and the First Lien Agent have no duty to them in respect of the maintenance or preservation of the First Lien Collateral, the First Lien Obligations or otherwise.

(d) Until the Discharge of First Lien Obligations, the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, agrees not to assert and hereby waives, to the fullest extent permitted by law, any right to demand, request, plead or otherwise assert or otherwise claim the benefit of, any marshalling, appraisal, valuation or other similar right that may otherwise be available under applicable law with respect to the Collateral or any other similar rights a junior secured creditor may have under applicable law.

**7.4 Obligations Unconditional.** All rights, interests, agreements and obligations of the Control Agent, the First Lien Agent and the First Lien Claimholders and the Second Lien Agent and the Second Lien Claimholders, respectively, hereunder shall remain in full force and effect irrespective of:

(a) any lack of validity or enforceability of any First Lien Loan Documents or any Second Lien Loan Documents or any setting aside or avoidance of any Lien;

(b) except as otherwise expressly set forth in this Agreement, any change in the time, manner or place of payment of, or in any other terms of, all or any of the First Lien Obligations or Second Lien Obligations, or any amendment or waiver or other modification, including any increase in the amount thereof, whether by course of conduct or otherwise, of the terms of any First Lien Loan Document or any Second Lien Loan Document;

(c) except as otherwise expressly set forth in this Agreement, any exchange of any security interest in any Collateral or any other collateral, or any amendment, waiver or other modification, whether in writing or by course of conduct or otherwise, of all or any of the First Lien Obligations or Second Lien Obligations or any guaranty thereof;

(d) the commencement of any Insolvency Proceeding in respect of the Borrower or any other Grantor; or

(e) any other circumstances which otherwise might constitute a defense available to, or a discharge of, the Borrower or any other Grantor in respect of the First Lien Agent, the First Lien Obligations, any First Lien Claimholder, the Second Lien Agent, the Second Lien Obligations or any Second Lien Claimholder in respect of this Agreement.

OPTIONAL ADDITIONAL PROVISION:

**7.5** Certain Notices.

(a) *Promptly upon the satisfaction of the conditions set forth in clauses (a), (b), (c) and (d) of the definition of Discharge of First Lien Obligations, the First Lien Agent shall deliver written notice confirming same to the Second Lien Agent provided that the failure to give any such notice shall not result in any liability of the First Lien Agent or the First Lien Claimholders hereunder or in the modification, alteration, impairment, or waiver of the rights of any party hereunder.*

(b) *Promptly upon (or as soon as practicable following) the commencement by the First Lien Agent of any enforcement action or the exercise of any remedy with respect to any Collateral (including by way of a public or private sale of Collateral), the First Lien Agent shall notify the Second Lien Agent of such action; provided that the failure to give any such notice shall not result in any liability of the First Lien Agent or the First Lien Claimholders hereunder or in the modification, alteration, impairment, or waiver of the rights of any party hereunder.]*

**SECTION 8. Miscellaneous.**

**8.1** Conflicts. In the event of any conflict between the provisions of this Agreement and the provisions of the First Lien Loan Documents or the Second Lien Loan Documents, the provisions of this Agreement shall govern and control.

**8.2** Effectiveness; Continuing Nature of this Agreement; Severability...  
This Agreement shall become effective when executed and delivered by the parties hereto. This is a continuing agreement of lien subordination and the First Lien Claimholders may continue, at any time and without notice to the Second Lien Agent or any Second Lien Claimholder subject to the Second Lien Loan Documents, to extend credit and other financial accommodations and lend monies to or for the benefit of the

Borrower or any Grantor constituting First Lien Obligations in reliance hereof. The Second Lien Agent, on behalf of itself and the Second Lien Claimholders, hereby waives any right it may have under applicable law to revoke this Agreement or any of the provisions of this Agreement. The terms of this Agreement shall survive, and shall continue in full force and effect, in any Insolvency Proceeding. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall not invalidate the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. All references to the Borrower or any other Grantor shall include the Borrower or such Grantor as debtor and debtor-in-possession and any receiver or trustee for the Borrower or any other Grantor (as the case may be) in any Insolvency Proceeding. This Agreement shall terminate and be of no further force and effect:

(a) with respect to the First Lien Agent, the First Lien Claimholders and the First Lien Obligations, the date of Discharge of First Lien Obligations, subject to the rights of the First Lien Claimholders under Section 6.5; and

(b) with respect to the Second Lien Agent, the Second Lien Claimholders and the Second Lien Obligations, upon the later of (1) the date upon which the obligations under the Second Lien Credit Agreement terminate if there are no other Second Lien Obligations outstanding on such date and (2) if there are other Second Lien Obligations outstanding on such date, the date upon which such Second Lien Obligations terminate.

**8.3** Amendments; Waivers. No amendment, modification or waiver of any of the provisions of this Agreement by the Second Lien Agent or the First Lien Agent shall be deemed to be made unless the same shall be in writing signed on behalf of each party hereto or its authorized agent and each waiver, if any, shall be a waiver only with respect to the specific instance involved and shall in no way impair the rights of the parties making such waiver or the obligations of the other parties to such party in any other respect or at any other time. Notwithstanding the foregoing, the Borrower shall not have any right to consent to or approve any amendment, modification or waiver of any provision of this Agreement except to the extent its rights are directly affected.

**8.4** Information Concerning Financial Condition of the Borrower and its Subsidiaries. The Control Agent, the First Lien Agent and the First Lien Claimholders, on the one hand, and the Second Lien Claimholders and the Second Lien Agent, on the other hand, shall each be responsible for keeping themselves informed of (a) the financial condition of the Borrower and its Subsidiaries and all endorsers and/or guarantors of the First Lien Obligations or the Second Lien Obligations and (b) all other circumstances bearing upon the risk of nonpayment of the First Lien Obligations or the Second Lien Obligations. The First Lien Agent, the Control Agent and the First Lien Claimholders shall have no duty to advise the Second Lien Agent or any Second Lien Claimholder of information known to it or them regarding such condition or any such circumstances or otherwise. In the event the First Lien Agent, the Control Agent, or any of the First Lien Claimholders, in its or their sole discretion, undertakes at any time or

from time to time to provide any such information to the Second Lien Agent or any Second Lien Claimholder, it or they shall be under no obligation:

(a) to make, and the First Lien Agent, the Control Agent, and the First Lien Claimholders shall not make, any express or implied representation or warranty, including with respect to the accuracy, completeness, truthfulness or validity of any such information so provided;

(b) to provide any additional information or to provide any such information on any subsequent occasion;

(c) to undertake any investigation; or

(d) to disclose any information, which pursuant to accepted or reasonable commercial finance practices, such party wishes to maintain confidential or is otherwise required to maintain confidential.

**8.5 Subrogation.** With respect to the value of any payments or distributions in cash, property or other assets that any of the Second Lien Claimholders or the Second Lien Agent pays over to the First Lien Agent or the First Lien Claimholders under the terms of this Agreement, the Second Lien Claimholders and the Second Lien Agent shall be subrogated to the rights of the First Lien Agent and the First Lien Claimholders; provided that, the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, hereby waives all such rights of subrogation it may acquire as a result of any payment hereunder until the Discharge of First Lien Obligations has occurred. The Borrower acknowledges and agrees that the value of any payments or distributions in cash, property or other assets received by the Second Lien Agent or the Second Lien Claimholders that are paid over to the First Lien Agent or the First Lien Claimholders pursuant to this Agreement shall not reduce any of the Second Lien Obligations.

**8.6 Application of Payments.** All payments received by the First Lien Agent or the First Lien Claimholders may be applied, reversed and reapplied, in whole or in part, to such part of the First Lien Obligations provided for in the First Lien Loan Documents. The Second Lien Agent, on behalf of itself and the Second Lien Claimholders, assents to any extension or postponement of the time of payment, subject to Section 5.3(a)(3), of the First Lien Obligations or any part thereof and to any other indulgence with respect thereto, to any substitution, exchange or release of any security which may at any time secure any part of the First Lien Obligations and to the addition or release of any other Person primarily or secondarily liable therefor.

**8.7 SUBMISSION TO JURISDICTION; WAIVERS.** (a) ALL JUDICIAL PROCEEDINGS BROUGHT AGAINST ANY PARTY ARISING OUT OF OR RELATING HERETO MAY BE BROUGHT IN ANY STATE OR FEDERAL COURT OF COMPETENT JURISDICTION IN THE STATE, COUNTY AND CITY OF [NEW YORK]. BY EXECUTING AND DELIVERING THIS AGREEMENT, EACH PARTY, FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES, IRREVOCABLY:

**(1) ACCEPTS GENERALLY AND UNCONDITIONALLY THE NONEXCLUSIVE JURISDICTION AND VENUE OF SUCH COURTS;**

**(2) WAIVES ANY DEFENSE OF FORUM NON CONVENIENS;**

**(3) 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 THE APPLICABLE PARTY AT ITS ADDRESS PROVIDED IN ACCORDANCE WITH SECTION 8.8; AND**

**(4) AGREES THAT SERVICE AS PROVIDED IN CLAUSE (3) ABOVE IS SUFFICIENT TO CONFER PERSONAL JURISDICTION OVER THE APPLICABLE PARTY IN ANY SUCH PROCEEDING IN ANY SUCH COURT, AND OTHERWISE CONSTITUTES EFFECTIVE AND BINDING SERVICE IN EVERY RESPECT.**

**(b) EACH OF THE PARTIES HERETO HEREBY AGREES TO WAIVE ITS RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING HEREUNDER. 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 HEREOF, 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 ITS 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 SECTION 8.7(b) AND EXECUTED BY EACH OF THE PARTIES HERETO), AND THIS WAIVER SHALL APPLY TO ANY SUBSEQUENT AMENDMENTS, RENEWALS, SUPPLEMENTS OR MODIFICATIONS HERETO. IN THE EVENT OF LITIGATION, THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.**

**(c) EACH OF THE PARTIES HERETO WAIVES ANY RIGHT IT MAY HAVE TO TRIAL BY JURY IN RESPECT OF ANY**

**LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER FIRST LIEN LOAN DOCUMENT OR SECOND LIEN LOAN DOCUMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, VERBAL OR WRITTEN STATEMENT OR ACTION OF ANY PARTY HERETO.**

**8.8** Notices. All notices to the Second Lien Claimholders and the First Lien Claimholders permitted or required under this Agreement shall also be sent to the Second Lien Agent and the First Lien Agent, respectively. Unless otherwise specifically provided herein, any notice hereunder shall be in writing and may be personally served, telexed 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 and signed for against receipt thereof, upon receipt of telefacsimile or telex, or three Business Days after depositing it in the United States mail with postage prepaid and properly addressed. For the purposes hereof, the addresses of the parties hereto shall be as set forth below each party's name on the signature pages hereto, or, as to each party, at such other address as may be designated by such party in a written notice to all of the other parties.

**8.9** Further Assurances. The First Lien Agent, on behalf of itself and the First Lien Claimholders under the First Lien Loan Documents, and the Second Lien Agent, on behalf of itself and the Second Lien Claimholders under the Second Lien Loan Documents, and the Borrower, agree that each of them shall take such further action and shall execute and deliver such additional documents and instruments (in recordable form, if requested) as the First Lien Agent or the Second Lien Agent may reasonably request to effectuate the terms of and the Lien priorities contemplated by this Agreement.

**8.10** APPLICABLE LAW. . THIS AGREEMENT, AND ANY CLAIM OR CONTROVERSY RELATING TO THE SUBJECT MATTER HEREOF WHETHER SOUNDING IN CONTRACT LAW OR TORT LAW, SHALL BE GOVERNED BY, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAW OF THE STATE OF THE LAWS OF THE STATE OF [NEW YORK] WITHOUT REGARD TO CONFLICT OF LAWS PRINCIPLES THEREOF [(INCLUDING SECTIONS 5-1401 AND 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW)].

**8.11** Binding on Successors and Assigns. This Agreement shall be binding upon the First Lien Agent, the First Lien Claimholders, the Control Agent, the Second Lien Agent, the Second Lien Claimholders and their respective successors and assigns. If either of the First Lien Agent or the Second Lien Agent resigns or is replaced pursuant to the First Lien Credit Agreement or the Second Lien Credit Agreement, as applicable, its successor shall be deemed to be a party to this Agreement and shall have all the rights of, and be subject to all the obligations of, this Agreement. Notwithstanding any other provision of this Agreement, it is acknowledged and agreed that this provision shall not be assignable to any Person except as expressly contemplated above, and that no party is a third party beneficiary hereof. Without limitation, no provision of this

Agreement shall inure to the benefit of a trustee, debtor-in-possession, creditor trust or any other representative of any estate or creditors of the Borrower or any other Grantor, including where such estate or creditor representative is the beneficiary of any Liens securing any Collateral by virtue of any avoidance of such Liens in any Insolvency Proceeding.

**8.12 Specific Performance** Each of the First Lien Agent and the Second Lien Agent may demand specific performance of this Agreement. The First Lien Agent, on behalf of itself and the First Lien Claimholders under the First Lien Loan Documents, and the Second Lien Agent, on behalf of itself and the Second Lien Claimholders, hereby irrevocably waive any defense based on the adequacy of a remedy at law and any other defense which might be asserted to bar the remedy of specific performance in any action which may be brought by the First Lien Agent or the First Lien Claimholders or the Second Lien Agent or the Second Lien Claimholders, as the case may be.

**8.13 Headings**. Section 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.

**8.14 Counterparts**. This Agreement may be executed in counterparts (and by different parties hereto in different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. Delivery of an executed counterpart of a signature page of this Agreement or any document or instrument delivered in connection herewith by telecopy shall be effective as delivery of a manually executed counterpart of this Agreement or such other document or instrument, as applicable.

**8.15 Authorization**.. By its signature, each Person executing this Agreement on behalf of a party hereto represents and warrants to the other parties hereto that it is duly authorized to execute this Agreement.

**8.16 No Third Party Beneficiaries**. This Agreement and the rights and benefits hereof shall inure to the benefit of each of the parties hereto and its respective successors and assigns and shall inure to the benefit of each of the First Lien Claimholders and the Second Lien Claimholders. Nothing in this Agreement shall impair, as between the Borrower and the other Grantors and the First Lien Agent and the First Lien Claimholders, or as between the Borrower and the other Grantors and the Second Lien Agent and the Second Lien Claimholders, the obligations of the Borrower and the other Grantors to pay principal, interest, fees and other amounts as provided in the First Lien Loan Documents and the Second Lien Loan Documents, respectively.

**8.17 Provisions Solely to Define Relative Rights**. The provisions of this Agreement are and are intended solely for the purpose of defining the relative rights of the First Lien Agent and the First Lien Claimholders on the one hand and the Second Lien Agent and the Second Lien Claimholders on the other hand. None of the Borrower, any other Grantor or any other creditor thereof shall have any rights hereunder and

neither the Borrower nor any Grantor may rely on the terms hereof. Nothing in this Agreement is intended to or shall impair the obligations of the Borrower or any other Grantor, which are absolute and unconditional, to pay the First Lien Obligations and the Second Lien Obligations as and when the same shall become due and payable in accordance with their terms.

IN WITNESS WHEREOF, the parties hereto have executed this Intercreditor Agreement as of the date first written above.

**First Lien Agent:**

**[NAME OF COLLATERAL AGENT],**  
as First Lien Agent,

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

**[NOTICE ADDRESS]**

**Control Agent:**

**[NAME OF CONTROL AGENT],**  
as Control Agent

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

**[NOTICE ADDRESS]**

**First Lien Lenders:**

**[NAME OF FIRST LIEN LENDER],**

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

**[NOTICE ADDRESS]**

**[NAME OF FIRST LIEN LENDER],**

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

**[NOTICE ADDRESS]**

**Second Lien Agent:**

**[NAME OF COLLATERAL AGENT],**  
as Second Lien Agent

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

**[NOTICE ADDRESS]**

**Second Lien Lenders:**

**[NAME OF SECOND LIEN LENDER],**

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

**[NOTICE ADDRESS]**

**[NAME OF SECOND LIEN LENDER],**

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

**[NOTICE ADDRESS]**

**Acknowledged and Agreed to by:**

**[THE BORROWER]**

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

**[NOTICE ADDRESS]**

**[OTHER GRANTORS]**