

Court File No. CV-09-8122-00CL

**Indalex Limited**  
**Indalex Holdings (B.C.) Ltd.**  
**6326765 Canada Inc. and**  
**Novar Inc.**

**THIRD REPORT OF THE MONITOR**  
**May 11, 2009**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
INDALEX LIMITED  
INDALEX HOLDINGS (B.C.) LTD.  
6326765 CANADA INC. and  
NOVAR INC.

**THIRD REPORT TO THE COURT  
SUBMITTED BY FTI CONSULTING CANADA ULC  
IN ITS CAPACITY AS MONITOR**

**INTRODUCTION**

1. On April 3, 2009, Indalex Limited ("**Indalex**"), Indalex Holdings (B.C.) Ltd. ("**Indalex BC**"), 6326765 Canada Inc. ("**632**") and Novar Inc. ("**Novar**") (collectively, the "**Applicants**") made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and an Initial Order (the "**Initial Order**") was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granting, *inter alia*, a stay of proceedings against the Applicants until May 1, 2009 (the "**Stay Period**"), and appointing FTI Consulting Canada ULC as monitor ("**FTI Canada**" or the "**Monitor**"). The proceedings commenced by the Applicants under the CCAA will be referred to herein as the "**CCAA Proceedings**".
2. On April 8, 2009, the Honourable Mr. Justice Morawetz granted the Amended & Restated Initial Order which, *inter alia*, approved the DIP Credit Agreement (as defined in paragraph 33 of the Amended & Restated Initial Order).

3. On April 22, 2009, the Honourable Mr. Justice Morawetz granted an Order which, *inter alia* extended the Stay Period to June 26, 2009, and approved the Marketing Process.
4. Indalex's parent is Indalex Holding Corp. ("**Indalex Holding**"), which is a wholly-owned subsidiary of Indalex Holdings Finance, Inc. ("**Indalex Finance**"). Indalex BC, 632 and Novar are wholly owned subsidiaries of Indalex. Collectively, Indalex Finance and its affiliates (the "**Indalex Group**") is the second largest aluminium extruder in North America.
5. On March 20, 2009, Indalex Holding, Indalex Finance, Indalex Inc., Caradon Lebanon, Inc. and Dolton Aluminum Company, Inc. (collectively, the "**US Debtors**") commenced proceedings (the "**Ch.11 Proceedings**") under chapter 11 of the *United States Bankruptcy Code* (the "**USBC**") in the United States Bankruptcy Court, District of Delaware (the "**US Court**"). The case has been assigned to Judge Walsh.
6. The purpose of this report is to inform the Court on the following:
  - (a) The final approval of the DIP Credit Agreement by the US Court;
  - (b) The receipts and disbursements of the Applicants for the period April 3, 2009, to May 1, 2009;
  - (c) The progress of the Marketing Process;
  - (d) The Applicants' request for certain amendments to the Amended & Restated Initial Order and the Monitor's recommendation thereon; and
  - (e) The Applicants' request for approval of a cross-border protocol (the "**Cross-Border Protocol**") and the Monitor's recommendation thereon.

7. In preparing this report, the Monitor has relied upon unaudited financial information of the Applicants, the Applicants' books and records, certain financial information prepared by the Applicants and discussions with the Applicants' management. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information. Accordingly, the Monitor expresses no opinion or other form of assurance on the information contained in this report or relied on in its preparation. Future oriented financial information reported or relied on in preparing this report is based on management's assumptions regarding future events; actual results may vary from forecast and such variations may be material.
8. Unless otherwise stated, all monetary amounts contained herein are expressed in United States Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the Amended & Restated Initial Order or the Monitor's Second Report.

#### **FINAL APPROVAL OF THE DIP CREDIT AGREEMENT BY THE US COURT**

9. As stated in the Monitor's Second Report, on April 9, 2009, the US Court entered an interim order approving the DIP Credit Agreement (the "**DIP Interim US Order**"). April 27, 2009, was set as the hearing date for the final order.
10. A number of objections were filed in the Ch. 11 Proceedings in respect of the DIP Credit Agreement. The US Debtors and the DIP Lenders were able to resolve all of these objections without any material change to the DIP Credit Agreement, agreeing to:
  - (a) An increase in the limit on the fees of the unsecured creditors' committee (the "Creditors' Committee") to be paid by the US Debtors from \$250,000 to \$300,000;

- (b) A waiver of the DIP Lenders right to receive a lien on Avoidance Actions and a restriction on receiving a super-priority claim on Avoidance Action Proceeds only to the extent of the amount outstanding under the DIP Credit Agreement less the amount of the Prepetition obligations; and
  - (c) An increase in the limit of the amount to be paid by the US Debtors in respect of fees and expenses of professionals retained by the Creditors' Committee to investigate claims against pre-petition lenders from \$50,000 to \$175,000.
11. An Amended Certification of Counsel regarding the final order approving the DIP Credit Agreement (the "**Final US DIP Order**") was filed on May 1, 2009. A copy of the Amended Certification of Counsel, which includes the Final US DIP Order and a black-line against the DIP Interim US Order, is attached hereto as Appendix A.

**RECEIPTS & DISBURSEMENTS TO MAY 1, 2009**

12. The Applicants' actual cash flow on a consolidated basis for the period April 3, 2009, to May 1, 2009, was approximately \$968,000 better than the April 7 Forecast (as defined in the Monitor's First Report) as summarized below:

	Forecast	Actual	Variance
	\$000	\$000	\$000
<b>Receipts:</b>			
Accounts Receivable	17,388	14,683	(2,705)
Other	354	46	(308)
<b>Total Receipts</b>	<b>17,742</b>	<b>14,728</b>	<b>(3,014)</b>
<b>Disbursements:</b>			
Raw Materials - Metals	11,654	8,562	3,092
Raw Materials - Other Materials	487	427	60
Payroll	1,589	1,793	(204)
Benefits	578	546	32
Operating Expenses	2,023	1,874	149
GST	354	164	190
Capex - Tool & Die	211	104	108
Bank Fees & Interest	240	37	203
Legal & Professional Fees	490	139	351
<b>Total Disbursements</b>	<b>17,627</b>	<b>13,646</b>	<b>3,981</b>
<b>Excess of Receipts over Disbursements</b>	<b>115</b>	<b>1,083</b>	<b>968</b>
<b>Pre-Filing Facility Roll-Up:</b>			
Balance b/f	21,361	21,361	0
Collections	(17,742)	(14,728)	3,014
<b>Balance c/f</b>	<b>3,619</b>	<b>6,633</b>	<b>3,014</b>
<b>DIP Facility:</b>			
Balance b/f	0	0	0
Advances	17,627	14,666	(2,961)
Repayments	0	0	0
<b>Balance c/f</b>	<b>17,627</b>	<b>14,666</b>	<b>(2,961)</b>
Margin Availability	21,370	21,615	245
Total Senior Secured Borrowings	(21,247)	(21,299)	(52)
<b>Excess/(Shortfall) Availability</b>	<b>123</b>	<b>316</b>	<b>192</b>

13. Explanations for the key variances in actual receipts and disbursements as compared to the April 7 Forecast are as follows:

- (a) Accounts receivable collections were lower than forecast due to a slow-down in collections immediately after filing that was greater than expected. This is believed to be a timing difference and the Applicants are being proactive in collection efforts;
- (b) The adverse variance in Other Collections is a timing difference in respect of GST refund collections;

- (c) The positive variance in Raw Material - Metals arose in part as a result of the time it took to stabilize supply arrangements immediately after the CCAA filing and in part due to availability constraints; and
  - (d) Other variances are primarily timing differences that are expected to reverse in future periods.
14. Pursuant to the DIP Credit Agreement, the Applicants and the US Debtors are required to prepare and present to the DIP Lenders a revised cash flow forecast by no later than May 15, 2009. The Applicants are in the process of finalizing the revised forecast and have informed the Monitor that it will be filed with the Court in the week ending May 22, 2009.

#### **THE PROGRESS OF THE MARKETING PROCESS**

15. Jefferies has provided the Monitor full access to information on the Marketing Process in addition to frequent updates on its progress and the Monitor can report that the Marketing Process is progressing well at this stage. A significant number of LOI's were received by the LOI Deadline and a number of Interested Parties have been invited to undertake further detailed due diligence. The Bid Deadline, which is expected to be in the first week of June, is being finalized and will be communicated to the Interested Parties shortly. Details have not been included in this report in order to protect the integrity of the Marketing Process. Further detail will, of course, be provided to this Honourable Court in connection with the motion which the Applicants expect to file in due course for the approval by the Court of a Stalking Horse, procedures for the solicitation of "qualifying topping bids" and for an auction involving the Stalking Horse and those parties that submit qualifying topping bids.

## **AMENDMENT OF THE AMENDED & RESTATED INITIAL ORDER**

16. The Applicants are seeking certain amendments to the Amended & Restated Initial Order, as set out in the affidavit of Michelle Schwartzberg sworn May 6, 2009, filed in support of the motion returnable May 12, 2009 (the “**Schwartzberg Affidavit**”).
17. The Monitor has reviewed the Schwartzberg Affidavit and the proposed amendments and is of the view that the proposed amendments are consistent with the form and intent of the DIP Credit Agreement approved by this Honourable Court. Accordingly, the Monitor respectfully recommends that this Honourable Court grant the Applicants’ request for the proposed amendments.

## **THE CROSS-BORDER PROTOCOL**

18. The Applicants and the US Debtors have developed the Cross-Border Protocol, which is intended to facilitate the co-ordination and efficient administration of the CCAA Proceedings and the Ch. 11 Proceedings (together, the “**Insolvency Proceedings**”) without divesting or diminishing the Court’s or US Court’s respective jurisdiction over the subject matter of the CCAA Proceedings and Ch. 11 Proceedings. A copy of the Cross-Border Protocol is attached hereto as Appendix B.
19. The key aspects of the Cross-Border Protocol are as follows:
  - (a) The Cross-Border Protocol is to become effective only upon its approval by both courts;
  - (b) The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases is incorporated by reference. In the case of any discrepancy between the Cross-Border Protocol and the Guidelines, the Cross-Border Protocol shall prevail;



- (c) The Court and the US Court may coordinate their activities and consider whether it is appropriate to defer to the judgement of the other court. Where an issue is to be addressed to only the Court or the US Court, such court may consult with the other court and in its sole discretion either: (i) render a binding decision after such consultation; (ii) defer to the determination of the other court by transferring the matter, in whole or in part to the other court; or (iii) seek a joint hearing of both courts;
- (d) The Court and the US Court may communicate with each other with respect to procedural matters relating to the Insolvency Proceedings and may coordinate their activities. The Court and the US Court may conduct joint hearings with respect to any cross-border matters or the interpretation or implementation of the Cross-Border Protocol where both courts consider such a joint hearing to be necessary or advisable. The Cross-Border Protocol outlines the procedures to be followed in the case of a joint hearing of the Court and the US Court;
- (e) The US Court maintains sole and exclusive jurisdiction and power over the conduct of, and hearing and determination of matters arising in, the Ch. 11 Proceeding and the Court maintains sole and exclusive jurisdiction and power over the conduct of, and hearing and determination of matters arising in, the CCAA Proceedings;

- (f) The Monitor, its officers, directors, employees, counsel and agents (the "**Monitor Parties**") and any other estate representatives in the CCAA Proceedings (the "**Canadian Representatives**") shall be subject to the sole and exclusive jurisdiction of the Court with respect to all matters including the Canadian Representatives': (i) tenure in office, (ii) retention and compensation, (iii) liability, if any, to any person or entity in connection with the Insolvency Proceedings, and (iv) the hearing and determination of any other matters relating to the Canadian Representatives arising in the CCAA Proceedings or other applicable Canadian law. The Monitor Parties shall be entitled to the same protections and immunities in the US as those granted to them under the CCAA and the CCAA Order. Likewise, any estate representative appointed in the Ch. 11 Proceedings (the "**Chapter 11 Representatives**", together with the Canadian Representatives, the "**Estate Representatives**") shall be subject to the sole and exclusive jurisdiction of the US Court with respect to all matters, including the Ch. 11 Representatives': (i) tenure in office, (ii) retention and compensation, (iii) liability, if any to any person or entity in connection with the Insolvency Proceedings, and (iv) the hearing and determination of any other matters relating to the Ch. 11 Representatives arising in the Ch. 11 Proceedings or other applicable laws of the U.S. Any professionals retained by the Applicants but not the US Debtors, including FTI Consulting Canada ULC, shall be subject to the sole and exclusive jurisdiction of the Canadian Court. Likewise, any professionals retained by the US Debtors but not the Applicants, including FTI Consulting Inc., and any professionals retained by the Creditors Committee, shall be subject to the sole and exclusive jurisdiction of the US Court. Any professionals retained by the Applicants and the US Debtors shall be subject to the jurisdiction of both courts; and

- (g) The US Debtors, the Applicants, their creditors and other interested parties in the Insolvency Proceedings, the Estate Representatives and the U.S. Trustee shall be subject to the personal jurisdiction of the Court or the US Court, as applicable, solely with respect to the particular matters as to which they appear before that court.
20. The Cross-Border Protocol is consistent with protocols approved by this Court in other cross-border cases. An application for the approval of the Cross-Border Protocol by the US Court has been filed by the US Debtors and is scheduled to be heard on May 12, 2009.
21. The deadline for objections to be filed with the US Court was May 5, 2009. No objections were filed.
22. The Monitor respectfully recommends that the Applicants' request for approval of the Cross-Border Protocol be granted.

The Monitor respectfully submits to the Court this, its Third Report.

Dated this 11<sup>th</sup> day of May, 2009.

FTI Consulting Canada ULC  
In its capacity as Monitor of  
Indalex Limited, Indalex Holdings (B.C.) Ltd.,  
6326765 Canada Inc. and Novar Inc.



Nigel D. Meakin  
Senior Managing Director

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# Appendix A

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**Certification of Counsel in respect of the Final US DIP Order**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

INDALEX HOLDINGS FINANCE, INC.,  
a Delaware Corporation, *et al.*<sup>1</sup>

Debtors

Chapter 11

Case No. 09-10982 (PJW)

(Jointly Administered)

Ref. Docket Nos.: 75, 118, 216, 217

**AMENDED CERTIFICATION OF COUNSEL REGARDING FINAL ORDER (I)  
AUTHORIZING THE DEBTORS (A) TO OBTAIN POST-PETITION FINANCING  
UNDER 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) AND 364(e)  
AND (B) TO UTILIZE CASH COLLATERAL UNDER 11 U.S.C. § 363 AND (II)  
GRANTING ADEQUATE PROTECTION UNDER 11 U.S.C. §§ 361, 362, 363 AND 364**

On April 7, 2009, Indalex Holdings Finance, Inc. ("Indalex Finance"), and its affiliated debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"), by and through their proposed undersigned counsel, filed the *Emergency Motion of the Debtors for Interim and Final Orders: (I) Authorizing the Debtors (A) to Obtain Postpetition Financing Under 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(3), 364(d)(1) and 364(e) and (B) to Utilize Cash Collateral Under 11 U.S.C. §363, (II) Granting Adequate Protection Under 11 U.S.C. §§ 361, 362, 363 and 364 and (III) Scheduling a Final Hearing Under Bankruptcy Rule 4001(b) and (c)* (the "Motion") [D.I. 75]. A hearing on the Motion was held on April 8, 2009, at which time the Court entered an order (the "Interim Order") [D.I. 118] (i) granting the relief requested on an interim basis and (ii) scheduling a final hearing on April 27, 2009. A hearing on the Motion was held on April 27, 2009 (the "Final Hearing").

<sup>1</sup> The Debtors in these cases and their tax identification numbers are: Indalex Holdings Finance, Inc. (XX-XXX0880), Indalex Holding Corp. (XX-XXX0715) ("Indalex Holding"), Indalex Inc. (XX-XXX7362) ("Indalex Inc."), Caradon Lebanon, Inc. (XX-XXX1208) ("Caradon"), and Dolton Aluminum Company, Inc. (XX-XXX2781) ("Dolton"). The business address for all of the Debtors is 75 Tri-State International, Suite 450, Lincolnshire, IL 60069.

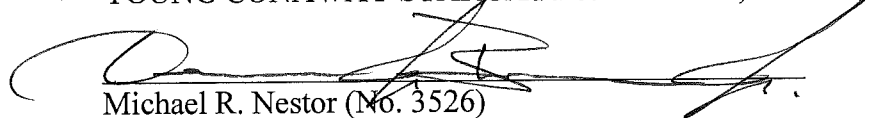
On April 30, 2009, the Debtors filed a certification of counsel regarding the Final Order (the "Certification of Counsel") [D.I. 216]. On April 30, 2009, U.S. Bank filed an objection to the Certification of Counsel [D.I. 217]. As a result of subsequent discussions with U.S. Bank, the parties have reached an agreement with respect to additional language to added to paragraph 17 of the order which resolves the U.S. Bank objection to the Certification of Counsel. The terms of the agreement are embodied in the further revised Final Order (the "Revised Final Order"), attached hereto as Exhibit A. For the Court's convenience, a cumulative blackline of the Revised Final Order is attached hereto as Exhibit B.

Additionally, the Term Lenders have advised the undersigned counsel that they reserve all rights (and should not be deemed to have waived any rights) that they have relative to the Prepetition Obligations, the Intercreditor Agreement and applicable bankruptcy and non-bankruptcy law.

WHEREFORE, the Debtors respectfully request that the Court enter the Revised Final Order, attached hereto as Exhibit A, without further notice or hearing at the Court's earliest convenience.

Dated: Wilmington, Delaware  
May 1, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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**Exhibit A**

**Revised DIP Order**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

INDALEX HOLDINGS FINANCE, INC.,  
a Delaware Corporation, *et al.*

Debtors

Chapter 11

Case No. 09-10982 (PJW)

(Jointly Administered)

**Ref. Docket Nos: 75 & 118**

**FINAL ORDER (I) AUTHORIZING THE DEBTORS (A) TO OBTAIN  
POST-PETITION FINANCING UNDER 11 U.S.C. §§ 105, 361, 362, 364(c)(1),  
364(c)(2), 364(c)(3), 364(d)(1) AND 364(e) AND (B) TO UTILIZE CASH  
COLLATERAL UNDER 11 U.S.C. § 363 AND (II) GRANTING ADEQUATE  
PROTECTION UNDER 11 U.S.C. §§ 361, 362, 363 AND 364**

Upon the motion (the “**Motion**”), dated April 7, 2009, of Indalex Holdings Finance, Inc. (“**Holdings**”), Indalex Holding Corp. (the “**Parent Borrower**”) and their affiliated debtors, each as a debtor and debtor-in-possession (collectively, the “**Debtors**”), in the above-captioned chapter 11 cases (the “**Cases**”) commenced in this Court on March 20, 2009 (the “**Petition Date**”), under sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e) and 507(b) of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (as amended, the “**Bankruptcy Code**”), and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and Local Rules for the Bankruptcy Court for the District of Delaware 4001-2 and 2002-1(b) (the “**Local Rules**”), seeking, among other things:

(1) authorization for Holdings, the Parent Borrower and each of the other Debtors to enter into the Credit Agreement, dated as of April 8, 2009, substantially in the form attached as Exhibit A to the Motion (the “**DIP Credit Agreement**”); together with the Domestic Security Agreement dated on or about April 8, 2009 (the “**DIP Domestic Security Agreement**”), the Canadian Security



Agreement dated on or about April 8, 2009, and any other related agreement, instrument or other document delivered or executed in connection with the DIP Credit Agreement, the “**DIP Documents**”), among Holdings, the Parent Borrower, each of the other Debtors, certain non-debtor affiliates of Holdings party thereto, JPMorgan Chase Bank, N.A. (“**JPMorgan**”), as administrative agent (in such capacity, the “**DIP Agent**”), and the lenders from time to time party thereto (collectively, the “**DIP Lenders**”), in connection with postpetition financing consisting of a senior secured superpriority revolving credit facility made available to the Parent Borrower and Indalex Limited (the “**Canadian Subsidiary Borrower**,” and together with the Parent Borrower, the “**Borrowers**”), a non-debtor affiliate of Holdings organized under the laws of Canada, in the aggregate principal amount of \$85,877,371 (it being understood that the actual available principal amount at any time shall be subject to those conditions set forth in the DIP Documents) (such postpetition financing, including (i) the conversion of the Prepetition Obligations and the Cash Collateral Loans made under the Interim Cash Collateral Order, in each case to DIP Obligations (as defined below) and (ii) the continuation and conversion of all letters of credit issued under the Prepetition Credit Agreement (as defined below) that are outstanding as of the date of entry of the Final Order (as defined below) to DIP Obligations in the form of letters of credit deemed issued under and in accordance with section 2.04 of the DIP Credit Agreement, the “**Financing**”);

(2) authorization for the Parent Borrower to guarantee the obligations of the Canadian Subsidiary Borrower under the DIP Credit Agreement and for each of the other Debtors (together with the Parent Borrower, solely in its capacity as guarantor of the obligations of the Canadian Subsidiary Borrower under the DIP Credit Agreement, the “**Guarantors**”) to guarantee each of the Borrowers’ obligations under the DIP Credit Agreement;

(3) authorization for the Debtors to execute and enter into the DIP Documents and to perform such other and further acts as may be required in connection with the DIP Documents;

(4) authorization for the Debtors to convert the Prepetition Obligations (as defined below) into DIP Obligations on the terms and conditions set forth in the DIP Credit Agreement, the other DIP Documents, the Interim Order and this Final Order (each as defined herein);

(5) authorization for the Debtors to use the Cash Collateral (as defined below) and any other Prepetition Collateral (as defined below) in which the Prepetition Secured Parties (as defined below) have an interest;

(6) the granting of adequate protection to the Prepetition Secured Parties with respect to any actual diminution in the value of the Prepetition Secured Parties’ interests in the Prepetition Collateral, whether from the use of the Cash Collateral, the use, sale, lease, depreciation or other diminution in value of the Prepetition Collateral, the priming of their liens or as a result of the imposition of the automatic stay under section 362(a) of the Bankruptcy Code;

(8) approval of certain stipulations by the Debtors with respect to the Prepetition Credit Agreement (as defined below) and the claims, liens and security interests arising therefrom;

(9) subject only to and effective upon entry of the Final Order, limitation of the Debtors' right to surcharge against collateral under section 506(c) of the Bankruptcy Code;

(10) under Bankruptcy Rule 4001 and Local Rule 4001-2, an interim hearing (the "**Interim Hearing**") on the Motion for the proposed interim order annexed to the Motion (i) authorizing the Borrowers, on an interim basis, to borrow from the DIP Lenders under the DIP Documents up to an aggregate principal or face amount not to exceed \$42,500,000 (subject to any limitations on borrowings under the DIP Documents), (ii) authorizing the Debtors' use of Cash Collateral and (iii) granting the adequate protection described therein; and

(11) a final hearing (the "**Final Hearing**") to be held within 30 days after entry of the Interim Order to consider entry of a final order (the "**Final Order**") authorizing the balance of the borrowings under the DIP Documents on a final basis, as set forth in the Motion and the DIP Documents filed with this Court.

The Debtors having served notice pursuant to sections 102(1), 363 and 364 of the Bankruptcy Code and Bankruptcy Rule 4001(b) and Local Rule 2002-1(b), of the Motion, the relief requested therein on an interim basis and the Interim Hearing on, among others, the thirty largest unsecured creditors of the Debtors, on a consolidated basis, the DIP Agent, the DIP Lenders, the Prepetition Agent, the Prepetition Indenture Trustee, the other Prepetition Secured

Parties, the Official Committee of Unsecured Creditors and the Office of the United States Trustee for the District of Delaware;

the Interim Hearing having been held by this Court on April 8, 2009, and this Court having entered an interim order, dated April 9, 2009 (the “**Interim Order**”), that, among other things, (i) authorized the Borrowers on an interim basis to borrow from the DIP Lenders up to an aggregate amount not to exceed \$42,500,000 (which is inclusive of the Prepetition Obligations and Cash Collateral Loans (each as defined below)) in accordance with the terms of the Interim Order and the DIP Documents, (ii) authorized each Guarantor to guaranty such borrowings, (iii) authorized the conversion of certain Cash Collateral Loans to postpetition obligations of the Debtors, (iv) authorized the Debtors’ use of cash collateral, (v) granted the adequate protection described in the Interim Order and (vi) scheduled the Final Hearing to consider entry of the Final Order, as set forth in the Motion and the DIP Documents filed with this Court;

the Debtors having served due and appropriate notice of the Motion, the relief requested therein on a final basis, the Interim Order and the Final Hearing on the Office of the United States Trustee for the District of Delaware, respective counsel for each of the DIP Agent, the Prepetition Agent and the Prepetition Indenture Trustee, the DIP Agent, the DIP Lenders, the Prepetition Agent, the Prepetition Indenture Trustee, the other Prepetition Secured Parties, counsel to the Official Committee of Unsecured Creditors, the Internal Revenue Service, the Securities and Exchange Commission and the parties requesting service pursuant to Bankruptcy Rule 2002 in accordance with the terms of the Interim Order, sections 363 and 364 of the Bankruptcy Code, Bankruptcy Rule 4001 and the Local Rules; and

upon the record made by the Debtors at the Interim Hearing and the Final Hearing, the record in these Cases and the Declaration of Timothy R. J. Stubbs in support of Chapter 11 Petitions and First Day Relief and after due deliberation and consideration and sufficient cause appearing therefor:

IT IS FOUND, DETERMINED, ORDERED AND ADJUDGED, that:

1. *Disposition.* The Motion is granted on a final basis on the terms set forth in this Final Order. Any objections to the relief sought in the Motion or this Final Order that have not been previously resolved or withdrawn, and all reservations of rights contained therein, are overruled on the merits. This Final Order shall be valid, binding and enforceable on all parties in interest and fully effective immediately upon entry.

2. *Jurisdiction and Venue.* This Court has jurisdiction over the Cases and the Motion as a core proceeding and over the parties and property affected hereby under 28 U.S.C. §§ 157(b) and 1334. Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409. No request has been made for the appointment of a trustee or examiner. On April 1, 2009, the United States Trustee appointed the Official Committee of Unsecured Creditors in these Cases (the “**Creditors’ Committee**”).

3. *Notice.* Under the circumstances, the notice given by the Debtors of the Motion, the relief requested therein, the Interim Hearing and the Final Hearing pursuant to Bankruptcy Rule 4001(b) and Local Rule 4001-2 constitutes appropriate, due and sufficient notice thereof and complies with Bankruptcy Rules 4001(b) and (c) and the Local Rules, and no other or further notice of the relief sought at the Final Hearing and the relief granted herein is necessary or required.

4. *Prepetition Secured Facilities.* As of the Petition Date, the Debtors were party to the following agreements:

(a) the Amended and Restated Credit Agreement, dated as of May 21, 2008 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Prepetition Credit Agreement**”), among Holdings, the Borrowers, the other subsidiaries of the Parent Borrower party thereto, the lenders party thereto (such lenders that made revolving extensions of credit under the Prepetition Credit Agreement, collectively, the “**Prepetition Revolving Lenders**”; and Sun Capital Partners, Inc. or any affiliate thereof (the “**Prepetition Term Lender**,” together with the Prepetition Revolving Lenders, the “**Prepetition Lenders**”) that made term loans under the Prepetition Credit Agreement (the “**Prepetition Term Loans**”) and JPMorgan, as administrative agent (in such capacity, the “**Prepetition Agent**”);

(b) Amendment No. 2, Waiver and Agreement, dated as of March 6, 2009 (“**Amendment No. 2**”), among Holdings, the Borrowers, each of the other Debtors party thereto, certain non-debtor affiliates of Holdings party thereto, the Prepetition Lenders and the Prepetition Agent;

(c) the Amended and Restated Domestic Security Agreement, dated as of May 21, 2008 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Domestic Security Agreement**”) among Holdings, the Parent Borrower, the subsidiaries of Holdings party thereto and the Prepetition Agent;

(d) the Canadian Security Agreement, dated as of February 2, 2006 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Canadian Security Agreement**”; together with the Domestic Security Agreement, any and all other

security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements, financing statements and any and all other collateral and ancillary documentation executed or delivered in connection therewith, the “**Prepetition Security Documents**”) among Holdings, the Canadian Subsidiary Borrower, the subsidiaries of Holdings party thereto and the Prepetition Agent;

(e) the Indenture, dated as of February 2, 2006 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Prepetition Indenture**”), among the Parent Borrower, each note guarantor from time to time party thereto and U.S. Bank National Association, a national banking association, as indenture trustee (the “**Prepetition Indenture Trustee**”) in respect of the \$270 million of 11½% Notes due 2014 (the holders of such notes, the “**Prepetition Secured Noteholders**”); together with the Prepetition Agent, the Prepetition Revolving Lenders, the Prepetition Term Lender and the Prepetition Indenture Trustee, the “**Prepetition Secured Parties**”); and

(f) the Intercreditor Agreement, dated as of February 2, 2006 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Intercreditor Agreement**”), among the Prepetition Agent, the Prepetition Indenture Trustee, Holdings and each subsidiary of Holdings party thereto.

5. *Interim Cash Collateral Order.* On March 23, 2009, the Bankruptcy Court entered the Interim Order (I) Authorizing the Use of Prepetition Lenders’ Cash Collateral Under 11 U.S.C. § 363, (II) Granting Adequate Protection Under 11 U.S.C. §§ 361, 363 and 364 and (III) Scheduling a Final Hearing Under Bankruptcy Rule 4001(b) and (c) (the “**Interim Cash Collateral Order**”). As of April 8, 2009, the Borrowers were indebted and liable to the

Prepetition Agent and the Prepetition Revolving Lenders in respect of “Cash Collateral Loans” (as defined in the Interim Cash Collateral Order) in the aggregate principal amount of not less than \$13,060,271.98 (plus accrued and unpaid interest thereon), and each other Debtor was contingently liable to the Prepetition Agent and the Prepetition Revolving Lenders in an aggregate amount not less than the outstanding amount of Cash Collateral Loans (plus accrued and unpaid interest thereon). Any Cash Collateral Loan or “Adequate Protection Obligation” (as defined, solely for the purposes of this sentence, in the Interim Cash Collateral Order) owed to or held by any Prepetition Revolving Lender shall remain in full force and effect and be unimpaired by the Interim Order or this Final Order and any “Postpetition Lien” or “Adequate Protection Lien” (as each such term is defined, solely for the purposes of this sentence, in the Interim Cash Collateral Order) granted to the Prepetition Agent for the ratable benefit of the Prepetition Revolving Lenders shall have the validity, priority and enforceability as set forth in the Interim Cash Collateral Order, except that the Cash Collateral Loans and the Postpetition Liens shall remain subject to paragraph 23 of the Interim Cash Collateral Order (it being understood that the phrase “timely successful challenge” as used in paragraph 23 of the Interim Cash Collateral Order shall refer to the “Investigatory Period” as defined and as set forth in paragraph 20 of this Final Order).

6. *Debtors’ Stipulations.* Without prejudice to the rights of any other party (but subject to the limitations thereon contained in paragraphs 20 and 21), the Debtors admit, stipulate and agree that:

(a) as of the Petition Date, (i) each of the Borrowers was indebted and liable to the Prepetition Agent and the Prepetition Revolving Lenders, without defense, counterclaim or



offset of any kind, in respect of revolving loans and bankers' acceptances made by the Prepetition Revolving Lenders to the Borrowers under the Prepetition Credit Agreement in the aggregate principal amount of not less than \$64,168,106.94 (it being understood that such amount is subject to fluctuation based on currency exchange rates) (plus accrued and unpaid interest thereon), (ii) each of the Borrowers was contingently liable to the issuing banks under the Prepetition Credit Agreement and the Prepetition Revolving Lenders in the aggregate face amount of not less than \$8,242,984.00 on account of the Borrowers' reimbursement obligations with respect to letters of credit issued under the Prepetition Credit Agreement, which remained outstanding as of the Petition Date, (iii) each of the Borrowers was indebted and liable to the Prepetition Agent and the Prepetition Revolving Lenders for fees, expenses (including any attorneys', accountants', appraisers' and financial advisors' fees that are chargeable or reimbursable under the Prepetition Credit Agreement, the Prepetition Security Documents, Amendment No. 2 or any related agreement, instrument or other document executed or delivered in connection therewith (collectively, the "**Prepetition Loan Documents**")), charges and other obligations incurred in connection with such loans, bankers' acceptances and letters of credit as provided in the Prepetition Loan Documents, (iv) the Debtors were liable to certain of the Prepetition Revolving Lenders or their affiliates in respect of Swap Obligations (as defined in the Prepetition Credit Agreement), (v) the Debtors were indebted to the Prepetition Revolving Lenders or their affiliates for Banking Services Obligations (as defined in the Prepetition Credit Agreement) (items (i) through (v), collectively, the "**Prepetition Obligations**") and (vi) each Debtor party to a guaranty executed and delivered in respect of the Prepetition Obligations was contingently liable to the Prepetition Agent and the Prepetition Revolving Lenders under each

such guaranty in the aggregate amount of not less than the aggregate amount of the Prepetition Obligations;

(b) the Prepetition Loan Documents and the Prepetition Obligations constitute the legal, valid and binding obligations of the Debtors, enforceable in accordance with their terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), and no portion of the Prepetition Obligations or any payments made to the Prepetition Agent or the Prepetition Revolving Lenders or applied to the Prepetition Obligations is subject to avoidance, recharacterization, reduction, disallowance, impairment, recovery or subordination under the Bankruptcy Code or applicable nonbankruptcy law;

(c) the Debtors do not have, hereby forever release, and are forever barred from bringing, any claims, counterclaims, causes of action, defenses or setoff rights, whether arising under the Bankruptcy Code or otherwise, against the Prepetition Agent, the Prepetition Revolving Lenders or their respective affiliates, subsidiaries, members, agents, officers, directors, employees and attorneys;

(d) as of the Petition Date, (i) each of the Borrowers was indebted and liable to the Prepetition Term Lender, without defense, counterclaim or offset of any kind, in respect of term loans made by the Prepetition Term Lender to the Borrowers under the Prepetition Credit Agreement in the aggregate principal amount of not less than \$30,275,416.66 (plus accrued and unpaid interest thereon), (ii) each of the Borrowers was indebted and liable to the Prepetition Term Lender for fees, expenses (including any attorneys', accountants', appraisers' and financial advisors' fees that are chargeable or reimbursable under the Prepetition Loan Documents, charges and other obligations incurred in connection with such term loans (items (i) through (iii),

collectively, the “**Prepetition Term Obligations**”) and (iv) each Debtor party to a guaranty executed and delivered in respect of the Prepetition Term Obligations was contingently liable to the Prepetition Term Lenders under each such guaranty in the aggregate amount of not less than the aggregate amount of the Prepetition Term Obligations;

(e) the Prepetition Loan Documents and the Prepetition Term Obligations constitute the legal, valid and binding obligations of the Debtors, enforceable in accordance with their terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), no portion of the Prepetition Term Obligations is subject to avoidance, recharacterization, reduction, disallowance, impairment, recovery or subordination under the Bankruptcy Code or applicable nonbankruptcy law;

(f) the Debtors do not have any claims, counterclaims, causes of action, defenses or setoff rights, whether arising under the Bankruptcy Code or otherwise, against the Prepetition Term Lenders or their respective affiliates, subsidiaries, members, agents, officers, directors, employees and attorneys;

(g) the liens and security interests granted to the Prepetition Agent (for the ratable benefit of the holders of the Prepetition Obligations and Prepetition Term Obligations) under and in connection with the Prepetition Security Documents are valid, binding, perfected, enforceable, first-priority liens on the personal and real property described in each such Prepetition Security Document (together with the setoff rights described in the Existing Documents (as defined below) and arising by operation of law, the “**Prepetition Collateral**”), not subject to avoidance, recharacterization or subordination under the Bankruptcy Code or applicable nonbankruptcy law and subject and subordinate only to (A) the DIP Liens (as defined

below), (B) the Adequate Protection Liens (as defined below), (C) the Carve Out (as defined below) and (D) valid, perfected and unavoidable liens permitted under the Prepetition Loan Documents to the extent such liens are permitted to be senior to or *pari passu* with the liens of the Prepetition Agent on the Prepetition Collateral; and

(h) the aggregate value of the Prepetition Collateral exceeds the aggregate amount of the Prepetition Obligations.

7. *Findings Regarding the Financing.*

(a) Good cause has been shown for issuance of this Final Order.

(b) The Debtors do not have available sources of working capital and financing to carry on the operation of their businesses without obtaining the Financing and the use of the Cash Collateral. The Debtors need to obtain the full amount of the Financing and use the Cash Collateral to permit, among other things, the orderly continuation of the operation of their businesses, to maintain business relationships with vendors, suppliers and customers, to make payroll, to make capital expenditures and to satisfy other working capital and operational needs. The access of the Debtors to sufficient working capital and liquidity through the use of Cash Collateral, incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the going concern values of the Debtors and to a successful reorganization of the Debtors.

(c) The Debtors are unable to obtain financing on more favorable terms from sources other than the DIP Lenders under the DIP Documents and are unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Debtors are also unable to obtain secured credit allowable under sections

364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code for the purposes set forth in the DIP Credit Agreement without the grant of priming liens and superpriority claims as set forth herein, the application of collateral proceeds to the Prepetition Obligations as set forth herein, and the conversion of any remaining Prepetition Obligations (including the letters of credit issued under the Prepetition Credit Agreement that are outstanding as of the date of entry of this Final Order, the “**Letters of Credit**”) to DIP Obligations as set forth herein.

(d) The terms of the Financing and the use of Cash Collateral are fair and reasonable, reflect the Debtors’ prudent exercise of business judgment consistent with their fiduciary duties and constitute reasonably equivalent value and fair consideration.

(e) The Financing and the use of the Cash Collateral have been negotiated in good faith and at arm’s length among the Debtors, the DIP Agent, the DIP Lenders and the Prepetition Agent, and all of the Debtors’ obligations and indebtedness arising under, in respect of or in connection with the Financing and the DIP Documents, including without limitation, (i) all loans made to, and all letters of credit deemed issued for the account of, the Borrowers under the DIP Credit Agreement, (ii) any “Secured Obligations” (as defined in the DIP Credit Agreement), including credit extended in respect of overdrafts and related liabilities and other depository, treasury, and cash management services and other clearing services provided by the DIP Agent or any DIP Secured Party (as defined below) or their respective affiliates, (iii) the Cash Collateral Loans that have been converted to postpetition obligations of the Debtors under the Interim Order and (iv) any obligations in respect of the “**Prior Swap**” (as defined in the DIP Credit Agreement) (all of the foregoing in clauses (i) - (iv) collectively, the “**DIP Obligations**”), shall be deemed to have been extended by the DIP Agent, such DIP Secured Party and their

affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and the DIP Obligations, the DIP Liens (as defined below) and the Superpriority Claims (as defined below) shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Final Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

(f) The Debtors have requested immediate entry of this Final Order under Bankruptcy Rules 4001(b)(2) and 4001(c)(2) and Local Rule 4001-2. Absent granting the relief sought by this Final Order, the Debtors' estates will be immediately and irreparably harmed. Consummation of the Financing and authorization of the use of Cash Collateral in accordance with this Final Order and the DIP Documents is therefore in the best interest of the Debtors' estates consistent with their fiduciary duties.

8. *Authorization of the Financing and the DIP Documents.*

(a) The Debtors were by the Interim Order and are hereby authorized to enter into the DIP Documents. The Parent Borrower was by the Interim Order and is hereby authorized to borrow money, pay interest, fees and expenses in accordance with this Final Order and the DIP Documents and amend, extend or renew the Letters of Credit pursuant to the DIP Credit Agreement in such amounts as may be made available to the Parent Borrower by the DIP Agent and the DIP Lenders in accordance with all of the lending formulae, sublimits and other terms and conditions set forth in the DIP Documents and this Final Order; *provided*, that the aggregate principal amount of the extensions of credit made under the DIP Credit Agreement outstanding at any time shall not exceed \$85,877,371 (plus interest, fees and other expenses and

amounts provided for in the DIP Documents) (excluding amounts in respect of the Prior Swap), which amount is inclusive of the Prepetition Obligations, the Cash Collateral Loans that have been converted to postpetition obligations of the Debtors under the Interim Order and the Debtors' reimbursement obligations with respect to the Letters of Credit issued under the Prepetition Credit Agreement that are outstanding as of the date of entry of the Final Order. The Guarantors were by the Interim Order and are hereby authorized to guarantee the DIP Obligations and the Borrowers' obligations under the DIP Credit Agreement and the other DIP Documents in accordance with the terms of this Final Order and the DIP Documents. The proceeds of any revolving loans made under the DIP Credit Agreement shall be used for the purposes, and subject to the terms and conditions, set forth in the DIP Credit Agreement and the other DIP Documents. In addition to such loans and obligations, the Debtors were by the Interim Order and are authorized to incur overdrafts and related liabilities arising from treasury, depository and cash management services including any automated clearing house fund transfers provided to or for the benefit of any of the Debtors by the DIP Agent, the DIP Lenders or any of their respective affiliates; *provided* that nothing herein shall require the DIP Agent, any DIP Lender or any of their respective affiliates to incur overdrafts or to provide such services or functions to the Debtors.

(b) In connection with the conversion of the obligations under the Prior Swap with JPMorgan into DIP Obligations, the Debtors are hereby authorized and directed to enter into the Amended and Restated ISDA, in substantially the form attached hereto as Exhibit A (the "**Amended and Restated ISDA**"), and to pay all amounts as and when due thereunder.

JPMorgan is hereby authorized to terminate the Prior Swap in accordance with the terms of the Amended and Restated ISDA.

(c) In furtherance of the foregoing and without further approval of this Court, each Debtor was by the Interim Order and is authorized and directed to perform all acts, to make, execute and deliver all instruments and documents (including, without limitation, the execution or recordation of security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements and financing statements), and to pay all fees that may be reasonably required or necessary for the Debtors' performance of their obligations under the DIP Documents, including, without limitation:

(i) the execution, delivery and performance of the DIP Credit Agreement and the other DIP Documents, any security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements, financing statements contemplated thereby and any exhibits attached thereto,

(ii) the non-refundable payment to the DIP Agent or the DIP Lenders, as the case may be, of the fees referred to in the DIP Credit Agreement (and in the separate letter agreements between the DIP Agent and the Debtors party thereto in connection with the Financing) and reasonable costs and expenses as may be due from time to time, including, without limitation, fees and expenses of the professionals retained as provided for in the DIP Documents; *provided* that the Debtors shall provide to the Creditors' Committee and the Office of the United States Trustee immediately upon receipt thereof a copy of any invoice for the



payment of professional fees and expenses incurred after the Effective Date and such invoice shall be subject to the procedures for review and objection set forth in paragraph 15(c),

(iii) the execution, delivery and performance of one or more amendments, waivers, consents or other modifications to the DIP Credit Agreement or the other DIP Documents (it being understood that no further approval of the Court shall be required for amendments, waivers, consents or other modifications to and under the DIP Credit Agreement or the other DIP Documents (or any fees paid in connection therewith) (x) to make any non-material amendments or modifications to the DIP Credit Agreement or any other DIP Documents or (y) to make any material amendment or material modification to the DIP Credit Agreement or any other DIP Document; *provided* that notice of any material modification or material amendment to any of the DIP Documents shall be filed with the Bankruptcy Court and served by the Debtors on the Creditors' Committee and the U.S. Trustee, and the Creditors' Committee and the U.S. Trustee shall have five business days from the date of such filing within which to object in writing to such proposed modification or amendment; *provided further* that if the Creditors' Committee or the U.S. Trustee timely objects to any such modification or amendment to the DIP documents, then such modification or amendment shall only be permitted pursuant to an order of this Court after notice and a hearing). For purposes hereof, a "material" modification shall mean any modification that operates to (1) shorten the maturity of the extensions of credit

under the DIP Documents, (2) increase the aggregate amount of any of the commitments thereunder, (3) increase the rate of interest or any other fees or charges payable thereunder (other than to the extent contemplated in the DIP Documents as in effect on the date hereof) or (4) otherwise modify the DIP Documents in a manner materially less favorable to the Debtors and their estates, and

(iv) the performance of all other acts required under or in connection with the DIP Documents.

(d) Upon execution and delivery of the DIP Documents, the DIP Documents were, as of the “**Effective Date**” (as defined in the DIP Credit Agreement) and shall continue to constitute, and upon execution and delivery of the Amended and Restated ISDA, the Amended and Restated ISDA shall constitute, valid and binding obligations of each of the Debtors, enforceable against each Debtor party thereto in accordance with their respective terms and the terms of this Final Order for all purposes during the Cases, any subsequently converted case of any Debtor under chapter 7 of the Bankruptcy Code or after the dismissal of any Case. Except as otherwise provided in paragraph 11(e) of this Order, no obligation, payment, transfer or grant of security under any DIP Document, the Amended and Restated ISDA, the Interim Order or this Final Order to or for the benefit of the DIP Agent, the DIP Secured Parties, the Prepetition Agent and the Prepetition Revolving Secured Parties, as applicable, shall be stayed, restrained, voidable, avoidable or recoverable under the Bankruptcy Code or under any applicable law (including without limitation, under sections 502(d), 548 or 549 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or

similar statute or common law), or subject to any defense, reduction, setoff, recoupment or counterclaim.

9. *Conversion of Cash Collateral Loans, Prepetition Obligations and Letters of Credit; Application of Collateral Proceeds.*

(a) As of the Effective Date, any and all outstanding Cash Collateral Loans made under the Interim Cash Collateral Order were and shall continue to be deemed to have been converted into U.S. Revolving Loans initially bearing interest at a rate determined by reference to the Alternate Base Rate (as such terms are defined in the DIP Credit Agreement) made to the Parent Borrower or the Canadian Subsidiary Borrower, as the case may be, and thereafter, such Cash Collateral Loans, the interest payable thereon and the other terms and conditions thereof shall be governed by the DIP Credit Agreement.

(b) Effective upon entry of this Final Order, (i) any and all Prepetition Obligations comprised of U.S. Revolving Loans under (and as defined in) the Prepetition Credit Agreement outstanding as of such date made by a Prepetition Revolving Lender to the Parent Borrower that have not been converted on or prior to the date of entry of the Final Order to DIP Obligations shall be deemed to be converted to DIP Obligations (in accordance with section 2.01(c) of the DIP Credit Agreement) outstanding under the DIP Credit Agreement, (ii) any and all Letters of Credit shall be deemed to be continued and converted to DIP Obligations (in the form of letters of credit deemed issued under and in accordance with section 2.04 of the DIP Credit Agreement) outstanding under the DIP Credit Agreement and (iii) each such conversion and continuance is hereby authorized as compensation for, in consideration for, and solely on account of, the agreement of the DIP Lenders to make new extensions of credit under the DIP Credit Agreement.

(c) The Debtors were under the Interim Order and are authorized and directed to remit to the DIP Agent immediately upon the Debtors' receipt thereof or otherwise in accordance with the Debtors' current practices all Cash Collateral in its possession or control arising from, or constituting proceeds of, the Collateral (including Prepetition Collateral) and all Cash Collateral so remitted shall be applied in the manner set forth in sections 2.09(c) and (d) of the DIP Credit Agreement. The DIP Agent was under the Interim Order and is hereby authorized, as of the Effective Date, to (i) send a notice to each Receivables Account Bank (as defined in the DIP Domestic Security Agreement) to commence a period during which the applicable Receivables Account Bank shall cease complying with any instructions originated by any applicable Debtor and shall comply with instructions originated by the DIP Agent directing dispositions of funds, without further consent of the applicable Debtor, and (ii) apply (and allocate) the funds in each Receivables Account (as defined in the DIP Domestic Security Agreement) pursuant to sections 2.09(c) and (d) of the DIP Credit Agreement without further order or approval of this Court. Each Receivables Account Bank was under the Interim Order and is hereby authorized to comply with any instructions originated by the DIP Agent on or after the Effective Date directing disposition of funds, without further consent of the applicable Debtor or further order or approval of this Court, and was under the Interim Order and is further authorized to comply with any instructions delivered by the DIP Agent or the Prepetition Agent to such Receivables Account Bank prior to the Effective Date directing disposition of funds, without further consent of the applicable Debtor or further order or approval of this Court. As of the Effective Date, each "Deposit Account Control Agreement" and "Receivables Account Control Agreement" (as each such term is defined in the Domestic Security Agreement) were

and shall continue and remain in full force and effect, in each case substituting the DIP Agent as the secured party thereunder in place of the Prepetition Agent. The automatic stay is hereby modified and vacated to permit such actions as contemplated by this paragraph 9. Except as otherwise provided herein or in the “first day” order relating thereto, the Debtors shall maintain their pre-Petition Date cash management and accounts receivable collection system, including the Collateral Accounts (as defined below) associated therewith.

(d) Any and all payments or proceeds remitted, or deemed to be remitted, pursuant to the provisions of this paragraph 9 of this Final Order to (i) the Prepetition Agent shall be received, or deemed received, by the Prepetition Agent for the ratable benefit of the Prepetition Revolving Lenders or (ii) the DIP Agent shall be received, or deemed received, by the DIP Agent for the ratable benefit of the DIP Lenders, in each case free and clear of any claim, charge, assessment or other liability including, without limitation, any such claim or charge arising out of or based on, directly or indirectly, sections 506(c) (whether asserted or assessed by, through or on behalf of the Debtors) or 552(b) of the Bankruptcy Code.

10. *Superpriority Claims.*

(a) Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed senior administrative expense claims against the Debtors with priority over any and all administrative expenses, diminution claims (including all Adequate Protection Obligations (as defined below)) and all other claims against the Debtors, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330,

331, 503(b), 506(c), 507(a), 507(b), 546, 726, 1113 or 1114 of the Bankruptcy Code, and shall at all times be senior to the rights of the Debtors, any successor trustee or any creditor, in these Cases or any subsequent proceedings under the Bankruptcy Code (the “**Superpriority Claims**”), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims shall be payable from and have recourse to all pre- and postpetition property of the Debtors and all proceeds thereof, subject only to (i) the payment of the Carve Out to the extent specifically provided for herein and (ii) the limitations on recourse to Avoidance Action Proceeds set forth in the following sentence. The Superpriority Claims granted hereunder shall also have recourse to any and all proceeds or property in respect of any Avoidance Action (as defined below), whether or not such proceeds or property is recovered from a judgment, settlement or otherwise (the “**Avoidance Action Proceeds**”), only if the DIP Obligations are not first indefeasibly paid in cash in full (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement) from the proceeds of the sale(s) or liquidation of all or substantially all of the Debtors’ assets; *provided* that such Superpriority Claims with recourse to Avoidance Action Proceeds shall not exceed an amount equal to the difference between the aggregate DIP Obligations minus the Prepetition Obligations that are converted to DIP Obligations (the “**Converted Obligations**”) (it being understood and agreed that for purposes hereof (x) any such proceeds from such sale or liquidation shall be applied, first, to the DIP Obligations that are Converted Obligations and, second, to the DIP Obligations that are not Converted Obligations and (y) any amount drawn under a letter of credit outstanding under the DIP Credit Agreement

(including all Letters of Credit continued and converted to DIP Obligations as provided herein) that is not reimbursed shall constitute a DIP Obligation that is not a Converted Obligation hereunder).

(b) For purposes of this Final Order, the “**Carve Out**” means (i) the unpaid fees and interest due and payable to the Clerk of the Bankruptcy Court and the Office of the United States Trustee pursuant to 28 U.S.C. § 1930; (ii) all reasonable fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code in an amount not exceeding \$25,000 in the aggregate; and (iii) after the occurrence of an “**Event of Default**” (as defined in the DIP Credit Agreement), the payment of allowed and unpaid professional fees and disbursements incurred after the occurrence of such Event of Default by (a) the Debtors in an amount not to exceed \$750,000 (including, without limitation, the fees and expenses of Jefferies & Company, Inc.) and (b) the Creditors’ Committee in an aggregate amount not to exceed \$300,000 (in each case, other than any such fees and disbursements incurred in connection with the initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation against the Prepetition Agent or the Prepetition Revolving Lenders, except as otherwise provided in paragraph 21 of this Final Order); *provided* (a) that the dollar limitation in this clause (iii) on fees and expenses shall neither be reduced nor increased by the amount of any compensation or reimbursement of expenses incurred, awarded or paid before the occurrence of an Event of Default in respect of which the Carve Out is invoked or by any fees, expenses, indemnities or other amounts paid to the Prepetition Agent, Prepetition Lenders or their respective attorneys and agents, and (b) that nothing herein shall be construed to prejudice any objection to any of the fees, expenses, reimbursement or compensation described in clauses (x)

and (y) above. For purposes of the DIP Credit Agreement, the Borrowers, the other Debtors and the DIP Lenders hereby agree that the definition of “**Carve-Out Cap**” shall be deemed to be amended without any further action or approval by any party by deleting the amount “\$1,000,000” and substituting in lieu thereof the amount “\$1,050,000”.

11. *DIP Liens.*

As security for the DIP Obligations, effective and perfected upon the date of entry of the Interim Order and without the necessity of the execution or recordation of filings by the Debtors, of security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements, financing statements or other similar documents, or the possession or control by the DIP Agent, any DIP Lender or any other “Secured Parties” (as such term is defined in the DIP Domestic Security Agreement, hereinafter referred to as the “**DIP Secured Parties**”) of, or over, any DIP Collateral (as defined below), the following security interests and liens are hereby granted to the DIP Agent for its own benefit and the benefit of the DIP Secured Parties (all property identified in clauses (a), (b) and (c) below being collectively referred to as the “**DIP Collateral**”), subject only to the payment of the Carve Out as set forth in this Final Order (all such liens and security interests granted to the DIP Agent, for its benefit and for the benefit of the DIP Secured Parties, pursuant to this Final Order and the DIP Documents, the “**DIP Liens**”):

(a) First Lien on Cash Balances and Unencumbered Property. Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all pre- and postpetition property of the Debtors, wherever located, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date is not subject to valid, perfected and non-avoidable liens



(collectively, “**Unencumbered Property**”), including without limitation, any and all unencumbered cash of the Debtors (whether maintained with the DIP Agent or otherwise) and any investment of such cash and any and all inventory, accounts receivable, any other right to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, patents, copyrights, trademarks, trade names, other intellectual property, capital stock of subsidiaries and the proceeds of all the foregoing. Unencumbered Property shall not include the Debtors’ claims and causes of action under sections 502(d), 544, 545, 547, 548, 549, 550 and 553 of the Bankruptcy Code and any other avoidance actions under the Bankruptcy Code (collectively, “**Avoidance Actions**”) or Avoidance Action Proceeds.

(b) Liens Priming Prepetition Secured Parties’ Liens. Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest in and lien upon all pre- and postpetition property of the Debtors (including, without limitation, Cash Collateral), inventory, accounts receivable, any other right to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, patents, copyrights, trademarks, trade names, other intellectual property, capital stock of subsidiaries, and the proceeds of all the foregoing), wherever located and whether now existing or hereafter acquired, that is presently subject to any lien or security interest granted to (a) the Prepetition Agent (for the ratable benefit of the “Secured Parties” (as such term is defined in the Domestic Security Agreement but excluding the Prepetition Term Lender, hereinafter referred to as the “**Prepetition Revolving Secured Parties**”)) under and in

connection with any Prepetition Security Document (the “**Prepetition Revolving Lender Liens**”), (b) the Prepetition Agent (for the benefit of the Prepetition Term Lender) under and in connection with any Prepetition Security Document (the “**Prepetition Term Lender Liens**”) and (c) the Prepetition Indenture Trustee (for the ratable benefit of the Prepetition Secured Noteholders) under and in connection with the Prepetition Indenture (and any security documents related thereto) (the “**Prepetition Secured Noteholder Liens**”) (the Prepetition Revolving Lender Liens, the Prepetition Term Lender Liens and the Prepetition Secured Noteholder Liens collectively, the “**Prepetition Liens**”). Such security interests and liens shall be senior in all respects to the interests in such property of the Prepetition Secured Parties arising from current and future liens of the Prepetition Secured Parties (including, without limitation, Adequate Protection Liens (as defined below) granted hereunder as adequate protection), but shall not be senior to any valid, perfected and unavoidable interests of other parties arising out of liens, if any, on such property existing immediately prior to the Petition Date, or to any valid, perfected and unavoidable interests in such property arising out of liens to which the liens of the Prepetition Secured Parties become or became subject to subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code.

(c) Liens Junior to Certain Other Liens. Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected security interest in and lien upon all pre- and postpetition property of the Debtors (other than the property described in clauses (a) or (b) of this paragraph 11, as to which the liens and security interests in favor of the DIP Agent will be as described in such clauses), whether now existing or hereafter acquired, that is subject to valid, perfected and unavoidable liens in existence immediately prior to the

Petition Date (other than the Prepetition Liens, which shall be governed by paragraph 11(b)) or to valid and unavoidable liens in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, which liens in favor of the DIP Agent are junior to such valid, perfected and unavoidable liens.

(d) Liens Senior to Certain Other Liens. The DIP Liens shall not be (a) subject or subordinate to (i) any lien or security interest that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code, (ii) any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit, commission, board or court for any tax liability of the Debtors, whether secured or unsecured, including property taxes for which liability is *in rem*, *in personam*, or both, except a tax of a kind specified in section 507(a)(8) of the Bankruptcy Code, or (iii) any intercompany or affiliate liens of the Debtors or (b) subordinated to or made *pari passu* with any other lien or security interest under sections 363 or 364 of the Bankruptcy Code or otherwise.

(e) Notwithstanding anything to the contrary contained in this Final Order, the Court reserves the right to unwind, after notice and a hearing, the DIP Liens, or a portion thereof (which might include the disgorgement or re-allocation of interest, fees or other consideration paid in respect thereof) granted to secure any Prepetition Obligations that are converted to DIP Obligations in accordance with the DIP Documents, the Interim Order or this Final Order, as applicable, solely in the event that there is a timely successful challenge, pursuant and subject to the limitations contained in paragraphs 20 and 21, to the validity, enforceability, extent or perfection of the liens securing the Prepetition Obligations and only to the extent that the Court

finds that, in light of such timely successful challenge, the DIP Liens unduly advantaged the Prepetition Revolving Lenders and the Prepetition Agent at the expense of other creditors of the Debtors or their estates. For the avoidance of doubt, the DIP Liens granted to secure any revolving loans or other extensions of credit made under the DIP Credit Agreement that are not Prepetition Obligations converted to DIP Obligations shall not be subject to challenge at any time during the Cases (or any subsequent case) and shall have the protections set forth in the Interim Order, this Final Order and the DIP Documents regardless of whether there is a timely successful challenge to the validity, enforceability, extent or perfection of the liens securing the Prepetition Obligations.

12. *Protection of DIP Secured Parties' Rights.*

(a) So long as there are any borrowings or letters of credit or other amounts (other than (A) contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid and (B) letters of credit outstanding under the DIP Credit Agreement which have been cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement) outstanding under the DIP Credit Agreement, or the DIP Lenders have any “**Commitment**” (as defined in the DIP Credit Agreement), the Prepetition Term Lender, the Prepetition Indenture Trustee and the Prepetition Secured Noteholders shall (i) take no action to foreclose upon or recover in connection with the liens granted thereto pursuant to the Prepetition Security Documents, the Prepetition Indenture (and any security documents related thereto), the Interim Order or this Final Order, or otherwise exercise remedies against any DIP Collateral, (ii) be deemed to have consented to any release of Collateral authorized under the DIP Documents and (iii) not file any further financing

statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments, or otherwise take any action to perfect their security interests in the Collateral unless, solely as to this clause (iii), the DIP Agent files any financing statement or other document to perfect the liens granted pursuant to the Interim Order or this Final Order, or as may be required by applicable state law to continue the perfection of valid and unavoidable liens or security interests as of the Petition Date.

(b) The automatic stay provisions of section 362 of the Bankruptcy Code are vacated and modified to the extent necessary to permit the DIP Agent, any DIP Lender and any other DIP Secured Party to exercise and enforce, upon the occurrence and continuance of an Event of Default and the giving of five business days' notice to the Debtors, the Prepetition Term Lenders and the Prepetition Indenture Trustee (with a copy to lead counsel for the Creditors' Committee and to the United States Trustee), all rights and remedies against the DIP Collateral under the DIP Documents (including, without limitation, the right to setoff monies of the Debtors in accounts maintained with the DIP Agent, any DIP Secured Party, the Prepetition Agent or any affiliate thereof). In any hearing regarding any exercise of rights or remedies after an Event of Default has occurred, the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing, and each of the Prepetition Term Lender, the Prepetition Indenture Trustee, the Prepetition Secured Noteholders and the Creditors' Committee hereby waives its right to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent such relief would in any way impair or restrict the rights and remedies of the DIP Agent, any DIP Secured Party, the Prepetition Agent or any affiliate thereof set forth in the Interim Order, this Final Order or the DIP Documents. Except as

otherwise provided in paragraph 10(a) of this Final Order, in no event shall the DIP Agent, the DIP Secured Parties, the Prepetition Agent or the Prepetition Revolving Secured Parties be subject to the equitable doctrine of “marshaling” or any similar doctrine with respect to the DIP Collateral or the Prepetition Collateral. The delay or failure of the DIP Agent or any DIP Secured Party to seek relief or otherwise exercise or enforce its rights and remedies under the DIP Documents, the Interim Order or this Final Order shall not constitute a waiver of the DIP Agent’s or any DIP Secured Party’s rights or remedies hereunder, thereunder or otherwise.

13. *The Cash Collateral.* To the extent any funds were on deposit with any Prepetition Secured Party as of the Petition Date, including all funds deposited in, or credited to, an account of any Debtor with any Prepetition Secured Party immediately before the Debtors commenced these Cases (regardless of whether, as of such time, such funds had been collected or made available for withdrawal by any such Debtor), such funds (the “**Deposited Funds**”) are subject to rights of setoff in favor of the Prepetition Secured Parties. By virtue of such setoff rights, the Deposited Funds are subject to a lien in favor of such Prepetition Secured Party, giving rise to a secured claim pursuant to sections 506(a) and 553 of the Bankruptcy Code. The Prepetition Secured Parties are obligated, to the extent provided in the Prepetition Loan Documents, the Prepetition Indenture (and any security documents related thereto) and the Intercreditor Agreement (together, the “**Existing Documents**”) to share the benefit of such setoff rights with the other Prepetition Secured Parties that are party to or are otherwise beneficiaries of such documents. The Debtors’ cash, including all cash and other amounts on deposit or maintained in any account subject to a control agreement with the Prepetition Agent (or any successor or replacement agent thereto) or the Prepetition Indenture Trustee or in the

concentration accounts maintained with the Prepetition Agent (or any successor or replacement agent thereto or any of its affiliates) (collectively, the “**Collateral Accounts**”) and any proceeds of the Prepetition Collateral (including the Deposited Funds or any other funds on deposit at the Prepetition Secured Parties or at any other institution as of the Petition Date) are “cash collateral” of the Prepetition Secured Parties within the meaning of section 363(a) of the Bankruptcy Code. The Debtors’ cash, if any, the Deposited Funds, if any, the funds in the Collateral Accounts, if any, and all such proceeds of Prepetition Collateral, if any, are referred to herein as “**Cash Collateral.**” Nothing in this Final Order shall preclude the Creditors’ Committee from investigating and otherwise challenging any of the Prepetition Term Lender’s alleged setoff rights, lien rights or other rights to the Cash Collateral.

14. *Use of Cash Collateral.* The Debtors were by the Interim Order and are authorized to use all Cash Collateral of the Prepetition Secured Parties during the period from the date of the Interim Order through and including the “**Termination Date**” (as defined in the DIP Credit Agreement), *provided* that the Prepetition Secured Parties are granted adequate protection as hereinafter set forth. The Debtors’ right to use the Cash Collateral shall terminate automatically on the Termination Date. In addition, if any Borrower voluntarily terminates the Commitments prior to the “**Maturity Date**” (as each such term is defined in the DIP Credit Agreement) and all DIP Obligations are indefeasibly paid in full in cash (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement), the Debtors shall, for the benefit of the Prepetition Secured Parties, continue to comply with the requirements of Articles V and VI of the DIP Credit Agreement and, upon any failure by the

Debtors to observe any such requirement or upon the occurrence of any event that would have constituted an Event of Default under the DIP Credit Agreement prior to the termination of the Commitments, the Prepetition Agent on behalf of the Prepetition Secured Parties shall have the immediate right unilaterally to terminate the Debtors' right to use Cash Collateral.

Notwithstanding anything to the contrary contained in the Interim Cash Collateral Order or the Interim Order, the Debtors' right to use Cash Collateral shall be governed by the terms of this Final Order from and after the date hereof.

15. *Adequate Protection.* The Prepetition Secured Parties are entitled, under sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, to adequate protection of their interest in the Prepetition Collateral, including the Cash Collateral, for and equal in amount to the aggregate diminution in the value of the Prepetition Secured Parties' interest in the Prepetition Collateral, including any such diminution resulting from (w) the use of the Cash Collateral under section 363(c) of the Bankruptcy Code, (x) the sale, lease or use by the Debtors (or other decline in value) of the Prepetition Collateral, (y) the priming of the Prepetition Secured Parties' security interests and liens in the Prepetition Collateral by the DIP Agent and the DIP Secured Parties pursuant to the DIP Documents, the Interim Order and this Final Order and (z) the imposition of the automatic stay under section 362 of the Bankruptcy Code (the amount of any such diminution being referred to hereinafter as the "**Adequate Protection Obligations**"). As adequate protection, the Debtors hereby grant the following:

(a) Adequate Protection Liens. The Prepetition Agent (for itself and the ratable benefit of the Prepetition Revolving Secured Parties and the Prepetition Term Lender) and the Prepetition Indenture Trustee (for the ratable benefit of the Prepetition Secured



Noteholders) were by the Interim Order and are hereby granted (effective and perfected as of the Petition Date and without the necessity of the execution by the Debtors of security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements, financing statements or other agreements) a valid, binding, enforceable and perfected replacement security interest in, and lien on, all of the DIP Collateral, subject and subordinate only to (i) the DIP Liens and liens on the DIP Collateral that are senior to, or *pari passu* with, the DIP Liens and (ii) the Carve Out (the “**Adequate Protection Liens**”). The Adequate Protection Liens granted hereunder shall be junior to the DIP Liens. The Adequate Protection Liens granted hereunder to the Prepetition Indenture Trustee, for the ratable benefit of the Prepetition Secured Noteholders, shall be immediately junior in priority and subject to the Adequate Protection Liens granted to the Prepetition Agent, for the ratable benefit of the Prepetition Revolving Secured Parties and the Prepetition Term Lenders, and the Adequate Protection Liens granted hereunder to the Prepetition Secured Parties shall otherwise rank in the same relative priority and right (including with respect to payment of distributions) both as among the Prepetition Lenders and vis-à-vis the Prepetition Secured Noteholders as such parties’ respective prepetition liens and security interests do with respect to the Prepetition Collateral as of the Petition Date under the Prepetition Loan Documents, the Prepetition Indenture (and any security documents related thereto) and the Intercreditor Agreement, including, for the avoidance of doubt, with respect to those terms of the Prepetition Loan Documents that provide that the Prepetition Term Lender, the Prepetition Indenture Trustee and the Prepetition Secured Noteholders shall have no right to seek or exercise any rights or remedies in respect of the Adequate Protection Liens granted herein (whether in these Cases or any subsequently converted cases) until all DIP Obligations

owing to the DIP Agent, the DIP Secured Parties and their respective affiliates and all Adequate Protection Obligations owing to the Prepetition Agent, the Prepetition Revolving Secured Parties and their affiliates have been indefeasibly paid in full in accordance with the DIP Documents, the Prepetition Loan Documents and this Final Order. The Adequate Protection Liens granted hereunder shall not attach to any Avoidance Action or any Avoidance Action Proceeds.

(b) Section 507(b) Claim. The Prepetition Agent and the Prepetition Revolving Secured Parties (and their affiliates) are hereby granted, subject to the payment of the Carve Out on the terms specified herein and the Superpriority Claims granted herein, a superpriority claim as provided for in section 507(b) of the Bankruptcy Code (the “**507(b) Claims**”) with priority in payment over any and all administrative expenses of the kinds specified or ordered under any provision of the Bankruptcy Code, including sections 105, 326, 328, 330, 331, 503, 507(a), 726, 1113 or 1114 of the Bankruptcy Code, and shall at all times be senior to the rights of the Debtors, any successor trustee or any creditor, in these Cases or, to the extent permitted by applicable law, any subsequent proceedings under the Bankruptcy Code. Except for the Carve Out and the Superpriority Claims granted to the DIP Agent and the DIP Secured Parties under paragraph 10(a), no cost or expense of administration under sections 105, 503(b), 507(b) or otherwise, including any such cost or expense resulting from the conversion of these Cases under section 1112 of the Bankruptcy Code, shall be senior to, or *pari passu* with, the 507(b) Claims of the Prepetition Agent and the Prepetition Revolving Secured Parties (and their affiliates). The 507(b) Claims granted hereunder shall not have any recourse to Avoidance Action Proceeds; and

(c) Interest, Fees and Expenses. The Prepetition Agent (for the benefit of the Prepetition Revolving Secured Parties) shall (i) have received from the Debtors on the Effective Date, payment of all accrued and unpaid interest on the Prepetition Obligations at the applicable rates specified under the Interim Cash Collateral Order, all accrued and unpaid letter of credit fees at the applicable rates specified under the Interim Cash Collateral Order, all accrued and unpaid interest on the Cash Collateral Loans outstanding under the Interim Cash Collateral Order at the rates specified therein and all other accrued and unpaid fees and disbursements incurred before the Effective Date (including, but not limited to, fees owed to the Prepetition Agent for its counsel and financial advisors) owing under the Prepetition Loan Documents or any unterminated Swap Agreement (as defined in the Prepetition Credit Agreement), (ii) receive from the Debtors from time to time after the Effective Date, current cash payment of all fees and expenses payable to the Prepetition Agent, the Prepetition Revolving Secured Parties, the issuing bank or any of their respective affiliates under the Prepetition Loan Documents or any unterminated Swap Agreement, including the reasonable fees and disbursements of counsel, financial advisors and other consultants for the Prepetition Agent or the Prepetition Revolving Lenders, promptly upon receipt of invoices therefor and (iii) receive from the Debtors on the first business day of each month, current cash payment of (x) all accrued and unpaid postpetition interest on the Prepetition Obligations at the rate equal to the Alternate Base Rate (as defined in the DIP Credit Agreement) plus 9.00% per annum and (y) letter of credit and other fees at the contract rates applicable under the DIP Credit Agreement, subject in each case to the Prepetition Agent's and Prepetition Revolving Secured Parties' reservation of their rights to assert claims for the payment of any other amounts provided for in the Prepetition Loan Documents and without

prejudice to the rights of any other party to contest such assertion. The Prepetition Term Lender shall receive from the Debtors on the first business day of each month, current cash payment of (i) the reasonable legal fees, disbursements and expenses of legal counsel for the Prepetition Term Lender incurred in connection with monitoring the Cases or the protection of the rights and interests of the Prepetition Term Lender under the Prepetition Loan Documents and (ii) other reimburseable expenses of the Prepetition Term Lender under the Prepetition Credit Agreement; *provided, however*, that the aggregate amount of fees, disbursements and expenses payable to the Prepetition Term Lender pursuant to this sentence shall not exceed \$25,000 per calendar month; *provided further*, that the rights of any party to assert that any such amounts paid pursuant to this sentence should be recharacterized as payments on account of the principal amount of the Prepetition Term Obligations outstanding as of the Petition Date are hereby fully preserved and that any such amounts paid pursuant to this sentence remain subject to paragraph 11(e) of this Final Order. None of the fees, costs and expenses payable under this paragraph shall be subject to separate or prior approval by this Court (but the Court shall resolve any dispute as to the reasonableness of any such fees, costs and expenses), and no recipient of any such payment shall be required to file any motion or interim or final fee application with respect thereto. Nothing contained herein shall be deemed to be a waiver by any party in interest of the right to object to the reasonableness of any fees, costs and charges incurred by the Prepetition Revolving Secured Parties, the Prepetition Term Lender or the Prepetition Agent. The Debtors shall provide to the Creditors' Committee and the Office of the United States Trustee, immediately upon receipt thereof, a copy of the monthly invoices for the Prepetition Agent's professionals and for the fees and expenses requested by the Prepetition Term Lender, and the Debtors are authorized and

directed to make payment to the professional retained by the Prepetition Agent or the Prepetition Term Lender (or its counsel) unless, within ten days after receipt of the invoice by the Debtors, a written objection has been received by the Debtors and the applicable professional retained by the Prepetition Agent or the Prepetition Term Lender (or its counsel), as the case may be, in which case the Debtors are hereby authorized and directed to make payment on account of any amounts which are not clearly identified as being contested in such written objection and, upon resolution of such objection, the remaining unpaid amounts that have been agreed or ordered to be paid.

16. *Limitation on Charging Expenses Against Collateral.* Except to the extent of the Carve Out, no expenses of administration of the Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Prepetition Collateral or DIP Collateral under section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of the DIP Agent and the Prepetition Agent, and no such consent shall be implied from any other action, inaction, or acquiescence by the DIP Agent, the DIP Secured Parties, the Prepetition Agent or the Prepetition Revolving Secured Parties.

17. *Reservation of Rights of the Prepetition Secured Parties.* Subject to the Prepetition Indenture Trustee's reservation of rights, the Court finds that the adequate protection provided herein is reasonable and sufficient under the circumstances to protect the interests of the Prepetition Secured Parties. Notwithstanding any other provision, the grant of adequate protection to the Prepetition Secured Parties is without prejudice to the Prepetition Agent's right to request any modification of, or further or different, adequate protection, and the Debtors' or

any other party's objection to any such request; *provided* that any such further or different adequate protection shall at all times be subordinate and junior to the claims and liens of the DIP Agent and the DIP Secured Parties granted under this Final Order, the Interim Order and the DIP Documents.

18. *Perfection of DIP Liens and Adequate Protection Liens.*

(a) The DIP Agent and the Prepetition Agent were by the Interim Order and are hereby authorized, but not required, to file or record financing statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments in any jurisdiction, or take possession of or control over, or take any other action in order to validate and perfect the liens and security interests granted to them hereunder. The DIP Liens and Adequate Protection Liens granted under this Final Order shall (and, in the case of DIP Liens and Adequate Protection Liens granted under the Interim Order, are and continue to) constitute valid and duly perfected security interests and liens, and the DIP Secured Parties and the Prepetition Secured Parties are hereby not required to file or record financing statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments which otherwise may be required under federal or state law in any jurisdiction, or take any action, including taking possession, to validate and perfect such security interests and liens, and such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge dispute or subordination, as of the Effective Date. The failure of the Debtors to execute any documentation relating to the enforceability, priority or perfection of the DIP Liens or Adequate Protection Liens shall in no

way affect the validity, perfection or priority of the DIP Liens or Adequate Protection Liens, as applicable.

(b) If the Prepetition Agent (on behalf of the Prepetition Revolving Secured Parties) or the DIP Agent (on behalf of the DIP Secured Parties), in their individual and sole discretion, elects to file any financing statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments, or otherwise to confirm perfection of such DIP Liens or Adequate Protection Liens, the Debtors shall cooperate with and assist in such process, the stay imposed under section 362 of the Bankruptcy Code is hereby lifted to permit the filing and recording of a certified copy of the Interim Order or this Final Order or any such financing statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments, and all such documents shall be deemed to have been filed and recorded at the time of and on the Effective Date. Any error, omission or other defect in any such filing shall not affect the validity, enforceability, priority or perfection of any DIP Lien or Adequate Protection Lien granted under this Final Order.

(c) A certified copy of the Interim Order or this Final Order may, in the discretion of the Prepetition Agent (on behalf of the Prepetition Revolving Secured Parties) or the DIP Agent (on behalf of the DIP Secured Parties), be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments, and all filing offices are hereby authorized to accept such certified copy of the Interim Order or this Final Order for filing and recording.

19. *Preservation of Rights Granted Under the Final Order.*

(a) No claim or lien having a priority superior to or *pari passu* with those granted by the Interim Order or this Final Order to the DIP Agent, the DIP Secured Parties, the Prepetition Agent or the Prepetition Revolving Secured Parties shall be granted or allowed while any portion of the Financing (or any refinancing thereof) or the Commitments thereunder or the DIP Obligations or the Adequate Protection Obligations remain outstanding (or, with respect to any letters of credit outstanding under the DIP Credit Agreement, such letters of credit are neither cash collateralized nor supported with a backstop letters of credit in accordance with the terms of the DIP Credit Agreement). Except as otherwise provided in this Final Order, the Adequate Protection Liens shall not be (i) subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtors' estates under section 551 of the Bankruptcy Code or (y) subordinated to or made *pari passu* with any other lien or security interest, whether under sections 363 or 364 of the Bankruptcy Code or otherwise.

(b) Unless all DIP Obligations shall have been indefeasibly paid in full and all Commitments terminated (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement), all Prepetition Obligations shall have been indefeasibly paid in full, and the Adequate Protection Obligations shall have been indefeasibly paid in full, the Debtors shall not seek (i) any order modifying or extending this Final Order without the prior written consent of the DIP Agent (or, to the extent the DIP Obligations shall have been indefeasibly paid in cash in full (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance



with the terms of the DIP Credit Agreement) and the Commitments shall have been terminated, the Prepetition Agent) and no such consent shall be implied by any other action, inaction or acquiescence, (ii) any order modifying or extending this Final Order adversely affecting the adequate protection provided to the Prepetition Secured Parties without the prior written consent of the Prepetition Secured Parties or (iii) an order converting or dismissing any of the Cases. If an order dismissing any of the Cases under section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that (i) the Superpriority Claims, the 507(b) Claims, DIP Liens and Adequate Protection Liens granted to the DIP Agent and the DIP Secured Parties and, as applicable, the Prepetition Secured Parties pursuant to this Final Order shall continue in full force and effect and shall maintain their priorities as provided in this Final Order until all DIP Obligations, Prepetition Obligations and Adequate Protection Obligations shall have been indefeasibly paid in cash and satisfied in full (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement) and the Commitments shall have been terminated (and that such Superpriority Claims, 507(b) Claims, DIP Liens and Adequate Protection Liens remain binding on all parties in interest) and (ii) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in (i) above, to the fullest extent authorized by statute.

(c) If any or all of the provisions of this Final Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacatur or stay shall not affect (i) the validity, priority or enforceability of any DIP Obligations or any Adequate Protection

Obligations incurred prior to the actual receipt of written notice by the DIP Agent, the Prepetition Agent or the Prepetition Indenture Trustee, as applicable, of the effective date of such reversal, modification, vacatur or stay or (ii) the validity or enforceability of any lien or priority authorized or created hereby, pursuant to the Interim Order or pursuant to the DIP Credit Agreement, as applicable, with respect to any DIP Obligations or Adequate Protection Obligations. Notwithstanding any such reversal, modification, vacatur or stay, any use of Cash Collateral, or DIP Obligations or Adequate Protection Obligations incurred by the Debtors to the DIP Agent, the DIP Secured Parties or the Prepetition Secured Parties prior to the actual receipt of written notice by the DIP Agent, the Prepetition Agent or the Prepetition Indenture Trustee, as applicable, of the effective date of such reversal, modification, vacatur or stay shall be governed in all respects by the original provisions of the Interim Order and this Final Order, as applicable, and the DIP Agent, the DIP Secured Parties and the Prepetition Secured Parties shall be entitled to all the rights, remedies, privileges and benefits granted in sections 363(m) and 364(e) of the Bankruptcy Code, the Interim Order and this Final Order with respect to all uses of Cash Collateral, DIP Obligations and Adequate Protection Obligations.

(d) Except as expressly provided in this Final Order or the DIP Documents, the DIP Liens, the Adequate Protection Liens, the Superpriority Claims, the 507(b) Claims, the DIP Obligations, the Adequate Protection Obligations and all other rights and remedies of the DIP Agent, the DIP Secured Parties and the Prepetition Secured Parties granted by the provisions of the Interim Order and this Final Order, as applicable, shall survive, and shall not be modified, impaired or discharged by (i) the entry of an order converting any of the Cases to a case under chapter 7, dismissing any of the Cases, terminating the joint administration of the Cases or by

any other act or omission or (ii) the entry of an order confirming a plan of reorganization in any of the Cases and, pursuant to section 1141(d)(4) of the Bankruptcy Code, the Debtors have waived any discharge as to any remaining DIP Obligations pursuant to the Financing. The terms and provisions of this Final Order shall continue in these Cases, in any successor cases if these Cases cease to be jointly administered, or in any superseding chapter 7 cases under the Bankruptcy Code, and the DIP Liens, the Adequate Protection Liens, the Superpriority Claims, the 507(b) Claims, the DIP Obligations, the Adequate Protection Obligations and all other rights and remedies of the DIP Agent, the DIP Secured Parties and the Prepetition Secured Parties granted by the provisions of this Final Order shall continue in full force and effect until the DIP Obligations are indefeasibly paid in full (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement), the Commitments are terminated and the Adequate Protections Obligations are indefeasibly paid in full.

20. *Effect of Stipulations on Third Parties.* The stipulations and admissions contained in this Final Order, including in paragraph 6 of this Final Order, shall be binding upon the Debtors and any successor thereto (including any chapter 7 or chapter 11 trustee appointed or elected in any of the Cases) in all circumstances, unless a chapter 7 or chapter 11 trustee is appointed or elected during the Investigatory Period (as defined below). The stipulations and admissions contained in this Final Order, including in paragraph 6 of this Final Order, shall be binding upon all other parties in interest, including the Creditors' Committee, unless (a) a party in interest, including any subsequently appointed chapter 7 or chapter 11 trustee and the Creditors' Committee, has timely filed an adversary proceeding or contested matter (subject to

the limitations contained herein, including, *inter alia*, in paragraph 21) by no later than the date that is 60 days after the entry of this Final Order (or such later date (x) as has been agreed to, in writing, (A) with respect to such adversary proceedings or contested matters relating to the Prepetition Obligations or the Prepetition Agent's or the Prepetition Revolving Secured Parties' liens on the Prepetition Collateral, by the Prepetition Agent in its sole discretion or (B) with respect to such adversary proceedings or contested matters relating solely to the Prepetition Term Obligations or the Prepetition Term Lender's liens on the Prepetition Collateral, by the Prepetition Term Lender in its sole discretion, or (y) as has been ordered by the Court for good cause shown) (such period, the "**Investigatory Period**") (i) challenging the validity, enforceability, priority or extent of the Prepetition Obligations, the Prepetition Term Obligations or the Prepetition Agent's, the Prepetition Revolving Secured Parties' or the Prepetition Term Lender's liens on the Prepetition Collateral or (ii) otherwise asserting or prosecuting any Avoidance Action or any other claims, counterclaims or causes of action, objections, contests or defenses (collectively, "**Claims and Defenses**") against the Prepetition Agent, the Prepetition Term Lender or any of the Prepetition Revolving Secured Parties or their affiliates, subsidiaries, members, agents, officers, directors, representatives, attorneys or advisors (each, a "**Released Party**") in connection with matters related to the Prepetition Loan Documents, the Prepetition Obligations, the Prepetition Term Obligations or the Prepetition Collateral, as applicable, and (b) there is a final order in favor of the plaintiff sustaining any such challenge or claim in any such timely filed adversary proceeding or contested matter; *provided* that, as to the Debtors, all such Claims and Defenses are hereby irrevocably waived and released as of the Petition Date, however, such waiver and release does not restrict, waive or otherwise impair the Creditors'

Committee's right to investigate, seek and obtain derivative standing to prosecute Claims and Defenses (which are preserved for the Creditors' Committee). If no such adversary proceeding or contested matter is timely filed, (x) the Prepetition Obligations and Prepetition Term Obligations shall constitute allowed secured claims in the amounts set forth in paragraph 6 of this Final Order, not subject to counterclaim, setoff, subordination, recharacterization, recovery, defense or avoidance, for all purposes in the Cases and any subsequent chapter 7 cases, (y) the Prepetition Agent's, the Prepetition Revolving Secured Parties' and the Prepetition Term Lender's liens on the Prepetition Collateral shall be deemed to have been, as of the Petition Date, enforceable, legal, valid, binding and perfected, and having the priority set forth in paragraph 6, not subject to recharacterization, subordination, avoidance or reduction and (z) the Prepetition Obligations and the Prepetition Term Obligations, the Prepetition Agent's, the Prepetition Revolving Secured Parties' and the Prepetition Term Lender's liens on the Prepetition Collateral and the Prepetition Agent, the Prepetition Revolving Secured Parties and the Prepetition Term Lender shall not be subject to any other or further challenge by any party in interest seeking to exercise the rights of the Debtors' estates, including any estate representative or any other successor to the Debtors (including any chapter 7 or 11 trustee appointed or elected for any of the Debtors). If any such adversary proceeding or contested matter is timely filed, the stipulations and admissions contained in paragraph 6 of this Final Order shall nevertheless remain binding and preclusive (as provided in the second sentence of this paragraph) on any official committee (including the Creditors' Committee) and on any other person or entity, except to the extent that such findings and admissions were expressly challenged in such adversary proceeding or contested matter. Except for the statutory rights of any chapter 11 or

chapter 7 trustee, nothing in this Final Order vests or confers on any Person (as defined in the Bankruptcy Code), including the Creditors' Committee, standing or authority to pursue any cause of action belonging to the Debtors or their estates, including Claims and Defenses with respect to the Prepetition Loan Documents or the Prepetition Obligations or Prepetition Term Obligations. Nothing in this Final Order shall bar the Creditors' Committee from filing a motion seeking to obtain derivative standing to prosecute Claims and Defenses in a manner consistent with paragraphs 20 and 21 of this Final Order.

21. *Limitation on Use of Collateral.* The Debtors have waived any and all claims and causes of action against the DIP Agent and the DIP Secured Parties and their respective agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors, directly related to the Financing, the Interim Order, this Final Order or the negotiation of the terms thereof. Notwithstanding anything herein or in any other order by this Court to the contrary, no borrowings, proceeds of letters of credit under the DIP Credit Agreement, Cash Collateral, DIP Collateral or the Carve Out may be used for any of the following without the prior written consent of each affected party: (a) to object, contest or raise any defense to, the validity, perfection, priority, extent or enforceability of any amount due under the Interim Order, this Final Order, the DIP Documents, the Prepetition Loan Documents, or the liens or claims granted under this Final Order, the DIP Documents or the Prepetition Loan Documents, (b) to assert any Claims or Defenses or causes of action against the DIP Agent, the Prepetition Agent, the Prepetition Term Lender or the Prepetition Revolving Secured Parties or their respective agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors, (c) to prevent, hinder or otherwise delay the DIP Agent's or the Prepetition Agent's assertion, enforcement or

realization on the Cash Collateral or the DIP Collateral in accordance with the DIP Documents, the Prepetition Loan Documents, the Interim Order or this Final Order, (d) to seek to modify any of the rights granted to the DIP Agent, the DIP Secured Parties, the Prepetition Agent, the Prepetition Term Lender or the Prepetition Revolving Secured Parties hereunder, under the Interim Order or under the DIP Documents or the Prepetition Loan Documents or (e) pay any amount on account of any claims arising before the Petition Date unless such payments are approved by an Order of this Court; *provided* that up to \$175,000 of Cash Collateral and proceeds of the Financing in the aggregate (the “**Litigation Cap**”) may be used (to the extent not otherwise used in accordance with the next proviso) to pay the allowed fees and expenses of professionals retained by the Creditors’ Committee incurred directly in connection with investigating, but not initiating or prosecuting, any Claims and Defenses against the Prepetition Agent or the Prepetition Revolving Secured Parties; *provided further*, that any portion of the Litigation Cap may be used to pay the allowed fees and expenses of professionals retained by the Creditors’ Committee incurred directly in connection with investigating, initiating or prosecuting Claims and Defenses against the Prepetition Term Lender or any of its affiliates (including in their capacity as Prepetition Secured Noteholders or equity security holders in the Debtors). The Creditors’ Committee reserves the right, upon notice and hearing, to seek an increase in the Litigation Cap; *provided*, that unless all DIP Obligations shall have been indefeasibly paid in full and all Commitments terminated (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement), all Prepetition Obligations shall have been indefeasibly paid in full, and all Adequate Protection Obligations owing to the Prepetition Agent

and the Prepetition Revolving Secured Parties shall have been indefeasibly paid in full, the Creditors' Committee shall be prohibited from seeking any such increase in the Litigation Cap until the DIP Agent and the Creditors' Committee shall have entered into a mutually acceptable written agreement setting forth a budget for any adversary proceeding or contested matter in respect of Claims and Defenses against the Prepetition Term Lender or any of its affiliates (including in their capacity as Prepetition Secured Noteholders or equity security holders in the Debtors) and other agreements relating to such litigation, including, without limitation, a protocol for making decisions on settling (or not settling) any such adversary proceeding or contested matter.

22. *JPMorgan as DIP Agent.* To the extent that any Prepetition Agent (or any predecessor, bailee, agent or designee thereof) is the secured party under any account control agreement, listed as loss payee under the Debtors' insurance policies as required under the Prepetition Credit Agreement or is the secured party under any other Prepetition Loan Document, JPMorgan, in its role as DIP Agent, is also deemed to be the secured party under such account control agreement, loss payee under the Debtors' insurance policies and the secured party under any other Prepetition Loan Document, shall have all rights and powers associated with that position (including, without limitation, rights of enforcement) and shall act in that capacity and distribute any proceeds recovered or received in accordance with the DIP Documents and this Final Order. The Prepetition Agent (and any predecessor, bailee, agent or designee thereof) shall serve as agent and bailee for the DIP Agent for purposes of perfecting the DIP Liens and the Adequate Protection Liens on all DIP Collateral that is of a type such that



perfection of a security interest therein may be accomplished only by possession or control by a secured party.

23. *Priority Among Prepetition Secured Parties.* Notwithstanding anything to the contrary herein or in any other order of this Court, in determining the relative priorities and rights of the Prepetition Secured Parties (including, without limitation, the relative priorities and rights of the Prepetition Secured Parties with respect to the adequate protection granted hereunder), such relative priorities and rights shall continue to be governed by the Prepetition Loan Documents, the Prepetition Indenture (and any security documents related thereto) and the Intercreditor Agreement, and the adequate protection rights granted hereunder to each Prepetition Secured Party shall have the same relative seniority and priority vis-à-vis the adequate protection rights granted to each other Prepetition Secured Party as the pre-petition claims of such Prepetition Secured Party have relative to the prepetition claims of such other Prepetition Secured Party (taking into consideration whether such claims are secured and the entity against which such claims are held or not held). Notwithstanding anything to the contrary herein or in any other order of this Court, (i) each of the Prepetition Agent and the Prepetition Term Lender acknowledge and agree that the intercreditor provisions of the Prepetition Credit Agreement, including, without limitation, sections 9.24 and 9.25 of the Prepetition Credit Agreement and (ii) each of the Prepetition Agent and the Prepetition Indenture Trustee (on behalf of the Prepetition Secured Noteholders) acknowledge and agree that the terms and conditions of the Intercreditor Agreement, in each case remain in full force and effect and constitute the enforceable, valid and binding obligations of the Prepetition Agent, the Prepetition Term Lender, the Prepetition Revolving Lenders and the Prepetition Indenture Trustee (on behalf of the Prepetition Secured

Noteholders), as applicable, under section 510(a) of the Bankruptcy Code; *provided* that the Prepetition Indenture Trustee (on behalf of the Prepetition Secured Noteholders) reserves its rights under the Intercreditor Agreement arising from a breach, if any, of the Intercreditor Agreement; *provided further* that the DIP Agent and Prepetition Agent reserve their rights to assert claims arising from a breach of the Intercreditor Agreement by the Prepetition Indenture Trustee or the Prepetition Secured Noteholders. Nothing contained herein shall modify or alter the voting or consent provisions contained in the DIP Credit Agreement.

24. *Order Governs.* In the event of any inconsistency between the provisions of this Final Order and the DIP Documents, the provisions of this Final Order shall govern.

25. *Binding Effect; Successors and Assigns.* The provisions of this Final Order, including all findings herein, shall be binding upon all parties in interest in these Cases, including the Prepetition Agent, the Prepetition Revolving Secured Parties, the other Prepetition Secured Parties, the Creditors' Committee, and the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of any of the Debtors) and shall inure to the benefit of the Prepetition Agent, the Prepetition Revolving Secured Parties and the Debtors and their respective successors and assigns; *provided* that the Prepetition Agent and the Prepetition Revolving Secured Parties shall have no obligation to extend any financing to any chapter 7 trustee or similar responsible person appointed for the estates of the Debtors.

26. *Master Proof of Claim.* The Prepetition Agent shall be authorized (but not required) to file a single master proof of claim against all Debtors (a "**Master Proof of Claim**") on behalf of itself and the applicable Prepetition Revolving Secured Parties on account of the

aggregate amount of prepetition claims arising under the Prepetition Loan Documents without setting forth the exposure of each individual Prepetition Revolving Secured Party in respect thereof, and the Prepetition Agent shall not be required to file a verified statement pursuant to Bankruptcy Rule 2019. If the Prepetition Agent so files a Master Proof of Claim against the Debtors, the Prepetition Agent and each Prepetition Revolving Secured Party (as applicable) and each of their respective successors and assigns shall be deemed to have filed a proof of claim in respect of its claims against the Debtors arising under the Prepetition Loan Documents, and such claim shall be allowed or disallowed as if such entity had filed a separate proof of claim against each Debtor in the amount set forth in the applicable Master Proof of Claim. The Prepetition Agent shall be authorized to amend the Master Proof of Claim from time to time.

27. *Notices to the Creditors' Committee.* Counsel for the Creditors' Committee shall receive all notices required pursuant to this Final Order when such notices are due.

28. *Headings.* Sections headings used herein are for convenience only and are not to affect the construction of or to be taken into consideration in interpreting this Final Order.

Dated: \_\_\_\_\_, 2009  
Wilmington, Delaware

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Peter J. Walsh  
United States Bankruptcy Judge

**EXHIBIT A**

Amended and Restated ISDA

**EXECUTION COPY**

**AMENDMENT**  
dated as of April 29, 2009

to the

**2002 ISDA MASTER AGREEMENT**  
dated as of August 8, 2007

**JPMORGAN CHASE BANK, N.A. and INDALEX HOLDING CORP.**

(the "Agreement")

The parties have previously entered into the Agreement and have now agreed to amend the Agreement in its entirety by the terms of this Amendment (the "Amendment")

Accordingly, in consideration of mutual agreements contained in this Amendment, the parties agree as follows:

1. **Amendment.** The Agreement is amended by amending and restating the Master ISDA and the related Schedule, in each case, in its entirety as set forth in Exhibit A hereto.

2. **Representations.** Each party represents to the other party in respect of the Agreement, as amended pursuant to this Amendment, that the representations made by it pursuant to the Agreement are true and accurate as of the date of this Amendment.

3. **Miscellaneous.**

(a) **Entire Agreement.** This Amendment constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings (except as otherwise provided herein) in respect thereto.

(b) **Restatement.** Except for any amendment to this Agreement made pursuant to this Amendment, all terms and conditions of the Agreement will continue in full force and effect in accordance with its provisions on the date of this Amendment. References to the Agreement will be to the Agreement, as amended by this Amendment.

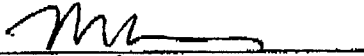
(c) **Amendment.** No amendment, modification or waiver in respect of the matters contemplated by this Amendment will be effective unless made in accordance with the terms of this Agreement.

(d) **Counterparts.** This Amendment may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which when executed and delivered shall be an original, but all of which shall together constitute one and the same instrument.

(e) **Governing Law.** This Amendment and the rights and obligations of the parties hereunder shall be construed in accordance with and governed by the law of the State of New York (without reference to choice of law doctrine).

IN WITNESS WHEREOF the parties have executed this Amendment with effect from the date specified first on the front page of this Amendment.


**JPMORGAN CHASE BANK, N.A.      INDALEX HOLDING CORP.**

By:       By: \_\_\_\_\_  
Name: *MELISSA McMahon*      Name:  
Title: *Managing Director and*      Title:  
*Associate General Counsel*

IN WITNESS WHEREOF the parties have executed this Amendment with effect from the date specified first on the front page of this Amendment.

JPMORGAN CHASE BANK, N.A.      INDALEX HOLDING CORP.

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

By:   
Name: TIMOTHY STUBBS  
Title: CEO



# ISDA®

International Swap Dealers Association, Inc.

## 2002 MASTER AGREEMENT

dated as of August 8, 2007  
as amended and restated on April 29, 2009

### JPMORGAN CHASE BANK, N.A. and INDALEX HOLDING CORP.

have entered and/or anticipate entering into one or more transactions (each a "Transaction") that are or will be governed by this 2002 Master Agreement, which includes the schedule (the "Schedule"), and the documents and other confirming evidence (each a "Confirmation") exchanged between the parties or otherwise effective for the purpose of confirming or evidencing those Transactions. This 2002 Master Agreement and the Schedule are together referred to as this "Master Agreement".

Accordingly, the parties agree as follows:—

#### 1. Interpretation

- (a) **Definitions.** The terms defined in Section 14 and elsewhere in this Master Agreement will have the meanings therein specified for the purpose of this Master Agreement.
- (b) **Inconsistency.** In the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement, the Schedule will prevail. In the event of any inconsistency between the provisions of any Confirmation and this Master Agreement, such Confirmation will prevail for the purpose of the relevant Transaction.
- (c) **Single Agreement.** All Transactions are entered into in reliance on the fact that this Master Agreement and all Confirmations form a single agreement between the parties (collectively referred to as this "Agreement"), and the parties would not otherwise enter into any Transactions.

#### 2. Obligations

- (a) **General Conditions.**
  - (i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement
  - (ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement, in freely transferable funds and in the manner customary for payments in the required currency. Where settlement is by delivery (that is, other than by payment), such delivery will be made for receipt on the due date in the manner customary for the relevant obligation unless otherwise specified in the relevant Confirmation or elsewhere in this Agreement.

(iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred or been effectively designated and (3) each other condition specified in this Agreement to be a condition precedent for the purpose of this Section 2(a)(iii).

(b) **Change of Account.** Either party may change its account for receiving a payment or delivery by giving notice to the other party at least five Local Business Days prior to the Scheduled Settlement Date for the payment or delivery to which such change applies unless such other party gives timely notice of a reasonable objection to such change.

(c) **Netting of Payments.** If on any date amounts would otherwise be payable:—

- (i) in the same currency; and
- (ii) in respect of the same Transaction,

by each party to the other, then, on such date, each party's obligation to make payment of any such amount will be automatically satisfied and discharged and, if the aggregate amount that would otherwise have been payable by one party exceeds the aggregate amount that would otherwise have been payable by the other party, replaced by an obligation upon the party by which the larger aggregate amount would have been payable to pay to the other party the excess of the larger aggregate amount over the smaller aggregate amount.

The parties may elect in respect of two or more Transactions that a net amount and payment obligation will be determined in respect of all amounts payable on the same date in the same currency in respect of those Transactions, regardless of whether such amounts are payable in respect of the same Transaction. The election may be made in the Schedule or any Confirmation by specifying that "Multiple Transaction Payment Netting" applies to the Transactions identified as being subject to the election (in which case clause (ii) above will not apply to such Transactions). If Multiple Transaction Payment Netting is applicable to Transactions, it will apply to those Transactions with effect from the starting date specified in the Schedule or such Confirmation, or, if a starting date is not specified in the Schedule or such Confirmation, the starting date otherwise agreed by the parties in writing. This election may be made separately for different groups of Transactions and will apply separately to each pairing of Offices through which the parties make and receive payments or deliveries.

(d) **Deduction or Withholding for Tax.**

(i) **Gross-Up.** All payments under this Agreement will be made without any deduction or withholding for or on account of any Tax unless such deduction or withholding is required by any applicable law, as modified by the practice of any relevant governmental revenue authority, then in effect. If a party is so required to deduct or withhold, then that party ("X") will:—

- (1) promptly notify the other party ("Y") of such requirement;
- (2) pay to the relevant authorities the full amount required to be deducted or withheld (including the full amount required to be deducted or withheld from any additional amount paid by X to Y under this Section 2(d)) promptly upon the earlier of determining that such deduction or withholding is required or receiving notice that such amount has been assessed against Y;
- (3) promptly forward to Y an official receipt (or a certified copy), or other documentation reasonably acceptable to Y, evidencing such payment to such authorities; and

(4) if such Tax is an Indemnifiable Tax, pay to Y, in addition to the payment to which Y is otherwise entitled under this Agreement, such additional amount as is necessary to ensure that the net amount actually received by Y (free and clear of Indemnifiable Taxes, whether assessed against X or Y) will equal the full amount Y would have received had no such deduction or withholding been required. However, X will not be required to pay any additional amount to Y to the extent that it would not be required to be paid but for:—

(A) the failure by Y to comply with or perform any agreement contained in Section 4(a)(i), 4(a)(iii) or 4(d); or

(B) the failure of a representation made by Y pursuant to Section 3(f) to be accurate and true unless such failure would not have occurred but for (I) any action taken by a taxing authority, or brought in a court of competent jurisdiction, after a Transaction is entered into (regardless of whether such action is taken or brought with respect to a party to this Agreement) or (II) a Change in Tax Law.

(ii) **Liability.** If:—

(1) X is required by any applicable law, as modified by the practice of any relevant governmental revenue authority, to make any deduction or withholding in respect of which X would not be required to pay an additional amount to Y under Section 2(d)(i)(4);

(2) X does not so deduct or withhold; and

(3) a liability resulting from such Tax is assessed directly against X,

then, except to the extent Y has satisfied or then satisfies the liability resulting from such Tax, Y will promptly pay to X the amount of such liability (including any related liability for interest, but including any related liability for penalties only if Y has failed to comply with or perform any agreement contained in Section 4(a)(i), 4(a)(iii) or 4(d)).

### 3. Representations

Each party makes the representations contained in Sections 3(a), 3(b), 3(c), 3(d), 3(e) and 3(f) and, if specified in the Schedule as applying, 3(g) to the other party (which representations will be deemed to be repeated by each party on each date on which a Transaction is entered into and, in the case of the representations in Section 3(f), at all times until the termination of this Agreement). If any "Additional Representation" is specified in the Schedule or any Confirmation as applying, the party or parties specified for such Additional Representation will make and, if applicable, be deemed to repeat such Additional Representation at the time or times specified for such Additional Representation.

(a) **Basic Representations.**

(i) **Status.** It is duly organised and validly existing under the laws of the jurisdiction of its organisation or incorporation and, if relevant under such laws, in good standing;

(ii) **Powers.** It has the power to execute this Agreement and any other documentation relating to this Agreement to which it is a party, to deliver this Agreement and any other documentation relating to this Agreement that it is required by this Agreement to deliver and to perform its obligations under this Agreement and any obligations it has under any Credit Support Document to which it is a party and has taken all necessary action to authorise such execution, delivery and performance;

- (iii) **No Violation or Conflict.** Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets;
- (iv) **Consents.** All governmental and other consents that are required to have been obtained by it with respect to this Agreement or any Credit Support Document to which it is a party have been obtained and are in full force and effect and all conditions of any such consents have been complied with; and
- (v) **Obligations Binding.** Its obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)).
- (b) **Absence of Certain Events.** No Event of Default or Potential Event of Default or, to its knowledge, Termination Event with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any Credit Support Document to which it is a party.
- (c) **Absence of Litigation.** There is not pending or, to its knowledge, threatened against it, any of its Credit Support Providers or any of its applicable Specified Entities any action, suit or proceeding at law or in equity or before any court, tribunal, governmental body, agency or official or any arbitrator that is likely to affect the legality, validity or enforceability against it of this Agreement or any Credit Support Document to which it is a party or its ability to perform its obligations under this Agreement or such Credit Support Document.
- (d) **Accuracy of Specified Information.** All applicable information that is furnished in writing by or on behalf of it to the other party and is identified for the purpose of this Section 3(d) in the Schedule is, as of the date of the information, true, accurate and complete in every material respect.
- (e) **Payer Tax Representation.** Each representation specified in the Schedule as being made by it for the purpose of this Section 3(e) is accurate and true.
- (f) **Payee Tax Representations.** Each representation specified in the Schedule as being made by it for the purpose of this Section 3(f) is accurate and true.
- (g) **No Agency.** It is entering into this Agreement, including each Transaction, as principal and not as agent of any person or entity.

#### 4. Agreements

Each party agrees with the other that, so long as either party has or may have any obligation under this Agreement or under any Credit Support Document to which it is a party:—

- (a) **Furnish Specified Information.** It will deliver to the other party or, in certain cases under clause (iii) below, to such government or taxing authority as the other party reasonably directs:—
- (i) any forms, documents or certificates relating to taxation specified in the Schedule or any Confirmation;
- (ii) any other documents specified in the Schedule or any Confirmation; and

(iii) upon reasonable demand by such other party, any form or document that may be required or reasonably requested in writing in order to allow such other party or its Credit Support Provider to make a payment under this Agreement or any applicable Credit Support Document without any deduction or withholding for or on account of any Tax or with such deduction or withholding at a reduced rate (so long as the completion, execution or submission of such form or document would not materially prejudice the legal or commercial position of the party in receipt of such demand), with any such form or document to be accurate and completed in a manner reasonably satisfactory to such other party and to be executed and to be delivered with any reasonably required certification,

in each case by the date specified in the Schedule or such Confirmation or, if none is specified, as soon as reasonably practicable.

(b) **Maintain Authorisations.** It will use all reasonable efforts to maintain in full force and effect all consents of any governmental or other authority that are required to be obtained by it with respect to this Agreement or any Credit Support Document to which it is a party and will use all reasonable efforts to obtain any that may become necessary in the future.

(c) **Comply With Laws.** It will comply in all material respects with all applicable laws and orders to which it may be subject if failure so to comply would materially impair its ability to perform its obligations under this Agreement or any Credit Support Document to which it is a party.

(d) **Tax Agreement.** It will give notice of any failure of a representation made by it under Section 3(f) to be accurate and true promptly upon learning of such failure.

(e) **Payment of Stamp Tax.** Subject to Section 11, it will pay any Stamp Tax levied or imposed upon it or in respect of its execution or performance of this Agreement by a jurisdiction in which it is incorporated, organised, managed and controlled or considered to have its seat, or where an Office through which it is acting for the purpose of this Agreement is located ("Stamp Tax Jurisdiction"), and will indemnify the other party against any Stamp Tax levied or imposed upon the other party or in respect of the other party's execution or performance of this Agreement by any such Stamp Tax Jurisdiction which is not also a Stamp Tax Jurisdiction with respect to the other party.

## 5. Events of Default and Termination Events

(a) **Events of Default.** The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any of the following events constitutes (subject to Sections 5(c) and 6(e)(iv)) an event of default (an "Event of Default") with respect to such party:—

(i) **Failure to Pay or Deliver.** Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 9(h)(i)(2) or (4) required to be made by it if such failure is not remedied on or before the first Local Business Day in the case of any such payment or the first Local Delivery Day in the case of any such delivery after, in each case, notice of such failure is given to the party;

(ii) **Breach of Agreement; Repudiation of Agreement.**

(1) Failure by the party to comply with or perform any agreement or obligation (other than an obligation to make any payment under this Agreement or delivery under Section 2(a)(i) or 9(h)(i)(2) or (4) or to give notice of a Termination Event or any agreement or obligation under Section 4(a)(i), 4(a)(iii) or 4(d)) to be complied with or performed by the party in accordance with this Agreement if such failure is not remedied within 30 days after notice of such failure is given to the party; or

(2) the party disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, this Master Agreement, any Confirmation executed and delivered by that party or any

Transaction evidenced by such a Confirmation (or such action is taken by any person or entity appointed or empowered to operate it or act on its behalf);

(iii) **Credit Support Default.**

(1) Failure by the party or any Credit Support Provider of such party to comply with or perform any agreement or obligation to be complied with or performed by it in accordance with any Credit Support Document if such failure is continuing after any applicable grace period has elapsed;

(2) the expiration or termination of such Credit Support Document or the failing or ceasing of such Credit Support Document, or any security interest granted by such party or such Credit Support Provider to the other party pursuant to any such Credit Support Document, to be in full force and effect for the purpose of this Agreement (in each case other than in accordance with its terms) prior to the satisfaction of all obligations of such party under each Transaction to which such Credit Support Document relates without the written consent of the other party; or

(3) the party or such Credit Support Provider disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, such Credit Support Document (or such action is taken by any person or entity appointed or empowered to operate it or act on its behalf);

(iv) **Misrepresentation.** A representation (other than a representation under Section 3(e) or 3(f)) made or repeated or deemed to have been made or repeated by the party or any Credit Support Provider of such party in this Agreement or any Credit Support Document proves to have been incorrect or misleading in any material respect when made or repeated or deemed to have been made or repeated;

(v) **Default Under Specified Transaction.** The party, any Credit Support Provider of such party or any applicable Specified Entity of such party:—

(1) defaults (other than by failing to make a delivery) under a Specified Transaction or any credit support arrangement relating to a Specified Transaction and, after giving effect to any applicable notice requirement or grace period, such default results in a liquidation of, an acceleration of obligations under, or an early termination of, that Specified Transaction;

(2) defaults, after giving effect to any applicable notice requirement or grace period, in making any payment due on the last payment or exchange date of, or any payment on early termination of, a Specified Transaction (or, if there is no applicable notice requirement or grace period, such default continues for at least one Local Business Day);

(3) defaults in making any delivery due under (including any delivery due on the last delivery or exchange date of) a Specified Transaction or any credit support arrangement relating to a Specified Transaction and, after giving effect to any applicable notice requirement or grace period, such default results in a liquidation of, an acceleration of obligations under, or an early termination of, all transactions outstanding under the documentation applicable to that Specified Transaction; or

(4) disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, a Specified Transaction or any credit support arrangement relating to a Specified Transaction that is, in either case, confirmed or evidenced by a document or other confirming evidence executed and delivered by that party, Credit Support Provider or Specified Entity (or such action is taken by any person or entity appointed or empowered to operate it or act on its behalf);

(vi) **Cross-Default.** If "Cross-Default" is specified in the Schedule as applying to the party, the occurrence or existence of:—

(1) a default, event of default or other similar condition or event (however described) in respect of such party, any Credit Support Provider of such party or any applicable Specified Entity of such party under one or more agreements or instruments relating to Specified Indebtedness of any of them (individually or collectively) where the aggregate principal amount of such agreements or instruments, either alone or together with the amount, if any, referred to in clause (2) below, is not less than the applicable Threshold Amount (as specified in the Schedule) which has resulted in such Specified Indebtedness becoming, or becoming capable at such time of being declared, due and payable under such agreements or instruments before it would otherwise have been due and payable; or

(2) a default by such party, such Credit Support Provider or such Specified Entity (individually or collectively) in making one or more payments under such agreements or instruments on the due date for payment (after giving effect to any applicable notice requirement or grace period) in an aggregate amount, either alone or together with the amount, if any, referred to in clause (1) above, of not less than the applicable Threshold Amount;

(vii) **Bankruptcy.** The party, any Credit Support Provider of such party or any applicable Specified Entity of such party:—

(1) is dissolved (other than pursuant to a consolidation, amalgamation or merger); (2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due; (3) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (4)(A) institutes or has instituted against it, by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in the jurisdiction of its incorporation or organisation or the jurisdiction of its head or home office, a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation by it or such regulator, supervisor or similar official, or (B) has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and such proceeding or petition is instituted or presented by a person or entity not described in clause (A) above and either (I) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation or (II) is not dismissed, discharged, stayed or restrained in each case within 15 days of the institution or presentation thereof; (5) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger); (6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets; (7) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 15 days thereafter; (8) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (1) to (7) above (inclusive); or (9) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts; or

(viii) **Merger Without Assumption.** The party or any Credit Support Provider of such party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, or reorganises, reincorporates or reconstitutes into or as, another entity and, at the time of such consolidation, amalgamation, merger, transfer, reorganisation, reincorporation or reconstitution:—

(1) the resulting, surviving or transferee entity fails to assume all the obligations of such party or such Credit Support Provider under this Agreement or any Credit Support Document to which it or its predecessor was a party; or

(2) the benefits of any Credit Support Document fail to extend (without the consent of the other party) to the performance by such resulting, surviving or transferee entity of its obligations under this Agreement.

(b) **Termination Events.** The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any event specified below constitutes (subject to Section 5(c)) an Illegality if the event is specified in clause (i) below, a Force Majeure Event if the event is specified in clause (ii) below, a Tax Event if the event is specified in clause (iii) below, a Tax Event Upon Merger if the event is specified in clause (iv) below, and, if specified to be applicable, a Credit Event Upon Merger if the event is specified pursuant to clause (v) below or an Additional Termination Event if the event is specified pursuant to clause (vi) below:—

(i) **Illegality.** After giving effect to any applicable provision, disruption fallback or remedy specified in, or pursuant to, the relevant Confirmation or elsewhere in this Agreement, due to an event or circumstance (other than any action taken by a party or, if applicable, any Credit Support Provider of such party) occurring after a Transaction is entered into, it becomes unlawful under any applicable law (including without limitation the laws of any country in which payment, delivery or compliance is required by either party or any Credit Support Provider, as the case may be), on any day, or it would be unlawful if the relevant payment, delivery or compliance were required on that day (in each case, other than as a result of a breach by the party of Section 4(b)):—

(1) for the Office through which such party (which will be the Affected Party) makes and receives payments or deliveries with respect to such Transaction to perform any absolute or contingent obligation to make a payment or delivery in respect of such Transaction, to receive a payment or delivery in respect of such Transaction or to comply with any other material provision of this Agreement relating to such Transaction; or

(2) for such party or any Credit Support Provider of such party (which will be the Affected Party) to perform any absolute or contingent obligation to make a payment or delivery which such party or Credit Support Provider has under any Credit Support Document relating to such Transaction, to receive a payment or delivery under such Credit Support Document or to comply with any other material provision of such Credit Support Document;

(ii) **Force Majeure Event.** After giving effect to any applicable provision, disruption fallback or remedy specified in, or pursuant to, the relevant Confirmation or elsewhere in this Agreement, by reason of force majeure or act of state occurring after a Transaction is entered into, on any day:—

(1) the Office through which such party (which will be the Affected Party) makes and receives payments or deliveries with respect to such Transaction is prevented from performing any absolute or contingent obligation to make a payment or delivery in respect of such Transaction, from receiving a payment or delivery in respect of such Transaction or from complying with any other material provision of this Agreement relating to such Transaction (or would be so prevented if such payment, delivery or compliance were required on that day), or it becomes impossible or



impracticable for such Office so to perform, receive or comply (or it would be impossible or impracticable for such Office so to perform, receive or comply if such payment, delivery or compliance were required on that day); or

(2) such party or any Credit Support Provider of such party (which will be the Affected Party) is prevented from performing any absolute or contingent obligation to make a payment or delivery which such party or Credit Support Provider has under any Credit Support Document relating to such Transaction, from receiving a payment or delivery under such Credit Support Document or from complying with any other material provision of such Credit Support Document (or would be so prevented if such payment, delivery or compliance were required on that day), or it becomes impossible or impracticable for such party or Credit Support Provider so to perform, receive or comply (or it would be impossible or impracticable for such party or Credit Support Provider so to perform, receive or comply if such payment, delivery or compliance were required on that day),

so long as the force majeure or act of state is beyond the control of such Office, such party or such Credit Support Provider, as appropriate, and such Office, party or Credit Support Provider could not, after using all reasonable efforts (which will not require such party or Credit Support Provider to incur a loss, other than immaterial, incidental expenses), overcome such prevention, impossibility or impracticability;

(iii) **Tax Event.** Due to (1) any action taken by a taxing authority, or brought in a court of competent jurisdiction, after a Transaction is entered into (regardless of whether such action is taken or brought with respect to a party to this Agreement) or (2) a Change in Tax Law, the party (which will be the Affected Party) will, or there is a substantial likelihood that it will, on the next succeeding Scheduled Settlement Date (A) be required to pay to the other party an additional amount in respect of an Indemnifiable Tax under Section 2(d)(i)(4) (except in respect of interest under Section 9(h)) or (B) receive a payment from which an amount is required to be deducted or withheld for or on account of a Tax (except in respect of interest under Section 9(h)) and no additional amount is required to be paid in respect of such Tax under Section 2(d)(i)(4) (other than by reason of Section 2(d)(i)(4)(A) or (B));

(iv) **Tax Event Upon Merger.** The party (the "Burdened Party") on the next succeeding Scheduled Settlement Date will either (1) be required to pay an additional amount in respect of an Indemnifiable Tax under Section 2(d)(i)(4) (except in respect of interest under Section 9(h)) or (2) receive a payment from which an amount has been deducted or withheld for or on account of any Tax in respect of which the other party is not required to pay an additional amount (other than by reason of Section 2(d)(i)(4)(A) or (B)), in either case as a result of a party consolidating or amalgamating with, or merging with or into, or transferring all or substantially all its assets (or any substantial part of the assets comprising the business conducted by it as of the date of this Master Agreement) to, or reorganising, reincorporating or reconstituting into or as, another entity (which will be the Affected Party) where such action does not constitute a Merger Without Assumption;

(v) **Credit Event Upon Merger.** If "Credit Event Upon Merger" is specified in the Schedule as applying to the party, a Designated Event (as defined below) occurs with respect to such party, any Credit Support Provider of such party or any applicable Specified Entity of such party (in each case, "X") and such Designated Event does not constitute a Merger Without Assumption, and the creditworthiness of X or, if applicable, the successor, surviving or transferee entity of X, after taking into account any applicable Credit Support Document, is materially weaker immediately after the occurrence of such Designated Event than that of X immediately prior to the occurrence of such Designated Event (and, in any such event, such party or its successor, surviving or transferee entity, as appropriate, will be the Affected Party). A "Designated Event" with respect to X means that:—

(1) X consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets (or any substantial part of the assets comprising the business conducted by X as of the

date of this Master Agreement) to, or reorganises, reincorporates or reconstitutes into or as, another entity;

(2) any person, related group of persons or entity acquires directly or indirectly the beneficial ownership of (A) equity securities having the power to elect a majority of the board of directors (or its equivalent) of X or (B) any other ownership interest enabling it to exercise control of X; or

(3) X effects any substantial change in its capital structure by means of the issuance, incurrence or guarantee of debt or the issuance of (A) preferred stock or other securities convertible into or exchangeable for debt or preferred stock or (B) in the case of entities other than corporations, any other form of ownership interest; or

(vi) **Additional Termination Event.** If any "Additional Termination Event" is specified in the Schedule or any Confirmation as applying, the occurrence of such event (and, in such event, the Affected Party or Affected Parties will be as specified for such Additional Termination Event in the Schedule or such Confirmation).

(c) **Hierarchy of Events.**

(i) An event or circumstance that constitutes or gives rise to an Illegality or a Force Majeure Event will not, for so long as that is the case, also constitute or give rise to an Event of Default under Section 5(a)(i), 5(a)(ii)(1) or 5(a)(iii)(1) insofar as such event or circumstance relates to the failure to make any payment or delivery or a failure to comply with any other material provision of this Agreement or a Credit Support Document, as the case may be.

(ii) Except in circumstances contemplated by clause (i) above, if an event or circumstance which would otherwise constitute or give rise to an Illegality or a Force Majeure Event also constitutes an Event of Default or any other Termination Event, it will be treated as an Event of Default or such other Termination Event, as the case may be, and will not constitute or give rise to an Illegality or a Force Majeure Event.

(iii) If an event or circumstance which would otherwise constitute or give rise to a Force Majeure Event also constitutes an Illegality, it will be treated as an Illegality, except as described in clause (ii) above, and not a Force Majeure Event.

(d) **Deferral of Payments and Deliveries During Waiting Period.** If an Illegality or a Force Majeure Event has occurred and is continuing with respect to a Transaction, each payment or delivery which would otherwise be required to be made under that Transaction will be deferred to, and will not be due until:—

(i) the first Local Business Day or, in the case of a delivery, the first Local Delivery Day (or the first day that would have been a Local Business Day or Local Delivery Day, as appropriate, but for the occurrence of the event or circumstance constituting or giving rise to that Illegality or Force Majeure Event) following the end of any applicable Waiting Period in respect of that Illegality or Force Majeure Event, as the case may be; or

(ii) if earlier, the date on which the event or circumstance constituting or giving rise to that Illegality or Force Majeure Event ceases to exist or, if such date is not a Local Business Day or, in the case of a delivery, a Local Delivery Day, the first following day that is a Local Business Day or Local Delivery Day, as appropriate.

(e) **Inability of Head or Home Office to Perform Obligations of Branch.** If (i) an Illegality or a Force Majeure Event occurs under Section 5(b)(i)(1) or 5(b)(ii)(1) and the relevant Office is not the Affected Party's head or home office, (ii) Section 10(a) applies, (iii) the other party seeks performance of the relevant obligation or

compliance with the relevant provision by the Affected Party's head or home office and (iv) the Affected Party's head or home office fails so to perform or comply due to the occurrence of an event or circumstance which would, if that head or home office were the Office through which the Affected Party makes and receives payments and deliveries with respect to the relevant Transaction, constitute or give rise to an Illegality or a Force Majeure Event, and such failure would otherwise constitute an Event of Default under Section 5(a)(i) or 5(a)(iii)(1) with respect to such party, then, for so long as the relevant event or circumstance continues to exist with respect to both the Office referred to in Section 5(b)(i)(1) or 5(b)(ii)(1), as the case may be, and the Affected Party's head or home office, such failure will not constitute an Event of Default under Section 5(a)(i) or 5(a)(iii)(1).

## **6. Early Termination; Close-Out Netting**

(a) **Right to Terminate Following Event of Default.** If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, "Automatic Early Termination" is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).

### **(b) Right to Terminate Following Termination Event**

(i) **Notice.** If a Termination Event other than a Force Majeure Event occurs, an Affected Party will, promptly upon becoming aware of it, notify the other party, specifying the nature of that Termination Event and each Affected Transaction, and will also give the other party such other information about that Termination Event as the other party may reasonably require. If a Force Majeure Event occurs, each party will, promptly upon becoming aware of it, use all reasonable efforts to notify the other party, specifying the nature of that Force Majeure Event, and will also give the other party such other information about that Force Majeure Event as the other party may reasonably require.

(ii) **Transfer to Avoid Termination Event.** If a Tax Event occurs and there is only one Affected Party, or if a Tax Event Upon Merger occurs and the Burdened Party is the Affected Party, the Affected Party will, as a condition to its right to designate an Early Termination Date under Section 6(b)(iv), use all reasonable efforts (which will not require such party to incur a loss, other than immaterial, incidental expenses) to transfer within 20 days after it gives notice under Section 6(b)(i) all its rights and obligations under this Agreement in respect of the Affected Transactions to another of its Offices or Affiliates so that such Termination Event ceases to exist.

If the Affected Party is not able to make such a transfer it will give notice to the other party to that effect within such 20 day period, whereupon the other party may effect such a transfer within 30 days after the notice is given under Section 6(b)(i).

Any such transfer by a party under this Section 6(b)(ii) will be subject to and conditional upon the prior written consent of the other party, which consent will not be withheld if such other party's policies in effect at such time would permit it to enter into transactions with the transferee on the terms proposed.

(iii) **Two Affected Parties.** If a Tax Event occurs and there are two Affected Parties, each party will use all reasonable efforts to reach agreement within 30 days after notice of such occurrence is given under Section 6(b)(i) to avoid that Termination Event.

(iv) ***Right to Terminate.***

(1) If:—

(A) a transfer under Section 6(b)(ii) or an agreement under Section 6(b)(iii), as the case may be, has not been effected with respect to all Affected Transactions within 30 days after an Affected Party gives notice under Section 6(b)(i); or

(B) a Credit Event Upon Merger or an Additional Termination Event occurs, or a Tax Event Upon Merger occurs and the Burdened Party is not the Affected Party,

the Burdened Party in the case of a Tax Event Upon Merger, any Affected Party in the case of a Tax Event or an Additional Termination Event if there are two Affected Parties, or the Non-affected Party in the case of a Credit Event Upon Merger or an Additional Termination Event if there is only one Affected Party may, if the relevant Termination Event is then continuing, by not more than 20 days notice to the other party, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all Affected Transactions.

(2) If at any time an Illegality or a Force Majeure Event has occurred and is then continuing and any applicable Waiting Period has expired:—

(A) Subject to clause (B) below, either party may, by not more than 20 days notice to the other party, designate (I) a day not earlier than the day on which such notice becomes effective as an Early Termination Date in respect of all Affected Transactions or (II) by specifying in that notice the Affected Transactions in respect of which it is designating the relevant day as an Early Termination Date, a day not earlier than two Local Business Days following the day on which such notice becomes effective as an Early Termination Date in respect of less than all Affected Transactions. Upon receipt of a notice designating an Early Termination Date in respect of less than all Affected Transactions, the other party may, by notice to the designating party, if such notice is effective on or before the day so designated, designate that same day as an Early Termination Date in respect of any or all other Affected Transactions.

(B) An Affected Party (if the Illegality or Force Majeure Event relates to performance by such party or any Credit Support Provider of such party of an obligation to make any payment or delivery under, or to compliance with any other material provision of, the relevant Credit Support Document) will only have the right to designate an Early Termination Date under Section 6(b)(iv)(2)(A) as a result of an Illegality under Section 5(b)(i)(2) or a Force Majeure Event under Section 5(b)(ii)(2) following the prior designation by the other party of an Early Termination Date, pursuant to Section 6(b)(iv)(2)(A), in respect of less than all Affected Transactions.

(c) ***Effect of Designation.***

(i) If notice designating an Early Termination Date is given under Section 6(a) or 6(b), the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is then continuing.

(ii) Upon the occurrence or effective designation of an Early Termination Date, no further payments or deliveries under Section 2(a)(i) or 9(h)(i) in respect of the Terminated Transactions will be required to be made, but without prejudice to the other provisions of this Agreement. The amount, if any, payable in respect of an Early Termination Date will be determined pursuant to Sections 6(e) and 9(h)(ii).

(d) **Calculations; Payment Date.**

(i) **Statement.** On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, if any, contemplated by Section 6(e) and will provide to the other party a statement (1) showing, in reasonable detail, such calculations (including any quotations, market data or information from internal sources used in making such calculations), (2) specifying (except where there are two Affected Parties) any Early Termination Amount payable and (3) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation or market data obtained in determining a Close-out Amount, the records of the party obtaining such quotation or market data will be conclusive evidence of the existence and accuracy of such quotation or market data.

(ii) **Payment Date.** An Early Termination Amount due in respect of any Early Termination Date will, together with any amount of interest payable pursuant to Section 9(h)(ii)(2), be payable (1) on the day on which notice of the amount payable is effective in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default and (2) on the day which is two Local Business Days after the day on which notice of the amount payable is effective (or, if there are two Affected Parties, after the day on which the statement provided pursuant to clause (i) above by the second party to provide such a statement is effective) in the case of an Early Termination Date which is designated as a result of a Termination Event.

(e) **Payments on Early Termination.** If an Early Termination Date occurs, the amount, if any, payable in respect of that Early Termination Date (the "Early Termination Amount") will be determined pursuant to this Section 6(e) and will be subject to Section 6(f).

(i) **Events of Default.** If the Early Termination Date results from an Event of Default, the Early Termination Amount will be an amount equal to (1) the sum of (A) the Termination Currency Equivalent of the Close-out Amount or Close-out Amounts (whether positive or negative) determined by the Non-defaulting Party for each Terminated Transaction or group of Terminated Transactions, as the case may be, and (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party less (2) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party. If the Early Termination Amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay the absolute value of the Early Termination Amount to the Defaulting Party.

(ii) **Termination Events.** If the Early Termination Date results from a Termination Event:—

(1) **One Affected Party.** Subject to clause (3) below, if there is one Affected Party, the Early Termination Amount will be determined in accordance with Section 6(e)(i), except that references to the Defaulting Party and to the Non-defaulting Party will be deemed to be references to the Affected Party and to the Non-affected Party, respectively.

(2) **Two Affected Parties.** Subject to clause (3) below, if there are two Affected Parties, each party will determine an amount equal to the Termination Currency Equivalent of the sum of the Close-out Amount or Close-out Amounts (whether positive or negative) for each Terminated Transaction or group of Terminated Transactions, as the case may be, and the Early Termination Amount will be an amount equal to (A) the sum of (I) one-half of the difference between the higher amount so determined (by party "X") and the lower amount so determined (by party "Y") and (II) the Termination Currency Equivalent of the Unpaid Amounts owing to X less (B) the Termination Currency Equivalent of the Unpaid Amounts owing to Y. If the Early Termination Amount is a positive number, Y will pay it to X; if it is a negative number, X will pay the absolute value of the Early Termination Amount to Y.

(3) **Mid-Market Events.** If that Termination Event is an Illegality or a Force Majeure Event, then the Early Termination Amount will be determined in accordance with clause (1) or (2) above, as appropriate, except that, for the purpose of determining a Close-out Amount or Close-out Amounts, the Determining Party will:—

(A) if obtaining quotations from one or more third parties (or from any of the Determining Party's Affiliates), ask each third party or Affiliate (I) not to take account of the current creditworthiness of the Determining Party or any existing Credit Support Document and (II) to provide mid-market quotations; and

(B) in any other case, use mid-market values without regard to the creditworthiness of the Determining Party.

(iii) **Adjustment for Bankruptcy.** In circumstances where an Early Termination Date occurs because Automatic Early Termination applies in respect of a party, the Early Termination Amount will be subject to such adjustments as are appropriate and permitted by applicable law to reflect any payments or deliveries made by one party to the other under this Agreement (and retained by such other party) during the period from the relevant Early Termination Date to the date for payment determined under Section 6(d)(ii).

(iv) **Adjustment for Illegality or Force Majeure Event.** The failure by a party or any Credit Support Provider of such party to pay, when due, any Early Termination Amount will not constitute an Event of Default under Section 5(a)(i) or 5(a)(iii)(1) if such failure is due to the occurrence of an event or circumstance which would, if it occurred with respect to payment, delivery or compliance related to a Transaction, constitute or give rise to an Illegality or a Force Majeure Event. Such amount will (1) accrue interest and otherwise be treated as an Unpaid Amount owing to the other party if subsequently an Early Termination Date results from an Event of Default, a Credit Event Upon Merger or an Additional Termination Event in respect of which all outstanding Transactions are Affected Transactions and (2) otherwise accrue interest in accordance with Section 9(h)(ii)(2).

(v) **Pre-Estimate.** The parties agree that an amount recoverable under this Section 6(e) is a reasonable pre-estimate of loss and not a penalty. Such amount is payable for the loss of bargain and the loss of protection against future risks, and, except as otherwise provided in this Agreement, neither party will be entitled to recover any additional damages as a consequence of the termination of the Terminated Transactions.

(f) **Set-Off.** Any Early Termination Amount payable to one party (the "Payee") by the other party (the "Payer"), in circumstances where there is a Defaulting Party or where there is one Affected Party in the case where either a Credit Event Upon Merger has occurred or any other Termination Event in respect of which all outstanding Transactions are Affected Transactions has occurred, will, at the option of the Non-defaulting Party or the Non-affected Party, as the case may be ("X") (and without prior notice to the Defaulting Party or the Affected Party, as the case may be), be reduced by its set-off against any other amounts ("Other Amounts") payable by the Payee to the Payer (whether or not arising under this Agreement, matured or contingent and irrespective of the currency, place of payment or place of booking of the obligation). To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party of any set-off effected under this Section 6(f).

For this purpose, either the Early Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency.

If an obligation is unascertained, X may in good faith estimate that obligation and set off in respect of the estimate, subject to the relevant party accounting to the other when the obligation is ascertained.

Nothing in this Section 6(f) will be effective to create a charge or other security interest. This Section 6(f) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right of retention or withholding or similar right or requirement to which any party is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise).

## 7. Transfer

Subject to Section 6(b)(ii) and to the extent permitted by applicable law, neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party, except that:—

- (a) a party may make such a transfer of this Agreement pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity (but without prejudice to any other right or remedy under this Agreement); and
- (b) a party may make such a transfer of all or any part of its interest in any Early Termination Amount payable to it by a Defaulting Party, together with any amounts payable on or with respect to that interest and any other rights associated with that interest pursuant to Sections 8, 9(h) and 11.

Any purported transfer that is not in compliance with this Section 7 will be void.

## 8. Contractual Currency

- (a) **Payment in the Contractual Currency.** Each payment under this Agreement will be made in the relevant currency specified in this Agreement for that payment (the "Contractual Currency"). To the extent permitted by applicable law, any obligation to make payments under this Agreement in the Contractual Currency will not be discharged or satisfied by any tender in any currency other than the Contractual Currency, except to the extent such tender results in the actual receipt by the party to which payment is owed, acting in good faith and using commercially reasonable procedures in converting the currency so tendered into the Contractual Currency, of the full amount in the Contractual Currency of all amounts payable in respect of this Agreement. If for any reason the amount in the Contractual Currency so received falls short of the amount in the Contractual Currency payable in respect of this Agreement, the party required to make the payment will, to the extent permitted by applicable law, immediately pay such additional amount in the Contractual Currency as may be necessary to compensate for the shortfall. If for any reason the amount in the Contractual Currency so received exceeds the amount in the Contractual Currency payable in respect of this Agreement, the party receiving the payment will refund promptly the amount of such excess.
- (b) **Judgments.** To the extent permitted by applicable law, if any judgment or order expressed in a currency other than the Contractual Currency is rendered (i) for the payment of any amount owing in respect of this Agreement, (ii) for the payment of any amount relating to any early termination in respect of this Agreement or (iii) in respect of a judgment or order of another court for the payment of any amount described in clause (i) or (ii) above, the party seeking recovery, after recovery in full of the aggregate amount to which such party is entitled pursuant to the judgment or order, will be entitled to receive immediately from the other party the amount of any shortfall of the Contractual Currency received by such party as a consequence of sums paid in such other currency and will refund promptly to the other party any excess of the Contractual Currency received by such party as a consequence of sums paid in such other currency if such shortfall or such excess arises or results from any variation between the rate of exchange at which the Contractual Currency is converted into the currency of the judgment or order for the purpose of such judgment or order and the rate of exchange at which such party is able, acting in good faith and using

commercially reasonable procedures in converting the currency received into the Contractual Currency, to purchase the Contractual Currency with the amount of the currency of the judgment or order actually received by such party.

(c) **Separate Indemnities.** To the extent permitted by applicable law, the indemnities in this Section 8 constitute separate and independent obligations from the other obligations in this Agreement, will be enforceable as separate and independent causes of action, will apply notwithstanding any indulgence granted by the party to which any payment is owed and will not be affected by judgment being obtained or claim or proof being made for any other sums payable in respect of this Agreement.

(d) **Evidence of Loss.** For the purpose of this Section 8, it will be sufficient for a party to demonstrate that it would have suffered a loss had an actual exchange or purchase been made.

**9. Miscellaneous**

(a) **Entire Agreement.** This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter. Each of the parties acknowledges that in entering into this Agreement it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in this Agreement) and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in this Agreement will limit or exclude any liability of a party for fraud.

(b) **Amendments.** An amendment, modification or waiver in respect of this Agreement will only be effective if in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or by an exchange of electronic messages on an electronic messaging system.

(c) **Survival of Obligations.** Without prejudice to Sections 2(a)(iii) and 6(c)(ii), the obligations of the parties under this Agreement will survive the termination of any Transaction.

(d) **Remedies Cumulative.** Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are cumulative and not exclusive of any rights, powers, remedies and privileges provided by law.

(e) **Counterparts and Confirmations.**

(i) This Agreement (and each amendment, modification and waiver in respect of it) may be executed and delivered in counterparts (including by facsimile transmission and by electronic messaging system), each of which will be deemed an original.

(ii) The parties intend that they are legally bound by the terms of each Transaction from the moment they agree to those terms (whether orally or otherwise). A Confirmation will be entered into as soon as practicable and may be executed and delivered in counterparts (including by facsimile transmission) or be created by an exchange of telexes, by an exchange of electronic messages on an electronic messaging system or by an exchange of e-mails, which in each case will be sufficient for all purposes to evidence a binding supplement to this Agreement. The parties will specify therein or through another effective means that any such counterpart, telex, electronic message or e-mail constitutes a Confirmation.

(f) **No Waiver of Rights.** A failure or delay in exercising any right, power or privilege in respect of this Agreement will not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.

(g) **Headings.** The headings used in this Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Agreement.



(h) ***Interest and Compensation.***

(i) ***Prior to Early Termination.*** Prior to the occurrence or effective designation of an Early Termination Date in respect of the relevant Transaction:—

(1) ***Interest on Defaulted Payments.*** If a party defaults in the performance of any payment obligation, it will, to the extent permitted by applicable law and subject to Section 6(c), pay interest (before as well as after judgment) on the overdue amount to the other party on demand in the same currency as the overdue amount, for the period from (and including) the original due date for payment to (but excluding) the date of actual payment (and excluding any period in respect of which interest or compensation in respect of the overdue amount is due pursuant to clause (3)(B) or (C) below), at the Default Rate.

(2) ***Compensation for Defaulted Deliveries.*** If a party defaults in the performance of any obligation required to be settled by delivery, it will on demand (A) compensate the other party to the extent provided for in the relevant Confirmation or elsewhere in this Agreement and (B) unless otherwise provided in the relevant Confirmation or elsewhere in this Agreement, to the extent permitted by applicable law and subject to Section 6(c), pay to the other party interest (before as well as after judgment) on an amount equal to the fair market value of that which was required to be delivered in the same currency as that amount, for the period from (and including) the originally scheduled date for delivery to (but excluding) the date of actual delivery (and excluding any period in respect of which interest or compensation in respect of that amount is due pursuant to clause (4) below), at the Default Rate. The fair market value of any obligation referred to above will be determined as of the originally scheduled date for delivery, in good faith and using commercially reasonable procedures, by the party that was entitled to take delivery.

(3) ***Interest on Deferred Payments.*** If:—

(A) a party does not pay any amount that, but for Section 2(a)(iii), would have been payable, it will, to the extent permitted by applicable law and subject to Section 6(c) and clauses (B) and (C) below, pay interest (before as well as after judgment) on that amount to the other party on demand (after such amount becomes payable) in the same currency as that amount, for the period from (and including) the date the amount would, but for Section 2(a)(iii), have been payable to (but excluding) the date the amount actually becomes payable, at the Applicable Deferral Rate;

(B) a payment is deferred pursuant to Section 5(d), the party which would otherwise have been required to make that payment will, to the extent permitted by applicable law, subject to Section 6(c) and for so long as no Event of Default or Potential Event of Default with respect to that party has occurred and is continuing, pay interest (before as well as after judgment) on the amount of the deferred payment to the other party on demand (after such amount becomes payable) in the same currency as the deferred payment, for the period from (and including) the date the amount would, but for Section 5(d), have been payable to (but excluding) the earlier of the date the payment is no longer deferred pursuant to Section 5(d) and the date during the deferral period upon which an Event of Default or Potential Event of Default with respect to that party occurs, at the Applicable Deferral Rate; or

(C) a party fails to make any payment due to the occurrence of an Illegality or a Force Majeure Event (after giving effect to any deferral period contemplated by clause (B) above), it will, to the extent permitted by applicable law, subject to Section 6(c) and for so long as the event or circumstance giving rise to that Illegality or Force Majeure Event

continues and no Event of Default or Potential Event of Default with respect to that party has occurred and is continuing, pay interest (before as well as after judgment) on the overdue amount to the other party on demand in the same currency as the overdue amount, for the period from (and including) the date the party fails to make the payment due to the occurrence of the relevant Illegality or Force Majeure Event (or, if later, the date the payment is no longer deferred pursuant to Section 5(d)) to (but excluding) the earlier of the date the event or circumstance giving rise to that Illegality or Force Majeure Event ceases to exist and the date during the period upon which an Event of Default or Potential Event of Default with respect to that party occurs (and excluding any period in respect of which interest or compensation in respect of the overdue amount is due pursuant to clause (B) above), at the Applicable Deferral Rate.

(4) *Compensation for Deferred Deliveries.* If:—

(A) a party does not perform any obligation that, but for Section 2(a)(iii), would have been required to be settled by delivery;

(B) a delivery is deferred pursuant to Section 5(d); or

(C) a party fails to make a delivery due to the occurrence of an Illegality or a Force Majeure Event at a time when any applicable Waiting Period has expired,

the party required (or that would otherwise have been required) to make the delivery will, to the extent permitted by applicable law and subject to Section 6(c), compensate and pay interest to the other party on demand (after, in the case of clauses (A) and (B) above, such delivery is required) if and to the extent provided for in the relevant Confirmation or elsewhere in this Agreement.

(ii) *Early Termination.* Upon the occurrence or effective designation of an Early Termination Date in respect of a Transaction:—

(1) *Unpaid Amounts.* For the purpose of determining an Unpaid Amount in respect of the relevant Transaction, and to the extent permitted by applicable law, interest will accrue on the amount of any payment obligation or the amount equal to the fair market value of any obligation required to be settled by delivery included in such determination in the same currency as that amount, for the period from (and including) the date the relevant obligation was (or would have been but for Section 2(a)(iii) or 5(d)) required to have been performed to (but excluding) the relevant Early Termination Date, at the Applicable Close-out Rate.

(2) *Interest on Early Termination Amounts.* If an Early Termination Amount is due in respect of such Early Termination Date, that amount will, to the extent permitted by applicable law, be paid together with interest (before as well as after judgment) on that amount in the Termination Currency, for the period from (and including) such Early Termination Date to (but excluding) the date the amount is paid, at the Applicable Close-out Rate.

(iii) *Interest Calculation.* Any interest pursuant to this Section 9(h) will be calculated on the basis of daily compounding and the actual number of days elapsed.

## 10. Offices; Multibranch Parties

(a) If Section 10(a) is specified in the Schedule as applying, each party that enters into a Transaction through an Office other than its head or home office represents to and agrees with the other party that, notwithstanding the place of booking or its jurisdiction of incorporation or organisation, its obligations are the same in terms of recourse against it as if it had entered into the Transaction through its head or home office, except that a party will not have recourse to the head or home office of the other party in respect of any payment or delivery deferred pursuant to Section 5(d) for so long as the payment or delivery is so deferred. This representation and agreement will be deemed to be repeated by each party on each date on which the parties enter into a Transaction.

(b) If a party is specified as a Multibranch Party in the Schedule, such party may, subject to clause (c) below, enter into a Transaction through, book a Transaction in and make and receive payments and deliveries with respect to a Transaction through any Office listed in respect of that party in the Schedule (but not any other Office unless otherwise agreed by the parties in writing).

(c) The Office through which a party enters into a Transaction will be the Office specified for that party in the relevant Confirmation or as otherwise agreed by the parties in writing, and, if an Office for that party is not specified in the Confirmation or otherwise agreed by the parties in writing, its head or home office. Unless the parties otherwise agree in writing, the Office through which a party enters into a Transaction will also be the Office in which it books the Transaction and the Office through which it makes and receives payments and deliveries with respect to the Transaction. Subject to Section 6(b)(ii), neither party may change the Office in which it books the Transaction or the Office through which it makes and receives payments or deliveries with respect to a Transaction without the prior written consent of the other party.

## 11. Expenses

A Defaulting Party will on demand indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees, execution fees and Stamp Tax, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement or any Credit Support Document to which the Defaulting Party is a party or by reason of the early termination of any Transaction, including, but not limited to, costs of collection.

## 12. Notices

(a) **Effectiveness.** Any notice or other communication in respect of this Agreement may be given in any manner described below (except that a notice or other communication under Section 5 or 6 may not be given by electronic messaging system or e-mail) to the address or number or in accordance with the electronic messaging system or e-mail details provided (see the Schedule) and will be deemed effective as indicated:—

- (i) if in writing and delivered in person or by courier, on the date it is delivered;
- (ii) if sent by telex, on the date the recipient's answerback is received;
- (iii) if sent by facsimile transmission, on the date it is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);
- (iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date it is delivered or its delivery is attempted;
- (v) if sent by electronic messaging system, on the date it is received; or

- (vi) if sent by e-mail, on the date it is delivered,

unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Local Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Local Business Day, in which case that communication will be deemed given and effective on the first following day that is a Local Business Day.

- (b) **Change of Details.** Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system or e-mail details at which notices or other communications are to be given to it.

### 13. Governing Law and Jurisdiction

- (a) **Governing Law.** This Agreement will be governed by and construed in accordance with the law specified in the Schedule.

- (b) **Jurisdiction.** With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:—

- (i) submits:—

(1) if this Agreement is expressed to be governed by English law, to (A) the non-exclusive jurisdiction of the English courts if the Proceedings do not involve a Convention Court and (B) the exclusive jurisdiction of the English courts if the Proceedings do involve a Convention Court; or

(2) if this Agreement is expressed to be governed by the laws of the State of New York, to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City;

- (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party; and

- (iii) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction.

- (c) **Service of Process.** Each party irrevocably appoints the Process Agent, if any, specified opposite its name in the Schedule to receive, for it and on its behalf, service of process in any Proceedings. If for any reason any party's Process Agent is unable to act as such, such party will promptly notify the other party and within 30 days appoint a substitute process agent acceptable to the other party. The parties irrevocably consent to service of process given in the manner provided for notices in Section 12(a)(i), 12(a)(iii) or 12(a)(iv). Nothing in this Agreement will affect the right of either party to serve process in any other manner permitted by applicable law.

- (d) **Waiver of Immunities.** Each party irrevocably waives, to the extent permitted by applicable law, with respect to itself and its revenues and assets (irrespective of their use or intended use), all immunity on the grounds of sovereignty or other similar grounds from (i) suit, (ii) jurisdiction of any court, (iii) relief by way of injunction or order for specific performance or recovery of property, (iv) attachment of its assets (whether before or after judgment) and (v) execution or enforcement of any judgment to which it or its revenues or assets might otherwise be entitled in any Proceedings in the courts of any jurisdiction and irrevocably agrees, to the extent permitted by applicable law, that it will not claim any such immunity in any Proceedings.

#### 14. Definitions

As used in this Agreement:—

*"Additional Representation"* has the meaning specified in Section 3.

*"Additional Termination Event"* has the meaning specified in Section 5(b).

*"Affected Party"* has the meaning specified in Section 5(b).

*"Affected Transactions"* means (a) with respect to any Termination Event consisting of an Illegality, Force Majeure Event, Tax Event or Tax Event Upon Merger, all Transactions affected by the occurrence of such Termination Event (which, in the case of an Illegality under Section 5(b)(i)(2) or a Force Majeure Event under Section 5(b)(ii)(2), means all Transactions unless the relevant Credit Support Document references only certain Transactions, in which case those Transactions and, if the relevant Credit Support Document constitutes a Confirmation for a Transaction, that Transaction) and (b) with respect to any other Termination Event, all Transactions.

*"Affiliate"* means, subject to the Schedule, in relation to any person, any entity controlled, directly or indirectly, by the person, any entity that controls, directly or indirectly, the person or any entity directly or indirectly under common control with the person. For this purpose, "control" of any entity or person means ownership of a majority of the voting power of the entity or person.

*"Agreement"* has the meaning specified in Section 1(c).

*"Applicable Close-out Rate"* means:—

- (a) in respect of the determination of an Unpaid Amount:—
  - (i) in respect of obligations payable or deliverable (or which would have been but for Section 2(a)(iii)) by a Defaulting Party, the Default Rate;
  - (ii) in respect of obligations payable or deliverable (or which would have been but for Section 2(a)(iii)) by a Non-defaulting Party, the Non-default Rate;
  - (iii) in respect of obligations deferred pursuant to Section 5(d), if there is no Defaulting Party and for so long as the deferral period continues, the Applicable Deferral Rate; and
  - (iv) in all other cases following the occurrence of a Termination Event (except where interest accrues pursuant to clause (iii) above), the Applicable Deferral Rate; and
- (b) in respect of an Early Termination Amount:—
  - (i) for the period from (and including) the relevant Early Termination Date to (but excluding) the date (determined in accordance with Section 6(d)(ii)) on which that amount is payable:—
    - (1) if the Early Termination Amount is payable by a Defaulting Party, the Default Rate;
    - (2) if the Early Termination Amount is payable by a Non-defaulting Party, the Non-default Rate; and
    - (3) in all other cases, the Applicable Deferral Rate; and

(ii) for the period from (and including) the date (determined in accordance with Section 6(d)(ii)) on which that amount is payable to (but excluding) the date of actual payment:—

- (1) if a party fails to pay the Early Termination Amount due to the occurrence of an event or circumstance which would, if it occurred with respect to a payment or delivery under a Transaction, constitute or give rise to an Illegality or a Force Majeure Event, and for so long as the Early Termination Amount remains unpaid due to the continuing existence of such event or circumstance, the Applicable Deferral Rate;
- (2) if the Early Termination Amount is payable by a Defaulting Party (but excluding any period in respect of which clause (1) above applies), the Default Rate;
- (3) if the Early Termination Amount is payable by a Non-defaulting Party (but excluding any period in respect of which clause (1) above applies), the Non-default Rate; and
- (4) in all other cases, the Termination Rate.

**“Applicable Deferral Rate”** means:—

- (a) for the purpose of Section 9(h)(i)(3)(A), the rate certified by the relevant payer to be a rate offered to the payer by a major bank in a relevant interbank market for overnight deposits in the applicable currency, such bank to be selected in good faith by the payer for the purpose of obtaining a representative rate that will reasonably reflect conditions prevailing at the time in that relevant market;
- (b) for purposes of Section 9(h)(i)(3)(B) and clause (a)(iii) of the definition of Applicable Close-out Rate, the rate certified by the relevant payer to be a rate offered to prime banks by a major bank in a relevant interbank market for overnight deposits in the applicable currency, such bank to be selected in good faith by the payer after consultation with the other party, if practicable, for the purpose of obtaining a representative rate that will reasonably reflect conditions prevailing at the time in that relevant market; and
- (c) for purposes of Section 9(h)(i)(3)(C) and clauses (a)(iv), (b)(i)(3) and (b)(ii)(1) of the definition of Applicable Close-out Rate, a rate equal to the arithmetic mean of the rate determined pursuant to clause (a) above and a rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount.

**“Automatic Early Termination”** has the meaning specified in Section 6(a).

**“Burdened Party”** has the meaning specified in Section 5(b)(iv).

**“Change in Tax Law”** means the enactment, promulgation, execution or ratification of, or any change in or amendment to, any law (or in the application or official interpretation of any law) that occurs after the parties enter into the relevant Transaction.

**“Close-out Amount”** means, with respect to each Terminated Transaction or each group of Terminated Transactions and a Determining Party, the amount of the losses or costs of the Determining Party that are or would be incurred under then prevailing circumstances (expressed as a positive number) or gains of the Determining Party that are or would be realised under then prevailing circumstances (expressed as a negative number) in replacing, or in providing for the Determining Party the economic equivalent of, (a) the material terms of that Terminated Transaction or group of Terminated Transactions, including the payments and deliveries by the parties under Section 2(a)(i) in respect of that Terminated Transaction or group of Terminated Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that date (assuming satisfaction of the conditions precedent in

Section 2(a)(iii) and (b) the option rights of the parties in respect of that Terminated Transaction or group of Terminated Transactions.

Any Close-out Amount will be determined by the Determining Party (or its agent), which will act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result. The Determining Party may determine a Close-out Amount for any group of Terminated Transactions or any individual Terminated Transaction but, in the aggregate, for not less than all Terminated Transactions. Each Close-out Amount will be determined as of the Early Termination Date or, if that would not be commercially reasonable, as of the date or dates following the Early Termination Date as would be commercially reasonable.

Unpaid Amounts in respect of a Terminated Transaction or group of Terminated Transactions and legal fees and out-of-pocket expenses referred to in Section 11 are to be excluded in all determinations of Close-out Amounts.

In determining a Close-out Amount, the Determining Party may consider any relevant information, including, without limitation, one or more of the following types of information:—

- (i) quotations (either firm or indicative) for replacement transactions supplied by one or more third parties that may take into account the creditworthiness of the Determining Party at the time the quotation is provided and the terms of any relevant documentation, including credit support documentation, between the Determining Party and the third party providing the quotation;
- (ii) information consisting of relevant market data in the relevant market supplied by one or more third parties including, without limitation, relevant rates, prices, yields, yield curves, volatilities, spreads, correlations or other relevant market data in the relevant market; or
- (iii) information of the types described in clause (i) or (ii) above from internal sources (including any of the Determining Party's Affiliates) if that information is of the same type used by the Determining Party in the regular course of its business for the valuation of similar transactions.

The Determining Party will consider, taking into account the standards and procedures described in this definition, quotations pursuant to clause (i) above or relevant market data pursuant to clause (ii) above unless the Determining Party reasonably believes in good faith that such quotations or relevant market data are not readily available or would produce a result that would not satisfy those standards. When considering information described in clause (i), (ii) or (iii) above, the Determining Party may include costs of funding, to the extent costs of funding are not and would not be a component of the other information being utilised. Third parties supplying quotations pursuant to clause (i) above or market data pursuant to clause (ii) above may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors, brokers and other sources of market information.

Without duplication of amounts calculated based on information described in clause (i), (ii) or (iii) above, or other relevant information, and when it is commercially reasonable to do so, the Determining Party may in addition consider in calculating a Close-out Amount any loss or cost incurred in connection with its terminating, liquidating or re-establishing any hedge related to a Terminated Transaction or group of Terminated Transactions (or any gain resulting from any of them).

Commercially reasonable procedures used in determining a Close-out Amount may include the following:—

- (1) application to relevant market data from third parties pursuant to clause (ii) above or information from internal sources pursuant to clause (iii) above of pricing or other valuation models that are, at the time of the determination of the Close-out Amount, used by the Determining Party in the regular course of its business in pricing or valuing transactions between the Determining Party and unrelated third parties that are similar to the Terminated Transaction or group of Terminated Transactions; and

(2) application of different valuation methods to Terminated Transactions or groups of Terminated Transactions depending on the type, complexity, size or number of the Terminated Transactions or group of Terminated Transactions.

**"Confirmation"** has the meaning specified in the preamble.

**"consent"** includes a consent, approval, action, authorisation, exemption, notice, filing, registration or exchange control consent.

**"Contractual Currency"** has the meaning specified in Section 8(a).

**"Convention Court"** means any court which is bound to apply to the Proceedings either Article 17 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters or Article 17 of the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

**"Credit Event Upon Merger"** has the meaning specified in Section 5(b).

**"Credit Support Document"** means any agreement or instrument that is specified as such in this Agreement.

**"Credit Support Provider"** has the meaning specified in the Schedule.

**"Cross-Default"** means the event specified in Section 5(a)(vi).

**"Default Rate"** means a rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount plus 1% per annum.

**"Defaulting Party"** has the meaning specified in Section 6(a).

**"Designated Event"** has the meaning specified in Section 5(b)(v).

**"Determining Party"** means the party determining a Close-out Amount.

**"Early Termination Amount"** has the meaning specified in Section 6(e).

**"Early Termination Date"** means the date determined in accordance with Section 6(a) or 6(b)(iv).

**"electronic messages"** does not include e-mails but does include documents expressed in markup languages, and **"electronic messaging system"** will be construed accordingly.

**"English law"** means the law of England and Wales, and **"English"** will be construed accordingly.

**"Event of Default"** has the meaning specified in Section 5(a) and, if applicable, in the Schedule.

**"Force Majeure Event"** has the meaning specified in Section 5(b).

**"General Business Day"** means a day on which commercial banks are open for general business (including dealings in foreign exchange and foreign currency deposits).

**"Illegality"** has the meaning specified in Section 5(b).



**"Indemnifiable Tax"** means any Tax other than a Tax that would not be imposed in respect of a payment under this Agreement but for a present or former connection between the jurisdiction of the government or taxation authority imposing such Tax and the recipient of such payment or a person related to such recipient (including, without limitation, a connection arising from such recipient or related person being or having been a citizen or resident of such jurisdiction, or being or having been organised, present or engaged in a trade or business in such jurisdiction, or having or having had a permanent establishment or fixed place of business in such jurisdiction, but excluding a connection arising solely from such recipient or related person having executed, delivered, performed its obligations or received a payment under, or enforced, this Agreement or a Credit Support Document).

**"law"** includes any treaty, law, rule or regulation (as modified, in the case of tax matters, by the practice of any relevant governmental revenue authority), and **"unlawful"** will be construed accordingly.

**"Local Business Day"** means (a) in relation to any obligation under Section 2(a)(i), a General Business Day in the place or places specified in the relevant Confirmation and a day on which a relevant settlement system is open or operating as specified in the relevant Confirmation or, if a place or a settlement system is not so specified, as otherwise agreed by the parties in writing or determined pursuant to provisions contained, or incorporated by reference, in this Agreement. (b) for the purpose of determining when a Waiting Period expires, a General Business Day in the place where the event or circumstance that constitutes or gives rise to the Illegality or Force Majeure Event, as the case may be, occurs, (c) in relation to any other payment, a General Business Day in the place where the relevant account is located and, if different, in the principal financial centre, if any, of the currency of such payment and, if that currency does not have a single recognised principal financial centre, a day on which the settlement system necessary to accomplish such payment is open, (d) in relation to any notice or other communication, including notice contemplated under Section 5(a)(i), a General Business Day (or a day that would have been a General Business Day but for the occurrence of an event or circumstance which would, if it occurred with respect to payment, delivery or compliance related to a Transaction, constitute or give rise to an Illegality or a Force Majeure Event) in the place specified in the address for notice provided by the recipient and, in the case of a notice contemplated by Section 2(b), in the place where the relevant new account is to be located and (e) in relation to Section 5(a)(v)(2), a General Business Day in the relevant locations for performance with respect to such Specified Transaction.

**"Local Delivery Day"** means, for purposes of Sections 5(a)(i) and 5(d), a day on which settlement systems necessary to accomplish the relevant delivery are generally open for business so that the delivery is capable of being accomplished in accordance with customary market practice, in the place specified in the relevant Confirmation or, if not so specified, in a location as determined in accordance with customary market practice for the relevant delivery.

**"Master Agreement"** has the meaning specified in the preamble.

**"Merger Without Assumption"** means the event specified in Section 5(a)(viii).

**"Multiple Transaction Payment Netting"** has the meaning specified in Section 2(c).

**"Non-affected Party"** means, so long as there is only one Affected Party, the other party.

**"Non-default Rate"** means the rate certified by the Non-defaulting Party to be a rate offered to the Non-defaulting Party by a major bank in a relevant interbank market for overnight deposits in the applicable currency, such bank to be selected in good faith by the Non-defaulting Party for the purpose of obtaining a representative rate that will reasonably reflect conditions prevailing at the time in that relevant market.

**"Non-defaulting Party"** has the meaning specified in Section 6(a).

**"Office"** means a branch or office of a party, which may be such party's head or home office.

**"Other Amounts"** has the meaning specified in Section 6(f).

**"Payee"** has the meaning specified in Section 6(f).

**"Payer"** has the meaning specified in Section 6(f).

**"Potential Event of Default"** means any event which, with the giving of notice or the lapse of time or both, would constitute an Event of Default.

**"Proceedings"** has the meaning specified in Section 13(b).

**"Process Agent"** has the meaning specified in the Schedule.

**"rate of exchange"** includes, without limitation, any premiums and costs of exchange payable in connection with the purchase of or conversion into the Contractual Currency.

**"Relevant Jurisdiction"** means, with respect to a party, the jurisdictions (a) in which the party is incorporated, organised, managed and controlled or considered to have its seat, (b) where an Office through which the party is acting for purposes of this Agreement is located, (c) in which the party executes this Agreement and (d) in relation to any payment, from or through which such payment is made.

**"Schedule"** has the meaning specified in the preamble.

**"Scheduled Settlement Date"** means a date on which a payment or delivery is to be made under Section 2(a)(i) with respect to a Transaction.

**"Specified Entity"** has the meaning specified in the Schedule.

**"Specified Indebtedness"** means, subject to the Schedule, any obligation (whether present or future, contingent or otherwise, as principal or surety or otherwise) in respect of borrowed money.

**"Specified Transaction"** means, subject to the Schedule, (a) any transaction (including an agreement with respect to any such transaction) now existing or hereafter entered into between one party to this Agreement (or any Credit Support Provider of such party or any applicable Specified Entity of such party) and the other party to this Agreement (or any Credit Support Provider of such other party or any applicable Specified Entity of such other party) which is not a Transaction under this Agreement but (i) which is a rate swap transaction, swap option, basis swap, forward rate transaction, commodity swap, commodity option, equity or equity index swap, equity or equity index option, bond option, interest rate option, foreign exchange transaction, cap transaction, floor transaction, collar transaction, currency swap transaction, cross-currency rate swap transaction, currency option, credit protection transaction, credit swap, credit default swap, credit default option, total return swap, credit spread transaction, repurchase transaction, reverse repurchase transaction, buy/sell-back transaction, securities lending transaction, weather index transaction or forward purchase or sale of a security, commodity or other financial instrument or interest (including any option with respect to any of these transactions) or (ii) which is a type of transaction that is similar to any transaction referred to in clause (i) above that is currently, or in the future becomes, recurrently entered into in the financial markets (including terms and conditions incorporated by reference in such agreement) and which is a forward, swap, future, option or other derivative on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, economic indices or measures of economic risk or value, or other benchmarks against which payments or deliveries are to be made, (b) any combination of these transactions and (c) any other transaction identified as a Specified Transaction in this Agreement or the relevant confirmation.

**"Stamp Tax"** means any stamp, registration, documentation or similar tax.

**"Stamp Tax Jurisdiction"** has the meaning specified in Section 4(e).

**"Tax"** means any present or future tax, levy, impost, duty, charge, assessment or fee of any nature (including interest, penalties and additions thereto) that is imposed by any government or other taxing authority in respect of any payment under this Agreement other than a stamp, registration, documentation or similar tax.

**"Tax Event"** has the meaning specified in Section 5(b).

**"Tax Event Upon Merger"** has the meaning specified in Section 5(b).

**"Terminated Transactions"** means, with respect to any Early Termination Date, (a) if resulting from an Illegality or a Force Majeure Event, all Affected Transactions specified in the notice given pursuant to Section 6(b)(iv), (b) if resulting from any other Termination Event, all Affected Transactions and (c) if resulting from an Event of Default, all Transactions in effect either immediately before the effectiveness of the notice designating that Early Termination Date or, if Automatic Early Termination applies, immediately before that Early Termination Date.

**"Termination Currency"** means (a) if a Termination Currency is specified in the Schedule and that currency is freely available, that currency, and (b) otherwise, euro if this Agreement is expressed to be governed by English law or United States Dollars if this Agreement is expressed to be governed by the laws of the State of New York.

**"Termination Currency Equivalent"** means, in respect of any amount denominated in the Termination Currency, such Termination Currency amount and, in respect of any amount denominated in a currency other than the Termination Currency (the "Other Currency"), the amount in the Termination Currency determined by the party making the relevant determination as being required to purchase such amount of such Other Currency as at the relevant Early Termination Date, or, if the relevant Close-out Amount is determined as of a later date, that later date, with the Termination Currency at the rate equal to the spot exchange rate of the foreign exchange agent (selected as provided below) for the purchase of such Other Currency with the Termination Currency at or about 11:00 a.m. (in the city in which such foreign exchange agent is located) on such date as would be customary for the determination of such a rate for the purchase of such Other Currency for value on the relevant Early Termination Date or that later date. The foreign exchange agent will, if only one party is obliged to make a determination under Section 6(e), be selected in good faith by that party and otherwise will be agreed by the parties.

**"Termination Event"** means an Illegality, a Force Majeure Event, a Tax Event, a Tax Event Upon Merger or, if specified to be applicable, a Credit Event Upon Merger or an Additional Termination Event.

**"Termination Rate"** means a rate per annum equal to the arithmetic mean of the cost (without proof or evidence of any actual cost) to each party (as certified by such party) if it were to fund or of funding such amounts.

**"Threshold Amount"** means the amount, if any, specified as such in the Schedule.

**"Transaction"** has the meaning specified in the preamble.

**"Unpaid Amounts"** owing to any party means, with respect to an Early Termination Date, the aggregate of (a) in respect of all Terminated Transactions, the amounts that became payable (or that would have become payable but for Section 2(a)(iii) or due but for Section 5(d)) to such party under Section 2(a)(i) or 2(d)(i)(4) on or prior to such Early Termination Date and which remain unpaid as at such Early Termination Date, (b) in respect of each Terminated Transaction, for each obligation under Section 2(a)(i) which was (or would have been but for Section 2(a)(iii) or 5(d)) required to be settled by delivery to such party on or prior to such Early Termination Date and which has not been so settled as at such Early Termination Date, an amount equal to the fair market value of that which was (or would have been) required to be delivered and (c) if the Early Termination Date results from an Event of Default, a Credit Event Upon Merger or an Additional Termination Event in respect of which all outstanding Transactions are Affected Transactions, any Early Termination Amount due prior to such Early Termination Date and which remains unpaid as of such Early Termination Date, in each case together with any amount of interest accrued or other

compensation in respect of that obligation or deferred obligation, as the case may be, pursuant to Section 9(h)(ii)(1) or (2), as appropriate. The fair market value of any obligation referred to in clause (b) above will be determined as of the originally scheduled date for delivery, in good faith and using commercially reasonable procedures, by the party obliged to make the determination under section 6(e) or, if each party is so obliged, it will be the average of the Termination Currency Equivalents of the fair market values so determined by both parties.

**"Waiting Period"** means:—


(a) in respect of an event or circumstance under Section 5(b)(i), other than in the case of Section 5(b)(i)(2) where the relevant payment, delivery or compliance is actually required on the relevant day (in which case no Waiting period will apply), a period of three Local Business Days (or days that would have been Local Business Days but for the occurrence of that event or circumstance) following the occurrence of that event or circumstance; and

(b) in respect of an event or circumstance under Section 5(b)(ii), other than in the case of Section 5(b)(ii)(2) where the relevant payment, delivery or compliance is actually required on the relevant day (in which case no Waiting Period will apply), a period of three Local Business Days (or days that would have been Local Business Days but for the occurrence of that event or circumstance) following the occurrence of that event or circumstance.

IN WITNESS WHEREOF the parties have executed this document on the respective dates specified below with effect from the date specified on the first page of this document.

JPMORGAN CHASE BANK, N.A.

INDALEX HOLDING CORP.

By:   
Name: Melissa McMahon  
Title: Managing Director and  
Associate General Counsel

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

compensation in respect of that obligation or deferred obligation, as the case may be, pursuant to Section 9(h)(ii)(1) or (2), as appropriate. The fair market value of any obligation referred to in clause (b) above will be determined as of the originally scheduled date for delivery, in good faith and using commercially reasonable procedures, by the party obliged to make the determination under section 6(e) or, if each party is so obliged, it will be the average of the Termination Currency Equivalents of the fair market values so determined by both parties.

**"Waiting Period"** means:—

(a) in respect of an event or circumstance under Section 5(b)(i), other than in the case of Section 5(b)(i)(2) where the relevant payment, delivery or compliance is actually required on the relevant day (in which case no Waiting period will apply), a period of three Local Business Days (or days that would have been Local Business Days but for the occurrence of that event or circumstance) following the occurrence of that event or circumstance; and


(b) in respect of an event or circumstance under Section 5(b)(ii), other than in the case of Section 5(b)(ii)(2) where the relevant payment, delivery or compliance is actually required on the relevant day (in which case no Waiting Period will apply), a period of three Local Business Days (or days that would have been Local Business Days but for the occurrence of that event or circumstance) following the occurrence of that event or circumstance.

IN WITNESS WHEREOF the parties have executed this document on the respective dates specified below with effect from the date specified on the first page of this document.

JPMORGAN CHASE BANK, N.A.

INDALEX HOLDING CORP.

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

By:   
Name: Timothy Stross  
Title: CEO  
Date: 4/29/09

AMENDED & RESTATED  
SCHEDULE  
to the  
2002 MASTER AGREEMENT  
dated as of April 29, 2009

between

JPMORGAN CHASE BANK,  
N.A.  
("Party A")

and

INDALEX HOLDING CORP.  
("Party B")

PART 1  
Termination Provisions

- (1) **"Specified Entity"** means, in relation to Party A, for the purpose of:  
Section 5(a)(v), any Affiliate of Party A;  
Section 5(a)(vi), none;  
Section 5(a)(vii), none; and  
Section 5(b)(v), none;  
and, in relation to Party B, for the purpose of:  
Section 5(a)(v), any Affiliate of Party B;  
Section 5(a)(vi), none;  
Section 5(a)(vii), none; and  
Section 5(b)(v), none.
- (2) **"Specified Transaction"** will have the meaning specified in Section 14 of this Agreement.
- (3) The **"Cross-Default"** provisions of Section 5(a)(vi) will apply to Party A and Party B, and for such purpose:

- (a) **“Specified Indebtedness”** will have the meaning specified in Section 14 of this Agreement, except that such term shall not include obligations in respect of deposits received in the ordinary course of a party’s banking business.
- (b) **“Threshold Amount”** means, (1) with respect to Party A, an amount equal to three percent of the shareholders’ equity of such party, determined in accordance with generally accepted accounting principles and (2) with respect to Party B, USD7,500,000 (or the equivalent in any other currency).
- (c) The following language shall be inserted at the end of Section 5(a)(vi):
- “provided, however, that, notwithstanding the foregoing, an Event of Default shall not occur under either (1) or (2) above if (I) the default, or other similar event or condition referred to in (I) or the failure to pay referred to in (2) is a failure to pay or deliver caused by an error or omission of an administrative or operational nature and (II) funds or the asset to be delivered were available to such party to enable it to make the relevant payment or delivery when due and (III) such payment or delivery is made within three (3) Local Business Days following receipt of written notice from an interested party of such failure to pay.”
- (d) In respect of Party B, Section 5(a)(vi) shall apply solely with respect to Specified Indebtedness incurred under or in respect of agreements entered into after March 20, 2009 in respect of Indalex Holdings Finance, Inc. (“Holdings”), Party B or the Domestic Subsidiaries (as such term is defined in the DIP Credit Agreement) or after April 3, 2009 in respect of Indalex Limited or the Canadian Subsidiary Loan Parties (as such term is defined in the DIP Credit Agreement), as applicable.
- (4) The **“Credit Event Upon Merger”** provisions of Section 5(b)(v) will apply to Party A and Party B; provided, however, that if the applicable party has long term, unsecured and unsubordinated indebtedness or deposits which is or are publicly rated (such rating, a “Credit Rating”) by Moody’s Investor Services, Inc. (“Moody’s”), Standard and Poors Ratings Group (“S&P”) or any other internationally recognized rating agency (a “Rating Agency”), then the words “materially weaker” in line 6 of Section 5(b)(v) shall mean that the Credit Rating of such party shall be rated lower than “Baa3” by Moody’s, or lower than “BBB-” by S&P or, in the event that there is no Credit Rating by either Moody’s or S&P applicable to such party but such party’s long-term indebtedness or deposits is or are rated by a Rating Agency, lower than a rating equivalent to the foregoing by such Rating Agency. In respect of Party B, Section 5(b)(v) shall apply solely to the extent the Designated Event occurred after March 20, 2009 in respect of Holdings, Party B or the Domestic Subsidiaries (as such term is defined in the DIP Credit Agreement) or after April 3, 2009 in respect of Indalex Limited or the Canadian Subsidiary Loan Parties (as such term is defined in the DIP Credit Agreement), as applicable.

- (5) The “**Automatic Early Termination**” provision of Section 6(a) will not apply to Party A or Party B.
- (6) “**Termination Currency**” will have the meaning set forth in Section 14 of this Agreement.
- (7) The “**Event of Default**” provisions set forth in Section 5(a)(iii) (*Credit Support Default*), Section 5(a)(vi) (*Cross-Default*), Section 5(a)(vii) (*Bankruptcy*), Section 5(a)(viii) (*Merger Without Assumption*) shall apply in respect of Party B to the extent that the events or circumstances triggering each aforementioned Event of Default arose after March 20, 2009 in respect of Holdings, Party B or the Domestic Subsidiaries (as such term is defined in the DIP Credit Agreement) or after April 3, 2009 in respect of Indalex Limited or the Canadian Subsidiary Loan Parties (as such term is defined in the DIP Credit Agreement), as applicable. For the avoidance of doubt and without limiting the foregoing, with respect to Section 5(a)(vii), the filing of Bankruptcy Cases and the Canadian Proceeding does not constitute an Event of Default with respect to Party B hereunder.
- (8) **Additional Events of Default.** Each of the following will constitute an Event of Default under Section 5(a) with respect to Party B and upon the occurrence of any one of such Events of Default Party B shall be the Defaulting Party:
- (i) The Bankruptcy Court or the Canadian Court shall have entered an order without the consent of Party A that adversely affects or impairs Party A’s rights under this Agreement.
- (ii) The occurrence of any events specified in Article 7 clauses (l)-(u) of the DIP Credit Agreement.
- (iii) The Credit Facility shall have been refinanced in whole or in part during the Bankruptcy Cases and such new debtor-in-possession financing facility does not provide for payment in full in cash of the obligations under all Swap Agreements (as such term is defined in the DIP Credit Agreement) with Party A or such new debtor-in-possession financing facility does not provide security identical to the Credit Facility.
- “**Credit Facility**” shall mean the secured super-priority credit facility provided to the Borrowers (as such term is defined in the DIP Credit Agreement) by certain financial institutions in an aggregate principal amount not to exceed USD 85,877,371 under the DIP Credit Agreement.
- “**DIP Credit Agreement**” shall mean the Credit Agreement defined in Part 5 (5) herein.



**PART 2**  
**Tax Representations**

- (A) **Payer Tax Representations.** For the purpose of Section 3(e) of this Agreement, Party A and Party B each hereby make the following representation:

It is not required by any applicable law, as modified by the practice of any relevant governmental revenue authority, of any Relevant Jurisdiction to make any deduction or withholding for or on account of any Tax from any payment (other than interest under Section 9(h) of this Agreement) to be made by it to the other party under this Agreement. In making this representation, it may rely on (i) the accuracy of any representations made by the other party pursuant to Section 3(f) of this Agreement, (ii) the satisfaction of the agreement contained in Section 4(a)(i) or 4(a)(iii) of this Agreement and the accuracy and effectiveness of any document provided by the other party pursuant to Section 4(a)(i) or 4(a)(iii) of this Agreement and (iii) the satisfaction of the agreement of the other party contained in Section 4(d) of this Agreement, except that it will not be a breach of this representation where reliance is placed on clause (ii) above and the other party does not deliver a form or document under Section 4(a)(iii) by reason of material prejudice to its legal or commercial position.

- (B) **Payee Tax Representations.** For the purpose of Section 3(f) of this Agreement, Party A and Party B make the representations specified below:

(i) Party A and Party B each represent, respectively, that it is the beneficial owner of each payment made or to be made under this Agreement and is a United States Person for U.S. federal income tax purposes.

(ii) Party B represents in respect of each Transaction where Party A's Office for the Transaction is not located in the United States of America:

Party B is fully eligible for the benefits of the "Business Profits" or "Industrial and Commercial Profits" provision, as the case may be, the "Interest" provision and the "Other Income" provision (if any) of the income tax treaty (if any), in effect between the jurisdiction of Party A's Office for the Transaction and the United States of America with respect to any payment described in such provisions and received or to be received by it in connection with this Agreement and no such payment is attributable to a trade or business carried on by it through a permanent establishment in the jurisdiction through which Party A has entered the relevant Transaction.

**PART 3**  
**Agreement to Deliver Documents**

For the purpose of Sections 4(a)(i) and 4(a)(ii) of this Agreement, each party agrees to deliver the following documents:

- (a) Tax forms, documents or certificates to be delivered are:

For the purpose of Sections 4(a)(i) and (ii) of this Agreement, each party agrees to deliver a complete and accurate United States Internal Revenue Service Form W-9 (or any applicable successor form), in a manner reasonably satisfactory to the other party, (I) upon execution of this Agreement, (II) promptly upon reasonable demand of the other party, and (III) promptly upon learning that such form previously provided by such party has become obsolete or incorrect (and each such form is hereby identified for purposes of Section 3(d) of this Agreement).

(b) Other documents to be delivered are:

<b><u>Party required to deliver document</u></b>	<b><u>Form/Document/Certificate</u></b>	<b><u>Date by which to be delivered</u></b>	<b><u>Covered by Section 3(d) Representation</u></b>
Party B	Certificate of authority and specimen signatures of individuals executing this Agreement and continuations.	Upon request of Party A	Yes
Party B	Copy of the most recent unaudited financial statements and other financial disclosure documents of Party B and the other Borrowers (as such term is defined in the DIP Credit Agreement) required to be delivered in accordance with Section 5.01 of the DIP Credit Agreement.	Promptly following reasonable demand by Party A or upon distributions to the creditors committee or filings with the U.S. Bankruptcy Court.	Yes

**PART 4**  
**Miscellaneous**

(1) **Addresses for Notices.** For the purpose of Section 12(a) of this Agreement:

Address for notice or communications to Party A:

Any notice relating to a particular Transaction shall be delivered to the address or facsimile number specified in the Confirmation of such Transaction. Any notice delivered for purposes of Sections 5 and 6 of this Agreement shall be delivered to the following address:

JPMorgan Chase Bank, N.A.  
Attention: Legal Department - Derivatives Practice Group  
270 Park Avenue

New York, New York 10017-2070  
Facsimile No.: (212) 270-3625

Address for notice or communications to Party B:

Indalex Holding Corp.  
Attention: Mike Alger  
75 Tri-State International, Suite 450  
Lincolnshire, Illinois 60069  
Facsimile No.: (847) 295-3851

- (2) **Process Agent.** For the purpose of Section 13(c) of this Agreement:  
Party A appoints as its Process Agent: Not applicable.  
Party B appoints as its Process Agent: Not applicable.
- (3) **Offices.** The provisions of Section 10(a) will apply to this Agreement.
- (4) **Multibranch Party.** For the purpose of Section 10 of this Agreement:  
Party A is a Multibranch Party acting through its Offices in New York or London.  
Party B is not a Multibranch Party.
- (5) **Calculation Agent.** The Calculation Agent is Party A, unless otherwise specified in a Confirmation in relation to the relevant Transaction.
- (6) **Credit Support Document.** With respect to Party B, any Collateral Documents (as defined in the DIP Credit Agreement) delivered pursuant to the DIP Credit Agreement shall be a Credit Support Document with respect to Party B's obligations hereunder.
- (7) **Credit Support Provider.** With respect to Party B, each Loan Party (as defined in the DIP Credit Agreement).
- (8) **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the State of New York (without reference to choice of law doctrine), except to the extent that the Bankruptcy Code governs.
- (9) **Jurisdiction.** Section 13(b)(i)(1) is hereby deleted and Section 13(b)(i)(2) is replaced with the following language:  

to the non-exclusive jurisdiction of Bankruptcy Court or the U.S. Federal or New York State court sitting in New York, New York.
- (10) **Netting of Payments.** "Multiple Transaction Payment Netting" will apply for the purpose of Section 2(c) of this Agreement to all Transactions starting from the date of this Agreement.
- (11) **Affiliate** will have the meaning specified in Section 14 of this Agreement.

- (12) **Absence of Litigation.** For the purpose of Section 3(c) of this Agreement:  
“Specified Entity” means, in relation to Party A, any Affiliate of Party A.  
“Specified Entity” means, in relation to Party B, any Affiliate of Party B.
- (13) **No Agency.** The provisions of Section 3(g) of this Agreement will apply to this Agreement.
- (14) **Additional Representations** will apply. For the purpose of Section 3 of this Agreement, the following will each constitute an Additional Representation:
- (i) **Relationship Between Parties.** Each party will be deemed to represent to the other party on the date on which it enters into a Transaction that (absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary for that Transaction):
- (ii) **Non-Reliance.** It is acting for its own account, and it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction, it being understood that information and explanations related to the terms and conditions of a Transaction will not be considered investment advice or a recommendation to enter into that Transaction. No communication (written or oral) received from the other party will be deemed to be an assurance or guarantee as to the expected results of that Transaction.
- (iii) **Assessment and Understanding.** It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of that Transaction. It is also capable of assuming, and assumes, the risks of that Transaction.
- (iv) **Status of Parties.** The other party is not acting as a fiduciary for or an adviser to it in respect of that Transaction.
- (v) **Other Transactions.** It understands and acknowledges that the other party may, either in connection with entering into a Transaction or from time to time thereafter, engage in open market transactions that are designed to hedge or reduce the risks incurred by it in connection with such Transaction and that the effect of such open market transactions may be to affect or reduce the value of such Transaction.
- (vi) **Representations regarding Bankruptcy.** Party B represents, warrants, covenants and acknowledges as of the trade date of each Transaction that:

(i) Party B is continuing in possession of its property and is operating and managing its business, as debtor in possession, pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

(ii) Party B is authorized to enter into the proposed Transactions pursuant to (x) the Final Order (as defined in the DIP Credit Agreement) and without further Bankruptcy Court approval or order and (y) Section 363(c)(1) of the Bankruptcy Code because the proposed Transactions are of the sort commonly undertaken by companies in debtor's industry, are consistent with Party B's prepetition business practice and therefore are intended to be entered into "*in the ordinary course of business*" as such term is used in Section 363(c)(1) of the Bankruptcy Code.

(iii) Party B's liabilities pursuant to the proposed Transactions constitute Superpriority Claims (as such term is defined in the DIP Credit Agreement) having priority over any or all administrative expenses under Sections 503(b) or 507(b) of the Bankruptcy Code to the extent provided in the Final Order and (y) are secured by liens having the priority set forth in the Orders.

(iv) Party A's right to terminate, net and set-off obligations under the proposed Transactions, including its right to apply any collateral, will not be stayed, avoided, or otherwise limited by Bankruptcy Code Sections 362(a) or 549, or any other provisions of the Bankruptcy Code, except as otherwise provided in the Final Order

(vii) **Representations regarding Conditions Precedent in DIP Credit Agreement.** Both parties represent and warrant as of the trade date of each Transaction entered into after April 29, 2009:

(a) Section 4.02(a)(iii) of the DIP Credit Agreement has been satisfied; and

(b) a Final Order by the Bankruptcy Court has been entered that (w) authorizes the Party B to (A) enter into Swap Agreements with Party A at any time during the Bankruptcy Cases, and (B) make payments to Party A as and when due hereunder, (x) allows Party A to terminate the Swap Agreements in accordance with the terms thereof, (y) grants liens and superpriority claims in respect of the Swap Obligations that are *pari passu* with the liens and superpriority claims granted to the lenders under the DIP Credit Agreement, and (z) is otherwise satisfactory to Party A.

(15) **Eligible Contract Participation.** Each party represents to the other party (which representation will be deemed to be repeated by each party on each date on which a Transaction is entered into) that it is an "eligible contract participant", as defined in the Commodity Futures Modernization Act of 2000.

- (16) **Recording of Conversations.** Each party (i) consents to the recording of telephone conversations between the trading, marketing and other relevant personnel of the parties and their Affiliates in connection with this Agreement or any potential Transaction, (ii) agrees to obtain any necessary consent of, and give any necessary notice of such recording to, its relevant personnel and (iii) agrees, to the extent permitted by applicable law, that recordings may be submitted in evidence in any Proceedings

**PART 5**  
**Other Provisions**

- (1) **Waiver of Jury Trial.** Each party waives, to the fullest extent permitted by applicable law, any right it may have to a trial by jury in respect of any suit, action or proceeding relating to this Agreement or any Credit Support Document. Each party (i) certifies that no representative, agent or attorney of the other party or any Credit Support Provider has represented, expressly or otherwise, that such other party would not, in the event of such a suit, action or proceeding, seek to enforce the foregoing waiver and (ii) acknowledges that it and the other party have been induced to enter into this Agreement and provide for any Credit Support Document, as applicable, by, among other things, the mutual waivers and certifications in this Section.
- (2) **ISDA Definitions.** Reference is hereby made to the 2000 ISDA Definitions (the "2000 Definitions") and the 1998 FX and Currency Option Definitions (the "FX Definitions") (collectively the "ISDA Definitions") each as published by the International Swaps and Derivatives Association, Inc., which are hereby incorporated by reference herein. Any terms used and not otherwise defined herein which are contained in the ISDA Definitions shall have the meaning set forth therein.
- (3) **Scope of Agreement.** Notwithstanding anything contained in this Agreement to the contrary, any transaction (other than a repurchase transaction, reverse repurchase transaction, buy/sell-back transaction or securities lending transaction) which may otherwise constitute a "Specified Transaction" (without regard to the phrase "which is not a Transaction under this Agreement but" in the definition of "Specified Transaction") for purposes of this Agreement which has been or will be entered into between the parties shall constitute a "Transaction" which is subject to, governed by, and construed in accordance with the terms of this Agreement, unless any Confirmation with respect to a Transaction entered into after the execution of this Agreement expressly provides otherwise.
- (4) **Inconsistency.** In the event of any inconsistency between any of the following documents, the relevant document first listed below shall govern: (i) a Confirmation; (ii) the Schedule; (iii) the ISDA Definitions; and (iv) the printed form of ISDA Master Agreement. In the event of any inconsistency between

provisions contained in the 2000 Definitions and the FX Definitions, the FX Definitions shall prevail.

- (5) **"DIP Credit Agreement"** means the Credit Agreement, dated as of April 8, 2009, among Indalex Holdings Finance, Inc., Indalex Limited, Party B, the Subsidiary Loan Parties party thereto, the Lenders party thereto and Party A as Administrative Agent, as amended, supplemented or otherwise modified from time to time; provided that if the obligations under the DIP Credit Agreement are paid in full or the DIP Credit Agreement is otherwise terminated or cancelled, or if Party A shall cease to be party thereto, DIP Credit Agreement means the DIP Credit Agreement as it existed immediately prior to such event. Capitalized terms defined therein and not otherwise defined herein shall have the meanings assigned in the DIP Credit Agreement.
- (6) **Basic Representation.** With respect to Party B, Section 3(a)(iii) is amended by (A) inserting the word "postpetition" between the words "any" and "contractual" in such Section and (B) inserting the words "(including any restrictions in prepetition contracts that have been assumed under Section 365 of the Bankruptcy Code)" between the words "restriction" and "binding" in such section
- (7) **Gross-Up.** With respect to Party B, the first line of Section 2(d)(i)(4)(B) is hereby modified by inserting the phrase "or Section 3(g)" following the phrase "Section 3(f)".
- (8) **Tax Event.** Section 5(b)(iii) is hereby amended by adding the words 'or be required to pay any US insurance excise tax with respect to any payments to be made hereunder' immediately prior to the word 'or' in the sixth line of that section.
- (9) **Transfer.**
  - (i) The following amendment is hereby made to Section 7:

In clause (a), insert the words "or reorganization, incorporation, reincorporation, or reconstitution into or as," immediately before the word "another".
- (10) **Definitions.**
  - (i) The following amendments are hereby made to Section 14:

**"Bankruptcy Cases"** means the cases under chapter 11 of title 11 of the Bankruptcy Code, captioned as *In re Indalex Holdings Finance, Inc. et al.*, Case No. 09-10982 (PWJ) pending in the Bankruptcy Court.

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

**“Bankruptcy Court”** means the United States Bankruptcy Court for the District of Delaware or any other court having competent jurisdiction over the Bankruptcy Cases.

**“Canadian Court”** means the Ontario Superior Court of Justice.

(11) **Entire Agreement.** This Amended & Restated Schedule constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings (except as otherwise provided herein) with respect thereto.



Please confirm your agreement to the terms of the foregoing Schedule by signing below.

JPMORGAN CHASE BANK, N.A.      INDALEX HOLDING CORP.

By: 

Name: *Melissa McMahon*  
Title: *Managing Director and  
Associate General Counsel*

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

Name:  
Title:

Please confirm your agreement to the terms of the foregoing Schedule by signing below.

JPMORGAN CHASE BANK, N.A.

INDALEX HOLDING CORP.

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

Name:

Title:

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

Name: *TIMOTHY STUBBS*

Title: *CEO*

*PK*

**Exhibit B**

**Blackline**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

INDALEX HOLDINGS FINANCE, INC.,  
a Delaware Corporation, *et al.*

Debtors

Chapter 11

Case No. 09-10982 (PJW)

(Jointly Administered)

Ref. Docket No. Nos: 75 & 118

**INTERIM/FINAL ORDER (I) AUTHORIZING THE DEBTORS (A) TO OBTAIN POST-PETITION FINANCING UNDER 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) AND 364(e) AND (B) TO UTILIZE CASH COLLATERAL UNDER 11 U.S.C. § 363, 363 AND (II) GRANTING ADEQUATE PROTECTION UNDER 11 U.S.C. §§ 361, 362, 363 AND 364 AND (III) SCHEDULING A FINAL HEARING UNDER BANKRUPTCY RULE 4001(b) AND (c)**

Upon the motion (the “**Motion**”), dated April 7, 2009, of Indalex Holdings Finance, Inc. (“**Holdings**”), Indalex Holding Corp. (the “**Parent Borrower**”) and their affiliated debtors, each as a debtor and debtor-in-possession (collectively, the “**Debtors**”), in the above-captioned chapter 11 cases (the “**Cases**”) commenced in this Court on March 20, 2009 (the “**Petition Date**”), under sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e) and 507(b) of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (as amended, the “**Bankruptcy Code**”), and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and Local Rules for the Bankruptcy Court for the District of Delaware 4001-2 and 2002-1(b) (the “**Local Rules**”), seeking, among other things:

(1) authorization for Holdings, the Parent Borrower and each of the other Debtors to enter into the Credit Agreement, dated as of April 8, 2009, substantially in the form attached as Exhibit A to the Motion (the “**DIP Credit Agreement**”); together with the Domestic Security Agreement dated on or about

April 8, 2009 (the “**DIP Domestic Security Agreement**”), the Canadian Security Agreement dated on or about April 8, 2009, and any other related agreement, instrument or other document delivered or executed in connection with the DIP Credit Agreement, the “**DIP Documents**”), among Holdings, the Parent Borrower, each of the other Debtors, certain non-debtor affiliates of Holdings party thereto, JPMorgan Chase Bank, N.A. (“**JPMorgan**”), as administrative agent (in such capacity, the “**DIP Agent**”), and the lenders from time to time party thereto (collectively, the “**DIP Lenders**”), in connection with postpetition financing (the “**Financing**”) consisting of a senior secured superpriority revolving credit facility made available to the Parent Borrower and Indalex Limited (the “**Canadian Subsidiary Borrower**,” and together with the Parent Borrower, the “**Borrowers**”), a non-debtor affiliate of Holdings organized under the laws of Canada, in the aggregate principal amount of \$85,877,371 (it being understood that the actual available principal amount at any time shall be subject to those conditions set forth in the DIP Documents and it being further understood that the aggregate principal amount available under such facility on an interim basis shall not exceed \$42,500,000, which is inclusive of the Prepetition Obligations and Cash Collateral Loans (each as defined below)) (such postpetition financing, including (i) the conversion of the Prepetition Obligations and the Cash Collateral Loans made under the Interim Cash Collateral Order, in each case to DIP Obligations (as defined below) and (ii) the continuation and conversion of all letters of credit issued under the Prepetition Credit Agreement (as defined below)

that are outstanding as of the date of entry of the Final Order (as defined below) to DIP Obligations in the form of letters of credit deemed issued under and in accordance with section 2.04 of the DIP Credit Agreement, the “Financing”;

(2) authorization for the Parent Borrower to guarantee the obligations of the Canadian Subsidiary Borrower under the DIP Credit Agreement and for each of the other Debtors (together with the Parent Borrower, solely in its capacity as guarantor of the obligations of the Canadian Subsidiary Borrower under the DIP Credit Agreement, the “Guarantors”) to guarantee each of the Borrowers’ obligations under the DIP Credit Agreement;

(3) authorization for the Debtors to execute and enter into the DIP Documents and to perform such other and further acts as may be required in connection with the DIP Documents;

(4) authorization for the Debtors to convert the Prepetition Obligations (as defined below) into DIP Obligations ~~(as defined below)~~ on the terms and conditions set forth in the DIP Credit Agreement, the other DIP Documents, ~~this the Interim~~ Order and ~~the~~ this Final Order (each as defined herein);

(5) authorization for the Debtors to use the Cash Collateral (as defined below) and any other Prepetition Collateral (as defined below) in which the Prepetition Secured Parties (as defined below) have an interest;

(6) the granting of adequate protection to the Prepetition Secured Parties with respect to any actual diminution in the value of the Prepetition Secured Parties’ interests in the Prepetition Collateral, whether from the use of the Cash

Collateral, the use, sale, lease, depreciation or other diminution in value of the Prepetition Collateral, the priming of their liens or as a result of the imposition of the automatic stay under section 362(a) of the Bankruptcy Code;

(8) approval of certain stipulations by the Debtors with respect to the Prepetition Credit Agreement (as defined below) and the claims, liens and security interests arising therefrom;

(9) subject only to and effective upon entry of the Final Order ~~(as defined below)~~, the limitation of the Debtors' right to surcharge against collateral under section 506(c) of the Bankruptcy Code;

(10) under Bankruptcy Rule 4001 and Local Rule 4001-2, an interim hearing (the "**Interim Hearing**") on the Motion for the proposed interim order annexed to the Motion ~~(this "**Order**")~~ (i) authorizing the Borrowers, on an interim basis, to ~~forthwith~~ borrow from the DIP Lenders under the DIP Documents up to an aggregate principal or face amount not to exceed \$42,500,000 (subject to any limitations on borrowings under the DIP Documents), (ii) authorizing the Debtors' use of Cash Collateral and (iii) granting the adequate protection described ~~herein~~therein; and

(11) a final hearing (the "**Final Hearing**") to be held within 30 days after entry of ~~this~~the Interim Order to consider entry of a final order (the "**Final Order**") authorizing the balance of the borrowings under the DIP Documents on a final basis, as set forth in the Motion and the DIP Documents filed with this Court.

The Debtors having served notice pursuant to sections 102(1), 363 and 364 of the Bankruptcy Code and Bankruptcy Rule 4001(b) and Local Rule 2002-1(b), of the Motion, the relief requested therein on an interim basis and the Interim Hearing on, among others, the thirty largest unsecured creditors of the Debtors, on a consolidated basis, the DIP Agent, the DIP Lenders, the Prepetition Agent, the Prepetition Indenture Trustee, the other Prepetition Secured Parties, the Official Committee of Unsecured Creditors and the Office of the United States Trustee for the District of Delaware;

the Interim Hearing having been held by this Court on April 8, 2009; and 2009, and this Court having entered an interim order, dated April 9, 2009 (the "Interim Order"), that, among other things, (i) authorized the Borrowers on an interim basis to borrow from the DIP Lenders up to an aggregate amount not to exceed \$42,500,000 (which is inclusive of the Prepetition Obligations and Cash Collateral Loans (each as defined below)) in accordance with the terms of the Interim Order and the DIP Documents, (ii) authorized each Guarantor to guaranty such borrowings, (iii) authorized the conversion of certain Cash Collateral Loans to postpetition obligations of the Debtors, (iv) authorized the Debtors' use of cash collateral, (v) granted the adequate protection described in the Interim Order and (vi) scheduled the Final Hearing to consider entry of the Final Order, as set forth in the Motion and the DIP Documents filed with this Court:

the Debtors having served due and appropriate notice of the Motion, the relief requested therein on a final basis, the Interim Order and the Final Hearing on the Office of the United States Trustee for the District of Delaware, respective counsel for each of the DIP Agent, the Prepetition Agent and the Prepetition Indenture Trustee, the DIP Agent, the DIP Lenders, the



Prepetition Agent, the Prepetition Indenture Trustee, the other Prepetition Secured Parties, counsel to the Official Committee of Unsecured Creditors, the Internal Revenue Service, the Securities and Exchange Commission and the parties requesting service pursuant to Bankruptcy Rule 2002 in accordance with the terms of the Interim Order, sections 363 and 364 of the Bankruptcy Code, Bankruptcy Rule 4001 and the Local Rules; and

upon the record made by the Debtors at the Interim Hearing and the Final Hearing, the record in these Cases and the Declaration of Timothy R. J. Stubbs in support of Chapter 11 Petitions and First Day Relief and after due deliberation and consideration and sufficient cause appearing therefor:

IT IS FOUND, DETERMINED, ORDERED AND ADJUDGED, that:

1. *Disposition.* The Motion is granted on an ~~interim~~ final basis on the terms set forth ~~herein~~ in this Final Order. Any objections to the ~~interim~~ relief sought in the Motion or this Final Order that have not been previously resolved or withdrawn, and all reservations of rights contained therein, are overruled on the merits. This Final Order shall be valid, binding and enforceable on all parties in interest and fully effective immediately upon entry.

2. *Jurisdiction and Venue.* This Court has jurisdiction over the Cases and the Motion as a core proceeding and over the parties and property affected hereby under 28 U.S.C. §§ 157(b) and 1334. Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409. No request has been made for the appointment of a trustee or examiner. On April 1, 2009, the United States Trustee appointed the Official Committee of Unsecured Creditors in these Cases (the “Creditors’ Committee”).

3. *Notice.* ~~Notice has been~~Under the circumstances, the notice given by the Debtors of the Motion ~~and, the relief requested therein,~~ the Interim Hearing and the Final Hearing pursuant to Bankruptcy Rule 4001(b) and Local Rule 4001-2-2 constitutes appropriate, due and sufficient notice thereof and complies with Bankruptcy Rules 4001(b) and (c) and the Local Rules, and no other or further notice of the relief sought at the Final Hearing and the relief granted herein is necessary or required.

4. *Prepetition Secured Facilities.* As of the Petition Date, the Debtors were party to the following agreements:

(a) the Amended and Restated Credit Agreement, dated as of May 21, 2008 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Prepetition Credit Agreement**”), among Holdings, the Borrowers, the other subsidiaries of the Parent Borrower party thereto, the lenders party thereto (such lenders that made revolving extensions of credit under the Prepetition Credit Agreement, collectively, the “**Prepetition Revolving Lenders**”; and Sun Capital Partners, Inc. or any affiliate thereof (the “**Prepetition Term Lender**,” together with the Prepetition Revolving Lenders, the “**Prepetition Lenders**”) that made term loans under the Prepetition Credit Agreement (the “**Prepetition Term Loans**”) and JPMorgan, as administrative agent (in such capacity, the “**Prepetition Agent**”);

(b) Amendment No. 2, Waiver and Agreement, dated as of March 6, 2009 (“**Amendment No. 2**”), among Holdings, the Borrowers, each of the other Debtors party thereto, certain non-debtor affiliates of Holdings party thereto, the Prepetition Lenders and the Prepetition Agent;

(c) the Amended and Restated Domestic Security Agreement, dated as of May 21, 2008 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Domestic Security Agreement**”) among Holdings, the Parent Borrower, the subsidiaries of Holdings party thereto and the Prepetition Agent;

(d) the Canadian Security Agreement, dated as of February 2, 2006 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Canadian Security Agreement**”; together with the Domestic Security Agreement, any and all other security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements, financing statements and any and all other collateral and ancillary documentation executed or delivered in connection therewith, the “**Prepetition Security Documents**”) among Holdings, the Canadian Subsidiary Borrower, the subsidiaries of Holdings party thereto and the Prepetition Agent;

(e) the Indenture, dated as of February 2, 2006 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Prepetition Indenture**”), among the Parent Borrower, each note guarantor from time to time party thereto and U.S. Bank National Association, a national banking association, as indenture trustee (the “**Prepetition Indenture Trustee**”) in respect of the \$270 million of 11½% Notes due 2014 (the holders of such notes, the “**Prepetition Secured Noteholders**”; together with the Prepetition Agent, the Prepetition Revolving Lenders, the Prepetition Term Lender and the Prepetition Indenture Trustee, the “**Prepetition Secured Parties**”); and

(f) the Intercreditor Agreement, dated as of February 2, 2006 (as amended, supplemented or otherwise modified prior to the Petition Date, the “**Intercreditor Agreement**”),

among the Prepetition Agent, the Prepetition Indenture Trustee, Holdings and each subsidiary of Holdings party thereto.

5. *Interim Cash Collateral Order.* On March 23, 2009, the Bankruptcy Court entered the Interim Order (I) Authorizing the Use of Prepetition Lenders' Cash Collateral Under 11 U.S.C. § 363, (II) Granting Adequate Protection Under 11 U.S.C. §§ 361, 363 and 364 and (III) Scheduling a Final Hearing Under Bankruptcy Rule 4001(b) and (c) (the "**Interim Cash Collateral Order**"). As of the date hereof, April 8, 2009, the Borrowers were indebted and liable to the Prepetition Agent and the Prepetition Revolving Lenders in respect of "**Cash Collateral Loans**" (as defined in the Interim Cash Collateral Order) in the aggregate principal amount of not less than \$13,060,271.98 (plus accrued and unpaid interest thereon), and each other Debtor was contingently liable to the Prepetition Agent and the Prepetition Revolving Lenders in an aggregate amount not less than the outstanding amount of Cash Collateral Loans (plus accrued and unpaid interest thereon). ~~The validity, priority and enforceability of (i) any~~ Any Cash Collateral Loan or "Adequate Protection Obligation" (as defined, solely for the purposes of this sentence, in the Interim Cash Collateral Order) ~~incurred under the Interim Cash Collateral~~ owed to or held by any Prepetition Revolving Lender shall remain in full force and effect and be unimpaired by the Interim Order or this Final Order and (ii) any "Postpetition Lien" or "Adequate Protection Lien" (as each such term is defined, solely for the purposes of this sentence, in the Interim Cash Collateral Order) ~~authorized or created by or pursuant to~~ granted to the Prepetition Agent for the ratable benefit of the Prepetition Revolving Lenders shall have the validity, priority and enforceability as set forth in the Interim Cash Collateral Order, in each case shall remain in full force and effect and be unimpaired and otherwise unaffected by this

Order except that the Cash Collateral Loans and the Postpetition Liens shall remain subject to paragraph 23 of the Interim Cash Collateral Order (it being understood that the phrase “timely successful challenge” as used in paragraph 23 of the Interim Cash Collateral Order shall refer to the “Investigatory Period” as defined and as set forth in paragraph 20 of this Final Order).

6. *Debtors’ Stipulations.* Without prejudice to the rights of any other party (but subject to the limitations thereon contained in paragraphs 20 and 21), the Debtors admit, stipulate and agree that:

(a) as of the Petition Date, (i) each of the Borrowers was indebted and liable to the Prepetition Agent and the Prepetition Revolving Lenders, without defense, counterclaim or offset of any kind, in respect of revolving loans and bankers’ acceptances made by the Prepetition Revolving Lenders to the Borrowers under the Prepetition Credit Agreement in the aggregate principal amount of not less than \$64,168,106.94 (it being understood that such amount is subject to fluctuation based on currency exchange rates) (plus accrued and unpaid interest thereon), (ii) each of the Borrowers was contingently liable to the issuing banks under the Prepetition Credit Agreement and the Prepetition Revolving Lenders in the aggregate face amount of not less than \$8,242,984.00 on account of the Borrowers’ reimbursement obligations with respect to letters of credit issued under the Prepetition Credit Agreement, which remained outstanding as of the Petition Date, (iii) each of the Borrowers was indebted and liable to the Prepetition Agent and the Prepetition Revolving Lenders for fees, expenses (including any attorneys’, accountants’, appraisers’ and financial advisors’ fees that are chargeable or reimbursable under the Prepetition Credit Agreement, the Prepetition Security Documents, Amendment No. 2 or any related agreement, instrument or other document executed or delivered

in connection therewith (collectively, the “**Prepetition Loan Documents**”), charges and other obligations incurred in connection with such loans, bankers’ acceptances and letters of credit as provided in the Prepetition Loan Documents, (iv) the Debtors were liable to certain of the Prepetition Revolving Lenders or their affiliates in respect of Swap Obligations (as defined in the Prepetition Credit Agreement), (v) the Debtors were indebted to the Prepetition Revolving Lenders or their affiliates for Banking Services Obligations (as defined in the Prepetition Credit Agreement) (items (i) through (v), collectively, the “**Prepetition Obligations**”) and (vi) each Debtor party to a guaranty executed and delivered in respect of the Prepetition Obligations was contingently liable to the Prepetition Agent and the Prepetition Revolving Lenders under each such guaranty in the aggregate amount of not less than the aggregate amount of the Prepetition Obligations;

(b) the Prepetition Loan Documents and the Prepetition Obligations constitute the legal, valid and binding obligations of the Debtors, enforceable in accordance with their terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), and no portion of the Prepetition Obligations or any payments made to the Prepetition Agent or the Prepetition Revolving Lenders or applied to the Prepetition Obligations is subject to avoidance, recharacterization, reduction, disallowance, impairment, recovery or subordination under the Bankruptcy Code or applicable nonbankruptcy law;

(c) the Debtors do not have hereby forever release, and are forever barred from bringing, any claims, counterclaims, causes of action, defenses or setoff rights, whether arising under the Bankruptcy Code or otherwise, against the Prepetition Agent, the Prepetition

Revolving Lenders or their respective affiliates, subsidiaries, members, agents, officers, directors, employees and attorneys;

(d) as of the Petition Date, (i) each of the Borrowers was indebted and liable to the Prepetition Term Lender, without defense, counterclaim or offset of any kind, in respect of term loans made by the Prepetition Term Lender to the Borrowers under the Prepetition Credit Agreement in the aggregate principal amount of not less than \$30,275,416.66 (plus accrued and unpaid interest thereon), (ii) each of the Borrowers was indebted and liable to the Prepetition Term Lender for fees, expenses (including any attorneys', accountants', appraisers' and financial advisors' fees that are chargeable or reimbursable under the Prepetition Loan Documents, charges and other obligations incurred in connection with such term loans (items (i) through (iii), collectively, the "**Prepetition Term Obligations**") and (iv) each Debtor party to a guaranty executed and delivered in respect of the Prepetition Term Obligations was contingently liable to the Prepetition Term Lenders under each such guaranty in the aggregate amount of not less than the aggregate amount of the Prepetition Term Obligations;

(e) the Prepetition Loan Documents and the Prepetition Term Obligations constitute the legal, valid and binding obligations of the Debtors, enforceable in accordance with their terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), no portion of the Prepetition Term Obligations is subject to avoidance, recharacterization, reduction, disallowance, impairment, recovery or subordination under the Bankruptcy Code or applicable nonbankruptcy law;

(f) the Debtors do not have any claims, counterclaims, causes of action, defenses or setoff rights, whether arising under the Bankruptcy Code or otherwise, against the

Prepetition Term Lenders or their respective affiliates, subsidiaries, members, agents, officers, directors, employees and attorneys;

(g) the liens and security interests granted to the Prepetition Agent (for the ratable benefit of the holders of the Prepetition Obligations and Prepetition Term Obligations) under and in connection with the Prepetition Security Documents are valid, binding, perfected, enforceable, first-priority liens on the personal and real property described in each such Prepetition Security Document (together with the setoff rights described in the Existing Documents (as defined below) and arising by operation of law, the “**Prepetition Collateral**”), not subject to avoidance, recharacterization or subordination under the Bankruptcy Code or applicable nonbankruptcy law and subject and subordinate only to (A) the DIP Liens (as defined below), (B) the Adequate Protection Liens (as defined below), (C) the Carve Out (as defined below) and (D) valid, perfected and unavoidable liens permitted under the Prepetition Loan Documents to the extent such liens are permitted to be senior to or *pari passu* with the liens of the Prepetition Agent on the Prepetition Collateral; and

(h) the aggregate value of the Prepetition Collateral exceeds the aggregate amount of the Prepetition Obligations and the Prepetition Term Obligations.

7. *Findings Regarding the Financing.*

(a) Good cause has been shown for issuance of this Final Order.

(b) The Debtors do not have available sources of working capital and financing to carry on the operation of their businesses without obtaining the Financing and the use of the Cash Collateral. The Debtors have an immediate need to obtain the full amount of the Financing and use the Cash Collateral to permit, among other things, the orderly continuation of



the operation of their businesses, to maintain business relationships with vendors, suppliers and customers, to make payroll, to make capital expenditures and to satisfy other working capital and operational needs. The access of the Debtors to sufficient working capital and liquidity through the use of Cash Collateral, incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the going concern values of the Debtors and to a successful reorganization of the Debtors.

(c) The Debtors are unable to obtain financing on more favorable terms from sources other than the DIP Lenders under the DIP Documents and are unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Debtors are also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code for the purposes set forth in the DIP Credit Agreement without the grant of priming liens and superpriority claims as set forth herein and the application of collateral proceeds to the Prepetition Obligations as set forth herein, and the conversion of any remaining Prepetition Obligations (including the letters of credit issued under the Prepetition Credit Agreement that are outstanding as of the date of entry of this Final Order, the "Letters of Credit") to DIP Obligations as set forth herein.

(d) ~~Based on the record presented to the Court at the Interim Hearing, the~~ The terms of the Financing and the use of Cash Collateral are fair and reasonable, reflect the Debtors' prudent exercise of business judgment consistent with their fiduciary duties and constitute reasonably equivalent value and fair consideration.

(e) The Financing and the use of the Cash Collateral have been negotiated in good faith and at arm's length among the Debtors, the DIP Agent, the DIP Lenders and the

Prepetition Agent, and all of the Debtors' obligations and indebtedness arising under, in respect of or in connection with the Financing and the DIP Documents, including without limitation, (i) all loans made to, and all letters of credit deemed issued for the account of, the Borrowers under the DIP Credit Agreement and (ii) any "Secured Obligations" (as defined in the DIP Credit Agreement), including credit extended in respect of overdrafts and related liabilities and other depository, treasury, and cash management services and other clearing services provided by the DIP Agent, or any DIP Secured Party (as defined below) or their respective affiliates, (iii) the Cash Collateral Loans that have been converted to postpetition obligations of the Debtors under the Interim Order and (iv) any obligations in respect of the "**Prior Swap**" (as defined in the DIP Credit Agreement) (all of the foregoing in clauses (i) and (ii) collectively, the "**DIP Obligations**"), shall be deemed to have been extended by the DIP Agent, such DIP Secured Party and their affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and the DIP Obligations, the DIP Liens (as defined below) and the Superpriority Claims (as defined below) shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Final Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise. ~~For purposes of this Order, the "DIP Obligations" shall include the Cash Collateral Loans (plus accrued and unpaid interest thereon) made under the Interim Cash Collateral Order outstanding as of the date hereof.~~

(f) The Debtors have requested immediate entry of this Final Order under Bankruptcy ~~Rule~~Rules 4001(b)(2) and 4001(c)(2) and Local Rule 4001-2. Absent granting the relief sought by this Final Order, the Debtors' estates will be immediately and irreparably

harmful. Consummation of the Financing and authorization of the use of Cash Collateral in accordance with this Final Order and the DIP Documents is therefore in the best interest of the Debtors' estates consistent with their fiduciary duties.

8. *Authorization of the Financing and the DIP Documents.*

(a) The Debtors were by the Interim Order and are hereby authorized to enter into the DIP Documents. The Parent Borrower was by the Interim Order and is hereby authorized to borrow money, pay interest, fees and expenses in accordance with this Final Order and the DIP Documents and, ~~subject to and effective upon entry of the Final Order,~~ amend, extend or renew ~~letters~~ the Letters of ~~credit~~ Credit pursuant to the DIP Credit Agreement in such amounts as may be made available to the Parent Borrower by the DIP Agent and the DIP Lenders in accordance with all of the lending formulae, sublimits and other terms and conditions set forth in the DIP Documents and this Final Order; *provided*, that ~~pending entry of the Final Order,~~ the aggregate principal amount of the extensions of credit made under the DIP Credit Agreement outstanding at any time shall not exceed \$42,500,000 85,877,371 (plus interest, fees and other expenses and amounts provided for in the DIP Documents) (excluding amounts in respect of the Prior Swap (as defined in the DIP Credit Agreement)), which amount is inclusive of the ~~Prepetition Obligations and Cash Collateral Loans outstanding under the Interim Cash Collateral Order as of the date of this,~~ the Cash Collateral Loans that have been converted to postpetition obligations of the Debtors under the Interim Order and the Debtors' reimbursement obligations with respect to the Letters of Credit issued under the Prepetition Credit Agreement that are outstanding as of the date of entry of the Final Order. The Guarantors were by the Interim Order and are hereby authorized to guarantee such ~~borrowings~~ the DIP Obligations and the Borrowers'

obligations under the DIP Credit Agreement and the other DIP Documents, in accordance with the terms of this Final Order and the DIP Documents. The proceeds of any revolving loans made under the DIP Credit Agreement shall be used for the purposes, and subject to the terms and conditions, set forth in the DIP Credit Agreement and the other DIP Documents. In addition to such loans and obligations, the Debtors were by the Interim Order and are authorized to incur overdrafts and related liabilities arising from treasury, depository and cash management services including any automated clearing house fund transfers provided to or for the benefit of any of the Debtors by the DIP Agent, the DIP Lenders or any of their respective affiliates; *provided* that nothing herein shall require the DIP Agent, any DIP Lender or any of their respective affiliates to incur overdrafts or to provide such services or functions to the Debtors.

(b) In connection with the conversion of the obligations under the Prior Swap with JPMorgan into DIP Obligations, the Debtors are hereby authorized and directed to enter into the Amended and Restated ISDA, in substantially the form attached hereto as Exhibit A (the “Amended and Restated ISDA”), and to pay all amounts as and when due thereunder. JPMorgan is hereby authorized to terminate the Prior Swap in accordance with the terms of the Amended and Restated ISDA.

(c) ~~(b)~~ In furtherance of the foregoing and without further approval of this Court, each Debtor was by the Interim Order and is authorized and directed to perform all acts, to make, execute and deliver all instruments and documents (including, without limitation, the execution or recordation of security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements and financing statements), and to pay all fees that

may be reasonably required or necessary for the Debtors' performance of their obligations under the DIP Documents, including, without limitation:

(i) the execution, delivery and performance of the DIP Credit Agreement and the other DIP Documents, any security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements, financing statements contemplated thereby and any exhibits attached thereto,

(ii) the non-refundable payment to the DIP Agent or the DIP Lenders, as the case may be, of the fees referred to in the DIP Credit Agreement (and in the separate letter agreements between the DIP Agent and the Debtors party thereto in connection with the Financing) and reasonable costs and expenses as may be due from time to time, including, without limitation, fees and expenses of the professionals retained as provided for in the DIP Documents; *provided* that the Debtors shall provide to the Creditors' Committee and the Office of the United States Trustee immediately upon receipt thereof a copy of any invoice for the payment of professional fees and expenses incurred after the Effective Date and such invoice shall be subject to the procedures for review and objection set forth in paragraph 15(c),

(iii) the execution, delivery and performance of one or more amendments, waivers, consents or other modifications to the DIP Credit Agreement or the other DIP Documents (it being understood that no further approval of the Court shall be required for amendments, waivers, consents or

other modifications to and under the DIP Credit Agreement or the other DIP Documents (or any fees paid in connection therewith) (x) to make any non-material amendments or modifications to the DIP Credit Agreement or any other DIP Documents or (y) to make any material amendment or material modification to the DIP Credit Agreement or any other DIP Document; *provided* that notice of any material modification or material amendment to any of the DIP Documents shall be filed with the Bankruptcy Court and served by the Debtors on the Creditors' Committee and the U.S. Trustee, and the Creditors' Committee and the U.S. Trustee shall have five business days from the date of such filing within which to object in writing to such proposed modification or amendment; *provided further* that if the Creditors' Committee or the U.S. Trustee timely objects to any such modification or amendment to the DIP documents, then such modification or amendment shall only be permitted pursuant to an order of this Court after notice and a hearing). For purposes hereof, a "material" modification shall mean any modification that operates to (1) shorten the maturity of the extensions of credit under the DIP Documents, (2) increase the aggregate amount of any of the commitments thereunder, (3) increase the rate of interest or any other fees or charges payable thereunder (other than to the extent contemplated in the DIP Documents as in effect on the date hereof) or (4) otherwise modify the DIP Documents in a manner materially less favorable to the Debtors and their estates), and

(iv) the performance of all other acts required under or in connection with the DIP Documents.

(d) ~~(e)~~ Upon execution and delivery of the DIP Documents, the DIP Documents shall constitute as of the "Effective Date" (as defined in the DIP Credit Agreement) and shall continue to constitute, and upon execution and delivery of the Amended and Restated ISDA, the Amended and Restated ISDA shall constitute, valid and binding obligations of each of the Debtors, enforceable against each Debtor party thereto in accordance with their respective terms and the terms of this Final Order for all purposes during the Cases, any subsequently converted case of any Debtor under chapter 7 of the Bankruptcy Code or after the dismissal of any Case. ~~No~~ Except as otherwise provided in paragraph 11(e) of this Order, no obligation, payment, transfer or grant of security under any DIP Document ~~or this Order, the~~ Amended and Restated ISDA, the Interim Order or this Final Order to or for the benefit of the DIP Agent, the DIP Secured Parties, the Prepetition Agent and the Prepetition Revolving Secured Parties, as applicable, shall be stayed, restrained, voidable, avoidable or recoverable under the Bankruptcy Code or under any applicable law (including without limitation, under sections 502(d), 548 or 549 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or similar statute or common law), or subject to any defense, reduction, setoff, recoupment or counterclaim.

9. *Conversion of Cash Collateral Loans ~~and~~ Prepetition Obligations and Letters of Credit; Application of Collateral Proceeds.*

(a) As of the "Effective Date" ~~(as defined in the DIP Credit Agreement), any~~ and all outstanding Cash Collateral Loans made under the Interim Cash Collateral Order were

and shall continue to be deemed to have been converted into U.S. Revolving Loans ~~or Canadian Revolving Loans~~, as the case may be, initially bearing interest at a rate determined by reference to the Alternate Base Rate (as such terms are defined in the DIP Credit Agreement) made to the Parent Borrower or the Canadian Subsidiary Borrower, as the case may be, and thereafter, such Cash Collateral Loans, the interest payable thereon and the other terms and conditions thereof shall be governed by the DIP Credit Agreement.

(b) Subject to and effective Effective upon entry of ~~the~~ this Final Order, (i) any and all Prepetition Obligations comprised of U.S. Revolving Loans under (and as defined in) the Prepetition Credit Agreement outstanding as of such date made by a Prepetition Revolving Lender to the Parent Borrower that have not been converted as ~~of~~ on or prior to the date of entry of the Final Order to DIP Obligations shall be deemed to be converted to a ~~DIP Obligation~~ DIP Obligations (in accordance with section 2.01(c) of the DIP Credit Agreement) outstanding under the DIP Credit Agreement and ~~(ii) any such conversion,~~ (ii) any and all Letters of Credit shall be deemed to be continued and converted to DIP Obligations (in the form of letters of credit deemed issued under and in accordance with section 2.04 of the DIP Credit Agreement) outstanding under the DIP Credit Agreement and (iii) each such conversion and continuance is hereby authorized as compensation for, in consideration for, and solely on account of, the agreement of the DIP Lenders to make new extensions of credit under the DIP Credit Agreement.

(c) The Debtors were under the Interim Order and are authorized and directed to remit to the DIP Agent immediately upon the Debtors' receipt thereof or otherwise in accordance with the Debtors' current practices all Cash Collateral in its possession or control arising from, or constituting proceeds of, the Collateral (including Prepetition Collateral) and all



Cash Collateral so remitted shall be applied, first, to the Prepetition Obligations, until such Prepetition Obligations are indefeasibly paid in full and completely satisfied, and then to the DIP Obligations in the manner set forth in sections 2.09(c) and (d) of the DIP Credit Agreement. The DIP Agent was under the Interim Order and is hereby authorized, as of the Effective Date, to (i) send a notice to each Receivables Account Bank (as defined in the DIP Domestic Security Agreement) to commence a period during which the applicable Receivables Account Bank shall cease complying with any instructions originated by any applicable Debtor and shall comply with instructions originated by the DIP Agent directing dispositions of funds, without further consent of the applicable Debtor, and (ii) apply (and allocate) the funds in each Receivables Account (as defined in the DIP Domestic Security Agreement) pursuant to sections 2.09(~~bc~~) and (~~ed~~) of the DIP Credit Agreement without further order or approval of this Court. Each Receivables Account Bank was under the Interim Order and is hereby authorized to comply with any instructions originated by the DIP Agent on or after the Effective Date directing disposition of funds, without further consent of the applicable Debtor or further order or approval of this Court, and was under the Interim Order and is further authorized to comply with any instructions delivered by the DIP Agent or the Prepetition Agent to such Receivables Account Bank prior to the Effective Date directing disposition of funds, without further consent of the applicable Debtor or further order or approval of this Court. As of the Effective Date, each “Deposit Account Control Agreement” and “Receivables Account Control Agreement” (as each such term is defined in the Domestic Security Agreement) ~~will~~were and shall continue and remain in full force and effect, in each case substituting the DIP Agent as the secured party thereunder in place of the Prepetition Agent. The automatic stay is hereby modified and vacated to permit such

actions as contemplated by this paragraph 9. Except as otherwise provided herein or in the “first day” order relating thereto, the Debtors shall maintain their pre-Petition Date cash management and accounts receivable collection system, including the Collateral Accounts (as defined below) associated therewith.

(d) Any and all payments or proceeds remitted, or deemed to be remitted, pursuant to the provisions of this paragraph 9 of this Final Order to (i) the Prepetition Agent shall be received, or deemed received, by the Prepetition Agent for the ratable benefit of the Prepetition Revolving Lenders or (ii) the DIP Agent shall be received, or deemed received, by the DIP Agent for the ratable benefit of the DIP Lenders, in each case free and clear of any claim, charge, assessment or other liability including, without limitation, any such claim or charge arising out of or based on, directly or indirectly, sections 506(c) (whether asserted or assessed by, through or on behalf of the Debtors) or 552(b) of the Bankruptcy Code.

10. *Superpriority Claims.*

(a) Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed senior administrative expense claims against the Debtors with priority over any and all administrative expenses, diminution claims (including all Adequate Protection Obligations (as defined below)) and all other claims against the Debtors, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330, 331, 503(b), 506(c) (subject to entry of a Final Order), 507(a), 507(b), 546, 726, 1113 or 1114 of the Bankruptcy Code, and shall at all times be senior to the rights of the Debtors, any successor

trustee or any creditor, in these Cases or any subsequent proceedings under the Bankruptcy Code (the “**Superpriority Claims**”), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims shall be payable from and have recourse to all pre- and postpetition property of the Debtors and all proceeds thereof, subject only to (i) the payment of the Carve Out to the extent specifically provided for herein; and (ii) the limitations on recourse to Avoidance Action Proceeds set forth in the following sentence. The Superpriority Claims granted hereunder shall also have recourse to any and all proceeds or property in respect of any Avoidance Action (as defined below), whether or not such proceeds or property is recovered from a judgment, settlement or otherwise (the “**Avoidance Action Proceeds**”), only if the DIP Obligations are not first indefeasibly paid in cash in full (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement) from the proceeds of the sale(s) or liquidation of all or substantially all of the Debtors’ assets; *provided* that such Superpriority Claims with recourse to Avoidance Action Proceeds shall not exceed an amount equal to the difference between the aggregate DIP Obligations minus the Prepetition Obligations that are converted to DIP Obligations (the “**Converted Obligations**”) (it being understood and agreed that for purposes hereof (x) any such proceeds from such sale or liquidation shall be applied, first, to the DIP Obligations that are Converted Obligations and, second, to the DIP Obligations that are not Converted Obligations and (y) any amount drawn under a letter of credit outstanding under the DIP Credit Agreement (including all Letters of Credit continued and converted to DIP Obligations as provided herein)

that is not reimbursed shall constitute a DIP Obligation that is not a Converted Obligation hereunder).

(b) For purposes of this Final Order, the “**Carve Out**” means (i) the unpaid fees and interest due and payable to the Clerk of the Bankruptcy Court and the Office of the United States Trustee pursuant to 28 U.S.C. § 1930; (ii) all reasonable fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code in an amount not exceeding \$25,000 in the aggregate; and (iii) after the occurrence of an “**Event of Default**” (as defined in the DIP Credit Agreement), the payment of allowed and unpaid professional fees and disbursements incurred after the occurrence of such Event of Default by (a) the Debtors in an amount not to exceed \$750,000 (~~but excluding any fees incurred on behalf~~including, without limitation, the fees and expenses of Jefferies & Company, Inc., ~~which fees shall be payable upon consummation of a sale or transaction as governed by the terms of the engagement approved by the Court~~) and (b) the Creditors’ Committee in an aggregate amount not to exceed ~~\$250,000~~300,000 (in each case, other than any such fees and disbursements incurred in connection with the initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation against the Prepetition Agent or the Prepetition Revolving Lenders, except as otherwise provided in paragraph 21 of this Final Order); *provided* (a) that the dollar limitation in this clause (iii) on fees and expenses shall neither be reduced nor increased by the amount of any compensation or reimbursement of expenses incurred, awarded or paid before the occurrence of an Event of Default in respect of which the Carve Out is invoked or by any fees, expenses, indemnities or other amounts paid to the Prepetition Agent, Prepetition Lenders or their respective attorneys and agents, and (b) that nothing herein shall be construed to prejudice any objection to any of the

fees, expenses, reimbursement or compensation described in clauses (x) and (y) above. For purposes of the DIP Credit Agreement, the Borrowers, the other Debtors and the DIP Lenders hereby agree that the definition of “Carve-Out Cap” shall be deemed to be amended without any further action or approval by any party by deleting the amount “\$1,000,000” and substituting in lieu thereof the amount “\$1,050,000”.

11. *DIP Liens.*

As security for the DIP Obligations, effective and perfected upon the ~~Effective Date~~ date of entry of the Interim Order and without the necessity of the execution or recordation of filings by the Debtors, of security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements, financing statements or other similar documents, or the possession or control by the DIP Agent, any DIP Lender or any other “Secured Parties” (as such term is defined in the DIP Domestic Security Agreement, hereinafter referred to as the “**DIP Secured Parties**”) of, or over, any DIP Collateral (as defined below), the following security interests and liens are hereby granted to the DIP Agent for its own benefit and the benefit of the DIP Secured Parties (all property identified in clauses (a), (b) and (c) below being collectively referred to as the “**DIP Collateral**”), subject only to the payment of the Carve Out as set forth in this Final Order (all such liens and security interests granted to the DIP Agent, for its benefit and for the benefit of the DIP Secured Parties, pursuant to this Final Order and the DIP Documents, the “**DIP Liens**”):

(a) First Lien on Cash Balances and Unencumbered Property. Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all pre- and postpetition property

of the Debtors, wherever located, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date is not subject to valid, perfected and non-avoidable liens (collectively, “**Unencumbered Property**”), including without limitation, any and all ~~unencumbered cash and cash collateral~~ of the Debtors (whether maintained with the DIP Agent or otherwise) and any investment of such ~~cash and cash collateral~~ and any and all inventory, accounts receivable, any other right to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, patents, copyrights, trademarks, trade names, other intellectual property, capital stock of subsidiaries and the proceeds of all the foregoing. Unencumbered Property shall not include the Debtors’ claims and causes of action under sections 502(d), 544, 545, 547, 548, 549, 550 and 553 of the Bankruptcy Code and any other avoidance actions under the Bankruptcy Code (collectively, “**Avoidance Actions**”); ~~provided that, subject to and effective upon entry of the Final Order, Unencumbered Property shall include the proceeds of Avoidance Actions and property received thereby whether by judgment, settlement or otherwise or~~ Avoidance Action Proceeds.

(b) Liens Priming Prepetition Secured Parties’ Liens. Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest in and lien upon all pre- and postpetition property of the Debtors (including, without limitation, Cash Collateral), inventory, accounts receivable, any other right to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, patents, copyrights, trademarks, trade names, other intellectual property, capital stock

of subsidiaries, and the proceeds of all the foregoing), wherever located and whether now existing or hereafter acquired, that is presently subject to any lien or security interest granted to (a) the Prepetition Agent (for the ratable benefit of the “Secured Parties” (as such term is defined in the Domestic Security Agreement but excluding the Prepetition Term Lender, hereinafter referred to as the “**Prepetition Revolving Secured Parties**”)) under and in connection with any Prepetition Security Document (the “**Prepetition Revolving Lender Liens**”), (b) the Prepetition Agent (for the benefit of the Prepetition Term Lender) under and in connection with any Prepetition Security Document (the “**Prepetition Term Lender Liens**”) and (c) the Prepetition Indenture Trustee (for the ratable benefit of the Prepetition Secured Noteholders) under and in connection with the Prepetition Indenture (and any security documents related thereto) (the “**Prepetition Secured Noteholder Liens**”) (the Prepetition Revolving Lender Liens, the Prepetition Term Lender Liens and the Prepetition Secured Noteholder Liens collectively, the “**Prepetition Liens**”). Such security interests and liens shall be senior in all respects to the interests in such property of the Prepetition Secured Parties arising from current and future liens of the Prepetition Secured Parties (including, without limitation, Adequate Protection Liens (as defined below) granted hereunder as adequate protection), but shall not be senior to any valid, perfected and unavoidable interests of other parties arising out of liens, if any, on such property existing immediately prior to the Petition Date, or to any valid, perfected and unavoidable interests in such property arising out of liens to which the liens of the Prepetition Secured Parties become or became subject to subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code.

(c) Liens Junior to Certain Other Liens. Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected security interest in and lien upon all pre- and postpetition property of the Debtors (other than the property described in clauses (a) or (b) of this paragraph 11, as to which the liens and security interests in favor of the DIP Agent will be as described in such clauses), whether now existing or hereafter acquired, that is subject to valid, perfected and unavoidable liens in existence immediately prior to the Petition Date (other than the Prepetition Liens, which shall be governed by paragraph 11(b)) or to valid and unavoidable liens in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, which liens in favor of the DIP Agent are junior to such valid, perfected and unavoidable liens.

(d) Liens Senior to Certain Other Liens. The DIP Liens shall not be (a) subject or subordinate to (i) any lien or security interest that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code or, (ii) any liens arising after the Petition Date including, without limitation, subject to and effective upon entry of a Final Order, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit, commission, board or court for any tax liability of the Debtors to the extent permitted by applicable law, whether secured or unsecured, including property taxes for which liability is *in rem*, *in personam*, or both, except a tax of a kind specified in section 507(a)(8) of the Bankruptcy Code, or (iii) any intercompany or affiliate liens of the Debtors or (b) subordinated to or made *pari passu* with any other lien or security interest under sections 363 or 364 of the Bankruptcy Code or otherwise.



(e) Notwithstanding anything to the contrary contained ~~herein~~ in this Final Order, the Court reserves the right to unwind, after notice and a hearing, the DIP Liens, or a portion thereof (which might include the disgorgement or re-allocation of interest, fees or other consideration paid in respect thereof) granted to secure any Prepetition Obligations that are converted to DIP Obligations in accordance with the DIP Documents ~~and this, the Interim Order~~ or ~~the~~ this Final Order, as applicable, solely in the event that there is a timely successful challenge, pursuant and subject to the limitations contained in paragraphs 20 and 21, to the validity, enforceability, extent or perfection of the liens securing the Prepetition Obligations and only to the extent that the Court finds that, in light of such timely successful challenge, the DIP Liens unduly advantaged the Prepetition Revolving Lenders and the Prepetition Agent at the expense of other creditors of the Debtors or their estates. For the avoidance of doubt, the DIP Liens granted to secure any revolving loans or other extensions of credit made under the DIP Credit Agreement that are not Prepetition Obligations converted to DIP Obligations shall not be subject to challenge at any time during the Cases (or any subsequent case) and shall have the protections set forth in the Interim Order, this Final Order and the DIP Documents regardless of whether there is a timely successful ~~challenge~~ challenge to the validity, enforceability, extent or perfection of the liens securing the Prepetition Obligations.

12. *Protection of DIP Secured Parties' Rights.*

(a) So long as there are any borrowings or letters of credit or other amounts (other than (A) contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid and (B) letters of credit outstanding under the DIP Credit Agreement which have been cash collateralized or supported with backstop letters of credit in

accordance with the terms of the DIP Credit Agreement) outstanding under the DIP Credit Agreement, or the DIP Lenders have any “**Commitment**” (as defined in the DIP Credit Agreement), the Prepetition Term Lender, the Prepetition Indenture Trustee and the Prepetition Secured Noteholders shall (i) take no action to foreclose upon or recover in connection with the liens granted thereto pursuant to the Prepetition Security Documents, the Prepetition Indenture (and any security documents related thereto), the Interim Order or this Final Order, or otherwise exercise remedies against any DIP Collateral, (ii) be deemed to have consented to any release of Collateral authorized under the DIP Documents and (iii) not file any further financing statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments, or otherwise take any action to perfect their security interests in the Collateral unless, solely as to this clause (iii), the DIP Agent files any financing statement or other document to perfect the liens granted pursuant to the Interim Order or this Final Order, or as may be required by applicable state law to continue the perfection of valid and unavoidable liens or security interests as of the Petition Date.

(b) The automatic stay provisions of section 362 of the Bankruptcy Code are vacated and modified to the extent necessary to permit the DIP Agent, any DIP Lender and any other DIP Secured Party to exercise and enforce, upon the occurrence and continuance of an Event of Default and the giving of five business days’ notice to the Debtors, the Prepetition Term Lenders and the Prepetition Indenture Trustee (with a copy to lead counsel for the Creditors’ Committee and to the United States Trustee), all rights and remedies against the DIP Collateral under the DIP Documents (including, without limitation, the right to setoff monies of the Debtors in accounts maintained with the DIP Agent, any DIP Secured Party, the Prepetition Agent or any

affiliate thereof). In any hearing regarding any exercise of rights or remedies after an Event of Default has occurred, the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing, and, ~~subject to and effective upon entry of the Final Order~~, each of the Prepetition Term Lender, the Prepetition Indenture Trustee and the Prepetition Secured Noteholders and the Creditors' Committee hereby waives its right to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent such relief would in any way impair or restrict the rights and remedies of the DIP Agent, any DIP Secured Party, the Prepetition Agent or any affiliate thereof set forth in the Interim Order, this Final Order or the DIP Documents. ~~In~~ Except as otherwise provided in paragraph 10(a) of this Final Order, in no event shall the DIP Agent, the DIP Secured Parties, the Prepetition Agent or the Prepetition Revolving Secured Parties be subject to the equitable doctrine of "marshaling" or any similar doctrine with respect to the DIP Collateral or the Prepetition Collateral. The delay or failure of the DIP Agent or any DIP Secured Party to seek relief or otherwise exercise or enforce its rights and remedies under the DIP Documents, the Interim Order or this Final Order shall not constitute a waiver of the DIP Agent's or any DIP Secured Party's rights or remedies hereunder, thereunder or otherwise.

13. *The Cash Collateral.* To the extent any funds were on deposit with any Prepetition Secured Party as of the Petition Date, including all funds deposited in, or credited to, an account of any Debtor with any Prepetition Secured Party immediately before the Debtors commenced these Cases (regardless of whether, as of such time, such funds had been collected or made available for withdrawal by any such Debtor), such funds (the "**Deposited Funds**") are subject to rights of setoff in favor of the Prepetition Secured Parties. By virtue of such setoff

rights, the Deposited Funds are subject to a lien in favor of such Prepetition Secured Party, giving rise to a secured claim pursuant to sections 506(a) and 553 of the Bankruptcy Code. The Prepetition Secured Parties are obligated, to the extent provided in the Prepetition Loan Documents, the Prepetition Indenture (and any security documents related thereto) and the Intercreditor Agreement (together, the “**Existing Documents**”) to share the benefit of such setoff rights with the other Prepetition Secured Parties that are party to or are otherwise beneficiaries of such documents. The Debtors’ cash, including all cash and other amounts on deposit or maintained in any account subject to a control agreement with the Prepetition Agent (or any successor or replacement agent thereto) or the Prepetition Indenture Trustee or in the concentration accounts maintained with the Prepetition Agent (or any successor or replacement agent thereto or any of its affiliates) (collectively, the “**Collateral Accounts**”) and any proceeds of the Prepetition Collateral (including the Deposited Funds or any other funds on deposit at the Prepetition Secured Parties or at any other institution as of the Petition Date) are “cash collateral” of the Prepetition Secured Parties within the meaning of section 363(a) of the Bankruptcy Code. The Debtors’ cash, if any, the Deposited Funds, if any, the funds in the Collateral Accounts, if any, and all such proceeds of Prepetition Collateral, if any, are referred to herein as “**Cash Collateral.**” Nothing in this Final Order shall preclude the Creditors’ Committee from investigating and otherwise challenging any of the Prepetition Term Lender’s alleged setoff rights, lien rights or other rights to the Cash Collateral.

14. *Use of Cash Collateral.* The Debtors were by the Interim Order and are authorized to use all Cash Collateral of the Prepetition Secured Parties during the period from the date of ~~this~~ the Interim Order through and including the “**Termination Date**” (as defined in the

DIP Credit Agreement), *provided* that the Prepetition Secured Parties are granted adequate protection as hereinafter set forth. The Debtors' right to use the Cash Collateral shall terminate automatically on the Termination Date. In addition, if any Borrower voluntarily terminates the Commitments prior to the "**Maturity Date**" (as each such term is defined in the DIP Credit Agreement) and all DIP Obligations are indefeasibly paid in full in cash (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement), the Debtors shall, for the benefit of the Prepetition Secured Parties, continue to comply with the requirements of Articles V and VI of the DIP Credit Agreement and, upon any failure by the Debtors to observe any such requirement or upon the occurrence of any event that would have constituted an Event of Default under the DIP Credit Agreement prior to the termination of the Commitments, the Prepetition Agent on behalf of the Prepetition Secured Parties shall have the immediate right unilaterally to terminate the Debtors' right to use Cash Collateral.

Notwithstanding anything to the contrary contained in the Interim Cash Collateral Order or the Interim Order, the Debtors' right to use Cash Collateral shall be governed by the terms of this Final Order from and after the date hereof.

15. *Adequate Protection.* The Prepetition Secured Parties are entitled, under sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, to adequate protection of their interest in the Prepetition Collateral, including the Cash Collateral, for and equal in amount to the aggregate diminution in the value of the Prepetition Secured Parties' interest in the Prepetition Collateral, including any such diminution resulting from (w) the use of the Cash Collateral under section 363(c) of the Bankruptcy Code, (x) the sale, lease or use by the Debtors (or other decline

in value) of the Prepetition Collateral, (y) the priming of the Prepetition Secured Parties' security interests and liens in the Prepetition Collateral by the DIP Agent and the DIP Secured Parties pursuant to the DIP Documents, the Interim Order and this Final Order and (z) the imposition of the automatic stay under section 362 of the Bankruptcy Code (the amount of any such diminution being referred to hereinafter as the "**Adequate Protection Obligations**"). As adequate protection, the Debtors hereby grant the following:

(a) Adequate Protection Liens. The Prepetition Agent (for itself and the ratable benefit of the Prepetition Revolving Secured Parties and the Prepetition Term Lender) and the Prepetition Indenture Trustee (for the ratable benefit of the Prepetition Secured Noteholders) were by the Interim Order and are hereby granted (effective and perfected as of the Petition Date and without the necessity of the execution by the Debtors of security agreements, pledge agreements, fixture filings, mortgages, hypothecs, deeds of trust, control agreements, financing statements or other agreements) a valid, binding, enforceable and perfected replacement security interest in, and lien on, all of the DIP Collateral, subject and subordinate only to (i) the DIP Liens and liens on the DIP Collateral that are senior to, or *pari passu* with, the DIP Liens and (ii) the Carve Out (the "**Adequate Protection Liens**"). The Adequate Protection Liens granted hereunder shall be junior to the DIP Liens. The Adequate Protection Liens granted hereunder to the Prepetition Indenture Trustee, for the ratable benefit of the Prepetition Secured Noteholders, shall be immediately junior in priority and subject to the Adequate Protection Liens granted to the Prepetition Agent, for the ratable benefit of the Prepetition Revolving Secured Parties and the Prepetition Term Lenders, and the Adequate Protection Liens granted hereunder to the Prepetition Secured Parties shall otherwise rank in the same relative priority and right

(including with respect to payment of distributions) both as among the Prepetition Lenders and vis-à-vis the Prepetition Secured Noteholders as such parties' respective prepetition liens and security interests do with respect to the Prepetition Collateral as of the Petition Date under the Prepetition Loan Documents, the Prepetition Indenture (and any security documents related thereto) and the Intercreditor Agreement, including, for the avoidance of doubt, with respect to those terms of the Prepetition Loan Documents that provide that the Prepetition Term Lender, the Prepetition Indenture Trustee and the Prepetition Secured Noteholders shall have no right to seek or exercise any rights or remedies in respect of the Adequate Protection Liens granted herein (whether in these Cases or any subsequently converted cases) until all DIP Obligations owing to the DIP Agent, the DIP Secured Parties and their respective affiliates and all Adequate Protection Obligations owing to the Prepetition Agent, the Prepetition Revolving Secured Parties and their affiliates have been indefeasibly paid in full in accordance with the DIP Documents, the Prepetition Loan Documents and this ~~Order~~ Final Order. The Adequate Protection Liens granted hereunder shall not attach to any Avoidance Action or any Avoidance Action Proceeds.

(b) Section 507(b) Claim. The Prepetition Agent and the Prepetition Revolving Secured Parties (and their affiliates) are hereby granted, subject to the payment of the Carve Out on the terms specified herein and the Superpriority Claims granted herein, a superpriority claim as provided for in section 507(b) of the Bankruptcy Code (the “**507(b) Claims**”) with priority in payment over any and all administrative expenses of the kinds specified or ordered under any provision of the Bankruptcy Code, including sections 105, 326, 328, 330, 331, 503, 507(a), 726, 1113 or 1114 of the Bankruptcy Code, and shall at all times be senior to the rights of the Debtors, any successor trustee or any creditor, in these Cases or, to the extent

permitted by applicable law, any subsequent proceedings under the Bankruptcy Code. Except for the Carveout and, subject to entry of a Final Order with respect to section 506(e), Carve Out and the Superpriority Claims granted to the DIP Agent and the DIP Secured Parties under paragraph 10(a), subject to entry of a Final Order, no cost or expense of administration under sections 105, 503(b), 507(b) or otherwise, including any such cost or expense resulting from the conversion of these Cases under section 1112 of the Bankruptcy Code, shall be senior to, or *pari passu* with, the 507(b) Claims of the Prepetition Agent and the Prepetition Revolving Secured Parties (and their affiliates). The 507(b) Claims granted hereunder shall not have any recourse to Avoidance Action Proceeds; and

(c) Interest, Fees and Expenses. The Prepetition Agent (for the benefit of the Prepetition Revolving Secured Parties) shall receive from the Debtors (i) have received from the Debtors on the Effective Date, payment of all accrued and unpaid interest on the Prepetition Obligations at the applicable rates specified under the Interim Cash Collateral Order, all accrued and unpaid letter of credit fees at the applicable rates specified under the Interim Cash Collateral Order, all accrued and unpaid interest on the Cash Collateral Loans outstanding under the Interim Cash Collateral Order at the rates specified therein and all other accrued and unpaid fees and disbursements incurred before the Effective Date (including, but not limited to, fees owed to the Prepetition Agent for its counsel and financial advisors) owing under the Prepetition Loan Documents or any unterminated Swap Agreement (as defined in the Prepetition Credit Agreement), (ii) receive from the Debtors from time to time after the Effective Date, current cash payment of all fees and expenses payable to the Prepetition Agent, the Prepetition Revolving Secured Parties, the issuing bank or any of their respective affiliates under the Prepetition Loan



Documents or any unterminated Swap Agreement, including the reasonable fees and disbursements of counsel, financial advisors and other consultants for the Prepetition Agent or the Prepetition Revolving Lenders, promptly upon receipt of invoices therefor and (iii) receive from the Debtors on the first business day of each month, current cash payment of (x) all accrued and unpaid postpetition interest on the Prepetition Obligations at the rate equal to the Alternate Base Rate (as defined in the DIP Credit Agreement) plus 9.00% per annum and (y) letter of credit and other fees at the contract rates applicable under the DIP Credit Agreement, subject in each case to the Prepetition Agent's and Prepetition Revolving Secured Parties' reservation of their rights to assert claims for the payment of any other amounts provided for in the Prepetition Loan Documents and without prejudice to the rights of any other party to contest such assertion. The Prepetition Term Lender shall receive from the Debtors on the first business day of each month, current cash payment of (i) the reasonable legal fees, disbursements and expenses of legal counsel for the Prepetition Term Lender incurred in connection with monitoring the Cases or the protection of the rights and interests of the Prepetition Term Lender under the Prepetition Loan Documents and (ii) other reimburseable expenses of the Prepetition Term Lender under the Prepetition Credit Agreement; *provided, however*, that the aggregate amount of fees, disbursements and expenses payable to the Prepetition Term Lender pursuant to this sentence shall not exceed \$25,000 per calendar month; *provided further*, that the rights of any party to assert that any such amounts paid pursuant to this sentence should be recharacterized as payments on account of the principal amount of the Prepetition Term Obligations outstanding as of the Petition Date are hereby fully preserved and that any such amounts paid pursuant to this sentence remain subject to paragraph 11(e) of this Final Order. None of the fees, costs and

expenses payable under this paragraph shall be subject to separate or prior approval by this Court (but the Court shall resolve any dispute as to the reasonableness of any such fees, costs and expenses), and no recipient of any such payment shall be required to file any motion or interim or final fee application with respect thereto. Nothing contained herein shall be deemed to be a waiver by any party in interest of the right to object to the reasonableness of any fees, costs and charges incurred by the Prepetition Revolving Secured Parties, the Prepetition Term Lender or the Prepetition Agent. The Debtors shall provide to the Creditors' Committee and the Office of the United States Trustee, immediately upon receipt thereof, a copy of the monthly invoices for the Prepetition Agent's professionals and for the fees and expenses requested by the Prepetition Term Lender, and the Debtors are authorized and directed to make payment to the professional retained by the Prepetition Agent or the Prepetition Term Lender (or its counsel) unless, within ten days after receipt of the invoice by the Debtors, a written objection has been received by the Debtors and the applicable professional retained by the Prepetition Agent or the Prepetition Term Lender (or its counsel), as the case may be, in which case the Debtors are hereby authorized and directed to make payment on account of any amounts which are not clearly identified as being contested in such written objection and, upon resolution of such objection, the remaining unpaid amounts that have been agreed or ordered to be paid.

16. *Limitation on Charging Expenses Against Collateral.* ~~Subject only to and effective upon entry of the Final Order, except~~Except to the extent of the Carve Out, no expenses of administration of the Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Prepetition Collateral or DIP Collateral under section 506(c) of the

Bankruptcy Code or any similar principle of law, without the prior written consent of the DIP Agent and the Prepetition Agent, and no such consent shall be implied from any other action, inaction, or acquiescence by the DIP Agent, the DIP Secured Parties, the Prepetition Agent or the Prepetition Revolving Secured Parties.

17. *Reservation of Rights of the Prepetition Secured Parties.* ~~The Subject to the Prepetition Indenture Trustee's reservation of rights, the~~ Court finds that the adequate protection provided herein is reasonable and sufficient under the circumstances to protect the interests of the Prepetition Secured Parties. Notwithstanding any other provision, the grant of adequate protection to the Prepetition Secured Parties is without prejudice to the Prepetition Agent's right to request any modification of, or further or different, adequate protection, and the Debtors' or any other party's objection to any such request; *provided* that any such further or different adequate protection shall at all times be subordinate and junior to the claims and liens of the DIP Agent and the DIP Secured Parties granted under this Final Order, the Interim Order and the DIP Documents.

18. *Perfection of DIP Liens and Adequate Protection Liens.*

(a) The DIP Agent and the Prepetition Agent were by the Interim Order and are hereby authorized, but not required, to file or record financing statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments in any jurisdiction, or take possession of or control over, or take any other action in order to validate and perfect the liens and security interests granted to them hereunder. The DIP Liens and Adequate Protection Liens granted under this ~~Order shall~~ Final Order shall (and, in the case of DIP Liens and Adequate Protection Liens granted under the Interim Order, are and continue to) constitute valid and duly perfected security interests and liens, and the DIP Secured Parties and the Prepetition Secured Parties are hereby not required to file or record financing statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments which otherwise may be required under federal or state law in any jurisdiction, or take any action, including taking possession, to validate and perfect such security interests and liens, and such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge dispute or subordination, as of the Effective Date. The failure of the Debtors to execute any documentation relating to the enforceability, priority or perfection of the DIP Liens or Adequate Protection Liens shall in no way affect the validity, perfection or priority of the DIP Liens or Adequate Protection Liens, as applicable.

(b) If the Prepetition Agent (on behalf of the Prepetition Revolving Secured Parties) or the DIP Agent (on behalf of the DIP Secured Parties), in their individual and sole discretion, elects to file any financing statements, trademark filings, copyright filings, mortgages,

hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments, or otherwise to confirm perfection of such DIP Liens or Adequate Protection Liens, the Debtors shall cooperate with and assist in such process, the stay imposed under section 362 of the Bankruptcy Code is hereby lifted to permit the filing and recording of a certified copy of the Interim Order or this Final Order or any such financing statements, trademark filings, copyright filings, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments, and all such documents shall be deemed to have been filed and recorded at the time of and on the Effective Date. Any error, omission or other defect in any such filing shall not affect the validity, enforceability, priority or perfection of any DIP Lien or Adequate Protection Lien granted under this Final Order.

(c) A certified copy of the Interim Order or this Final Order may, in the discretion of the Prepetition Agent (on behalf of the Prepetition Revolving Secured Parties) or the DIP Agent (on behalf of the DIP Secured Parties), be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, hypothecs, fixture filings, deeds of trust, notices of lien or similar instruments, and all filing offices are hereby authorized to accept such certified copy of the Interim Order or this Final Order for filing and recording.

19. *Preservation of Rights Granted Under the Final Order.*

(a) No claim or lien having a priority superior to or *pari passu* with those granted by the Interim Order or this Final Order to the DIP Agent, the DIP Secured Parties, the Prepetition Agent or the Prepetition Revolving Secured Parties shall be granted or allowed while any portion of the Financing (or any refinancing thereof) or the Commitments thereunder or the

DIP Obligations or the Adequate Protection Obligations remain outstanding (or, with respect to any letters of credit outstanding under the DIP Credit Agreement, such letters of credit are neither cash collateralized nor supported with a backstop letters of credit in accordance with the terms of the DIP Credit Agreement). Except as otherwise provided in this Final Order, the Adequate Protection Liens shall not be (i) subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtors' estates under section 551 of the Bankruptcy Code or (y) subordinated to or made *pari passu* with any other lien or security interest, whether under sections 363 or 364 of the Bankruptcy Code or otherwise.

(b) Unless all DIP Obligations shall have been indefeasibly paid in full and all Commitments terminated (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement), all Prepetition Obligations shall have been indefeasibly paid in full, and the Adequate Protection Obligations shall have been indefeasibly paid in full, the Debtors shall not seek (i) any order modifying or extending this Final Order without the prior written consent of the DIP Agent (or, to the extent the DIP Obligations shall have been indefeasibly paid in cash in full (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement) and the Commitments shall have been terminated, the Prepetition Agent) and no such consent shall be implied by any other action, inaction or acquiescence, (ii) any order modifying or extending this Final Order adversely affecting the adequate protection provided to the Prepetition Secured Parties without the prior written consent of the Prepetition Secured Parties or (iii) an order converting or dismissing any of the Cases. If

an order dismissing any of the Cases under section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that (i) the Superpriority Claims, the 507(b) Claims, DIP Liens and Adequate Protection Liens granted to the DIP Agent and the DIP Secured Parties and, as applicable, the Prepetition Secured Parties pursuant to this Final Order shall continue in full force and effect and shall maintain their priorities as provided in this Final Order until all DIP Obligations, Prepetition Obligations and Adequate Protection Obligations shall have been indefeasibly paid in cash and satisfied in full (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement) and the Commitments shall have been terminated (and that such Superpriority Claims, 507(b) Claims, DIP Liens and Adequate Protection Liens remain binding on all parties in interest) and (ii) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in (i) above, to the fullest extent authorized by statute.

(c) If any or all of the provisions of this Final Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacatur or stay shall not affect (i) the validity, priority or enforceability of any DIP Obligations or any Adequate Protection Obligations incurred prior to the actual receipt of written notice by the DIP Agent, the Prepetition Agent or the Prepetition Indenture Trustee, as applicable, of the effective date of such reversal, modification, vacatur or stay or (ii) the validity or enforceability of any lien or priority authorized or created hereby, pursuant to the Interim Order or pursuant to the DIP Credit Agreement, as applicable, with respect to any DIP Obligations or Adequate Protection Obligations.

Notwithstanding any such reversal, modification, vacatur or stay, any use of Cash Collateral, or DIP Obligations or Adequate Protection Obligations incurred by the Debtors to the DIP Agent, the DIP Secured Parties or the Prepetition Secured Parties prior to the actual receipt of written notice by the DIP Agent, the Prepetition Agent or the Prepetition Indenture Trustee, as applicable, of the effective date of such reversal, modification, vacatur or stay shall be governed in all respects by the original provisions of the Interim Order and this Final Order, as applicable, and the DIP Agent, the DIP Secured Parties and the Prepetition Secured Parties shall be entitled to all the rights, remedies, privileges and benefits granted in sections 363(m) and 364(e) of the Bankruptcy Code, the Interim Order and this Final Order with respect to all uses of Cash Collateral, DIP Obligations and Adequate Protection Obligations.

(d) Except as expressly provided in this Final Order or the DIP Documents, the DIP Liens, the Adequate Protection Liens, the Superpriority Claims, the 507(b) Claims, the DIP Obligations, the Adequate Protection Obligations and all other rights and remedies of the DIP Agent, the DIP Secured Parties and the Prepetition Secured Parties granted by the provisions of the Interim Order and this Final Order, as applicable, shall survive, and shall not be modified, impaired or discharged by (i) the entry of an order converting any of the Cases to a case under chapter 7, dismissing any of the Cases, terminating the joint administration of the Cases or by any other act or omission or (ii) the entry of an order confirming a plan of reorganization in any of the Cases and, pursuant to section 1141(d)(4) of the Bankruptcy Code, the Debtors have waived any discharge as to any remaining DIP Obligations pursuant to the Financing. The terms and provisions of this Final Order shall continue in these Cases, in any successor cases if these Cases cease to be jointly administered, or in any superseding chapter 7 cases under the



Bankruptcy Code, and the DIP Liens, the Adequate Protection Liens, the Superpriority Claims, the 507(b) Claims, the DIP Obligations, the Adequate Protection Obligations and all other rights and remedies of the DIP Agent, the DIP Secured Parties and the Prepetition Secured Parties granted by the provisions of this Final Order shall continue in full force and effect until the DIP Obligations are indefeasibly paid in full (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement), the Commitments are terminated and the Adequate Protections Obligations are indefeasibly paid in full.

20. *Effect of Stipulations on Third Parties.* The stipulations and admissions contained in this Final Order, including in paragraph 6 of this Final Order, shall be binding upon the Debtors and any successor thereto (including any chapter 7 or chapter 11 trustee appointed or elected in any of the Cases) in all circumstances, unless a chapter 7 or chapter 11 trustee is appointed or elected during the Investigatory Period (as defined below). The stipulations and admissions contained in this Final Order, including in paragraph 6 of this Final Order, shall be binding upon all other parties in interest, including the Creditors' Committee, unless (a) a party in interest, including any subsequently appointed chapter 7 or chapter 11 trustee and the Creditors' Committee, has timely filed an adversary proceeding or contested matter (subject to the limitations contained herein, including, *inter alia*, in paragraph 21) by no later than the date that is 60 days after the entry of this Final Order (or such later date (x) as has been agreed to, in writing, (A) with respect to such adversary proceedings or contested matters relating to the Prepetition Obligations or the Prepetition Agent's or the Prepetition Revolving Secured Parties' liens on the Prepetition Collateral, by the Prepetition Agent in its sole discretion or (B) with

respect to such adversary proceedings or contested matters relating solely to the Prepetition Term Obligations or the Prepetition Term Lender's liens on the Prepetition Collateral, by the Prepetition Term Lender in its sole discretion, or (y) as has been ordered by the Court for good cause shown) (such period, the "**Investigatory Period**") (i) challenging the validity, enforceability, priority or extent of the Prepetition Obligations, the Prepetition Term Obligations or the Prepetition Agent's, the Prepetition Revolving Secured Parties' or the Prepetition Term Lender's liens on the Prepetition Collateral or (ii) otherwise asserting or prosecuting any Avoidance Action or any other ~~any~~ claims, counterclaims or causes of action, objections, contests or defenses (collectively, "**Claims and Defenses**") against the Prepetition Agent, the Prepetition Term Lender or any of the Prepetition Revolving Secured Parties or their affiliates, subsidiaries, members, agents, officers, directors, representatives, attorneys or advisors (each, a "**Released Party**") in connection with matters related to the Prepetition Loan Documents, the Prepetition Obligations, the Prepetition Term Obligations or the Prepetition Collateral, as applicable, and (b) there is a final order in favor of the plaintiff sustaining any such challenge or claim in any such timely filed adversary proceeding or contested matter: provided that, as to the Debtors, all such Claims and Defenses are hereby irrevocably waived and released as of the Petition Date, however, such waiver and release does not restrict, waive or otherwise impair the Creditors' Committee's right to investigate, seek and obtain derivative standing to prosecute Claims and Defenses (which are preserved for the Creditors' Committee). If no such adversary proceeding or contested matter is timely filed, (x) the Prepetition Obligations and Prepetition Term Obligations shall constitute allowed secured claims in the amounts set forth in paragraph 6 of this Final Order, not subject to counterclaim, setoff, subordination, recharacterization, recovery.

defense or avoidance, for all purposes in the Cases and any subsequent chapter 7 cases, (y) the Prepetition Agent's, the Prepetition Revolving Secured Parties' and the Prepetition Term Lender's liens on the Prepetition Collateral shall be deemed to have been, as of the Petition Date, enforceable, legal, valid, binding and perfected, and having the priority set forth in paragraph 6, not subject to recharacterization, subordination or avoidance or reduction and (z) the Prepetition Obligations and the Prepetition Term Obligations, the Prepetition Agent's, the Prepetition Revolving Secured Parties' and the Prepetition Term Lender's liens on the Prepetition Collateral and the Prepetition Agent, the Prepetition Revolving Secured Parties and the Prepetition Term Lender shall not be subject to any other or further challenge by any party in interest seeking to exercise the rights of the Debtors' estates, including any estate representative or any other successor to the Debtors (including any chapter 7 or 11 trustee appointed or elected for any of the Debtors). If any such adversary proceeding or contested matter is timely filed, the stipulations and admissions contained in paragraph 6 of this Final Order shall nevertheless remain binding and preclusive (as provided in the second sentence of this paragraph) on any official committee (including the Creditors' Committee) and on any other person or entity, except to the extent that such findings and admissions were expressly challenged in such adversary proceeding or contested matter. Except for the statutory rights of any chapter 11 or chapter 7 trustee, nothing in this Final Order vests or confers on any Person (as defined in the Bankruptcy Code), including the Creditors' Committee, standing or authority to pursue any cause of action belonging to the Debtors or their estates, including Claims and Defenses with respect to the Prepetition Loan Documents or the Prepetition Obligations or Prepetition Term Obligations. Nothing in this Final Order shall bar the Creditors' Committee from filing a motion seeking to obtain derivative

standing to prosecute Claims and Defenses in a manner consistent with paragraphs 20 and 21 of this Final Order.

21. *Limitation on Use of Collateral.* The Debtors have waived any and all claims and causes of action against the DIP Agent and the DIP Secured Parties and their respective agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors, directly related to the Financing, the Interim Order, this Final Order or the negotiation of the terms thereof. Notwithstanding anything herein or in any other order by this Court to the contrary, no borrowings, proceeds of letters of credit under the DIP Credit Agreement, Cash Collateral, DIP Collateral or the Carve Out may be used for any of the following without the prior written consent of each affected party: (a) to object, contest or raise any defense to, the validity, perfection, priority, extent or enforceability of any amount due under the Interim Order, this Final Order, the DIP Documents, the Prepetition Loan Documents, or the liens or claims granted under this Final Order, the DIP Documents or the Prepetition Loan Documents, (b) to assert any Claims or Defenses or causes of action against the DIP Agent, the Prepetition Agent, the Prepetition Term Lender or the Prepetition Revolving Secured Parties or their respective agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors, (c) to prevent, hinder or otherwise delay the DIP Agent's or the Prepetition Agent's assertion, enforcement or realization on the Cash Collateral or the DIP Collateral in accordance with the DIP Documents, the Prepetition Loan Documents, the Interim Order or this Final Order, (d) to seek to modify any of the rights granted to the DIP Agent, the DIP Secured Parties, the Prepetition Agent, the Prepetition Term Lender or the Prepetition Revolving Secured Parties hereunder, under the Interim Order or under the DIP Documents or the Prepetition Loan Documents or (e) pay any

amount on account of any claims arising before the Petition Date unless such payments are approved by an Order of this Court; *provided* that up to \$50,000~~175,000~~ of Cash Collateral and proceeds of the Financing in the aggregate (the "**Litigation Cap**") may be used (to the extent not otherwise used in accordance with the next proviso) to pay the allowed fees and expenses of professionals retained by the Creditors' Committee incurred directly in connection with investigating, but not initiating or prosecuting, any Claims and Defenses against the Prepetition Agent, the Prepetition Term Lender or the Prepetition Revolving Secured Parties; *provided further, that any portion of the Litigation Cap may be used to pay the allowed fees and expenses of professionals retained by the Creditors' Committee incurred directly in connection with investigating, initiating or prosecuting Claims and Defenses against the Prepetition Term Lender or any of its affiliates (including in their capacity as Prepetition Secured Noteholders or equity security holders in the Debtors). The Creditors' Committee reserves the right, upon notice and hearing, to seek an increase in the Litigation Cap; *provided, that unless all DIP Obligations shall have been indefeasibly paid in full and all Commitments terminated (and, with respect to letters of credit outstanding under the DIP Credit Agreement, cash collateralized or supported with backstop letters of credit in accordance with the terms of the DIP Credit Agreement), all Prepetition Obligations shall have been indefeasibly paid in full, and all Adequate Protection Obligations owing to the Prepetition Agent and the Prepetition Revolving Secured Parties shall have been indefeasibly paid in full, the Creditors' Committee shall be prohibited from seeking any such increase in the Litigation Cap until the DIP Agent and the Creditors' Committee shall have entered into a mutually acceptable written agreement setting forth a budget for any adversary proceeding or contested matter in respect of Claims and Defenses against the**

Prepetition Term Lender or any of its affiliates (including in their capacity as Prepetition Secured Noteholders or equity security holders in the Debtors) and other agreements relating to such litigation, including, without limitation, a protocol for making decisions on settling (or not settling) any such adversary proceeding or contested matter.

22. *JPMorgan as DIP Agent.* To the extent that any Prepetition Agent (or any predecessor, bailee, agent or designee thereof) is the secured party under any account control agreement, listed as loss payee under the Debtors' insurance policies as required under the Prepetition Credit Agreement or is the secured party under any other Prepetition Loan Document, JPMorgan, in its role as DIP Agent, is also deemed to be the secured party under such account control agreement, loss payee under the Debtors' insurance policies and the secured party under any other Prepetition Loan Document, shall have all rights and powers associated with that position (including, without limitation, rights of enforcement) and shall act in that capacity and distribute any proceeds recovered or received in accordance with the DIP Documents and this Final Order. The Prepetition Agent (and any predecessor, bailee, agent or designee thereof) shall serve as agent and bailee for the DIP Agent for purposes of perfecting the DIP Liens and the Adequate Protection Liens on all DIP Collateral that is of a type such that perfection of a security interest therein may be accomplished only by possession or control by a secured party.

23. *Priority Among Prepetition Secured Parties.* Notwithstanding anything to the contrary herein or in any other order of this Court, in determining the relative priorities and rights of the Prepetition Secured Parties (including, without limitation, the relative priorities and rights of the Prepetition Secured Parties with respect to the adequate protection granted hereunder), such relative priorities and rights shall continue to be governed by the Prepetition Loan

Documents, the Prepetition Indenture (and any security documents related thereto) and the Intercreditor Agreement, and the adequate protection rights granted hereunder to each Prepetition Secured Party shall have the same relative seniority and priority vis-à-vis the adequate protection rights granted to each other Prepetition Secured Party as the pre-petition claims of such Prepetition Secured Party have relative to the prepetition claims of such other Prepetition Secured Party (taking into consideration whether such claims are secured and the entity against which such claims are held or not held). Notwithstanding anything to the contrary herein or in any other order of this Court, (i) each of the Prepetition Agent and the Prepetition Term Lender acknowledge and agree that the intercreditor provisions of the Prepetition Credit Agreement, including, without limitation, sections 9.24 and 9.25 of the Prepetition Credit Agreement and (ii) each of the Prepetition Agent and the Prepetition Indenture Trustee (on behalf of the Prepetition Secured Noteholders) acknowledge and agree that the terms and conditions of the Intercreditor Agreement, in each case remain in full force and effect and constitute the enforceable, valid and binding obligations of the Prepetition Agent, the Prepetition Term Lender, the Prepetition Revolving Lenders and the Prepetition Indenture Trustee (on behalf of the Prepetition Secured Noteholders), as applicable, under section 510(a) of the Bankruptcy Code; *provided* that the Prepetition Indenture Trustee (on behalf of the Prepetition Secured Noteholders) reserves its rights under the Intercreditor Agreement arising from a breach, if any, of the Intercreditor Agreement; *provided further* that the DIP Agent and Prepetition Agent reserve their rights to assert claims arising from a breach of the Intercreditor Agreement by the Prepetition Indenture Trustee or the Prepetition Secured Noteholders. Nothing contained herein shall modify or alter the voting or consent provisions contained in the DIP Credit Agreement.

24. *Order Governs.* In the event of any inconsistency between the provisions of this Final Order and the DIP Documents, the provisions of this Final Order shall govern.

25. *Binding Effect; Successors and Assigns.* The provisions of this Final Order, including all findings herein, shall be binding upon all parties in interest in these Cases, including the Prepetition Agent, the Prepetition Revolving Secured Parties, the other Prepetition Secured Parties, the Creditors' Committee, and the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of any of the Debtors) and shall inure to the benefit of the Prepetition Agent, the Prepetition Revolving Secured Parties and the Debtors and their respective successors and assigns; *provided* that the Prepetition Agent and the Prepetition Revolving Secured Parties shall have no obligation to extend any financing to any chapter 7 trustee or similar responsible person appointed for the estates of the Debtors.

26. *Final Hearing.* ~~The Final Hearing shall be held on April 27, 2009 at 2:00 p.m. (prevailing Eastern time) before this Court.~~ Master Proof of Claim. The Prepetition Agent shall be authorized (but not required) to file a single master proof of claim against all Debtors (a "Master Proof of Claim") on behalf of itself and the applicable Prepetition Revolving Secured Parties on account of the aggregate amount of prepetition claims arising under the Prepetition Loan Documents without setting forth the exposure of each individual Prepetition Revolving Secured Party in respect thereof, and the Prepetition Agent shall not be required to file a verified statement pursuant to Bankruptcy Rule 2019. If the Prepetition Agent so files a Master Proof of Claim against the Debtors, the Prepetition Agent and each Prepetition Revolving Secured Party (as applicable) and each of their respective successors and assigns shall be deemed to have filed a



proof of claim in respect of its claims against the Debtors arising under the Prepetition Loan Documents, and such claim shall be allowed or disallowed as if such entity had filed a separate proof of claim against each Debtor in the amount set forth in the applicable Master Proof of Claim. The Prepetition Agent shall be authorized to amend the Master Proof of Claim from time to time.

~~The Debtors shall promptly mail copies of this Order (which shall constitute adequate notice of the Final Hearing, including without limitation, notice that the Debtors will seek approval at the Final Hearing of (i) a waiver of rights under section 506(c) of the Bankruptcy Code, (ii) to grant a lien on proceeds of Avoidance Actions and (iii) authority to convert the Prepetition Obligations to DIP Obligations) to the parties having been given notice of the Interim Hearing, to any other party that has filed a request for notices with this Court and to the Creditors' Committee, or its lead counsel, if the same shall have been employed. Any party in interest objecting to the relief sought at the Final Hearing shall serve a written objection upon Young Conaway Stargatt & Taylor, LLP, The Brandywine Building, 1000 West Street, 17th Floor, Wilmington, Delaware 19801, Attention: Michael Nestor, attorneys for the Debtors; Cravath, Swaine & Moore LLP, Worldwide Plaza, 825 Eighth Avenue, New York, New York 10019, Attention: Robert Trust, and Landis, Rath & Cobb LLP, 919 Market Street, Suite 1800, Wilmington, Delaware 19899, Attention: Adam Landis and Matthew McGuire, attorneys for JPMorgan Chase Bank, N.A., as Prepetition Agent; and the Office of the United States Trustee for the District of Delaware, and shall file the objection with the Clerk of the United States Bankruptcy Court, District of Delaware, in each case to allow actual receipt by the foregoing no later than **April 20, 2009 at 4:00 p.m. (prevailing Eastern time).**~~

27. Notices to the Creditors' Committee. Counsel for the Creditors' Committee shall receive all notices required pursuant to this Final Order when such notices are due.

28. Headings. Sections headings used herein are for convenience only and are not to affect the construction of or to be taken into consideration in interpreting this Final Order.

Date April \_\_\_\_\_,  
d: 2009  
Wilmington, Delaware

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Peter J. Walsh  
United States Bankruptcy Judge

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# Appendix B

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## The Cross-Border Protocol

## **CROSS-BORDER INSOLVENCY PROTOCOL**

This cross-border insolvency protocol (the “Cross- Border Protocol”) shall govern the conduct of all parties in interest in the Insolvency Proceedings (as such term is defined herein).

The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the “Guidelines”) attached hereto as Schedule “A”, shall be incorporated by reference and form part of this Cross-Border Protocol. Where there is any discrepancy between the Cross-Border Protocol and the Guidelines, this Cross-Border Protocol shall prevail.

### **A. Background**

1. On March 20, 2009, Indalex Holding Corp. (“Indalex Holding”) and certain of its U.S. based subsidiaries<sup>1</sup> (collectively, the “U.S. Debtors”) filed for protection pursuant to Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) and commenced proceedings (the “Chapter 11 Cases”) before the United States Bankruptcy Court for the District of Delaware (the “U.S. Court”). The cases of the U.S. Debtors have been consolidated (for procedural purposes only) under Case No. 09-10983. The U.S. Debtors are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Office of United States Trustee (the “U.S. Trustee”) has appointed an official committee of unsecured creditors (the “Creditors Committee”) in the U.S. Proceeding.

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<sup>1</sup> The U.S. subsidiaries are: Indalex Inc., Caradon Lebanon, Inc. and Dolton Aluminum Company, Inc.

2. On April 3, 2009, Indalex Holding's indirect Canadian subsidiary Indalex Limited ("Indalex Canada") and its affiliated Canadian entities<sup>2</sup> (collectively, the "Canadian Debtors") filed for protection pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA") (the "Canadian Proceedings"). The Canadian Debtors obtained an initial order of the Canadian Court (the "Initial Order"), under which, *inter alia*: (a) the Canadian Debtors have been determined to be entitled to relief under the CCAA; (b) FTI Consulting Canada ULC has been appointed as monitor (the "Monitor") of the Canadian Debtors, with the rights, powers, duties and limitations upon liabilities set forth in the CCAA and the CCAA Order; and (c) a stay of proceedings in respect of the Canadian Debtors has been granted.

3. On April 8, 2009 the Initial Order granted in the Canadian Proceedings was amended and restated by an order (as may be further amended from time to time, the "CCAA Order") to, *inter alia*, authorize the Canadian Debtors to exercise certain restructuring powers and authorize Indalex Canada to borrow funds pursuant a debtor-in-possession credit agreement (the "DIP Credit Agreement") among the Debtors (as defined below) and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase is administrative agent.

4. On April 9, 2009, the U.S. Court issued an interim order [Docket No. 118] (the "Interim DIP Order") approving the DIP Credit Agreement on an interim basis, pending the issuance of a final order (the "Final DIP Order") by the U.S. Court finally approving the DIP Credit Agreement.

5. Pursuant to the DIP Credit Agreement and subject to and in accordance with the CCAA Order and the Interim DIP Order and the Final DIP Order once issued, the U.S. Debtors agreed to guarantee the obligations of the Canadian Debtors thereunder and the

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<sup>2</sup> The Canadian affiliates are: Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc.

Canadian Debtors agreed to guarantee the obligations of the U.S. Debtors thereunder (collectively, the “Guarantees”). The primary borrowing by Indalex Holding and Indalex Canada as well as the Guarantees are secured by way of super-priority administrative claims in the Chapter 11 Cases and court ordered charges in the Canadian Proceedings.

6. For convenience, (a) the Chapter 11 Cases and the Canadian Proceedings shall be referred to herein collectively as the “Insolvency Proceedings”, (b) the U.S. Court and the Canadian Court shall be referred to herein collectively as the “Courts”, and each individually as a “Court”, (c) the Chapter 11 Representatives and the Canadian Representatives (each as defined below) shall be referred to herein collectively as the “Estate Representatives”, and (d) the U.S. Debtors and Canadian Debtors shall be referred to herein collectively as the “Debtors”.

**B. Purpose and Goals**

7. Though full and separate plenary proceedings are pending in the United States for the U.S. Debtors and in Canada for the Canadian Debtors, the implementation of administrative procedures and cross-border guidelines is both necessary and desirable to coordinate certain activities in the Insolvency Proceedings, protect the rights of parties thereto, ensure the maintenance of the Courts’ respective independent jurisdiction and give effect to the doctrines of comity. Accordingly, this Cross-Border Protocol has been developed to promote the following mutually desirable goals and objectives in the Insolvency Proceedings:

- a. harmonize and coordinate activities in the Insolvency Proceedings before the Courts;
- b. promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

- c. honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada, respectively;
- d. promote international cooperation and respect for comity among the Courts, the Debtors, the Creditors Committee, the Estate Representatives and other creditors and interested parties in the Insolvency Proceedings;
- e. facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors' creditors and other interested parties, wherever located; and
- f. implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

As the Insolvency Proceedings progress, the Courts may also jointly determine that other cross-border matters that may arise in the Insolvency Proceedings should be dealt with under and in accordance with the principles of this Cross-Border Protocol. Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts.

**C. Comity and Independence of the Courts**

8. The approval and implementation of this Cross-Border Protocol shall not divest nor diminish the U.S. Court's and the Canadian Court's respective independent jurisdiction over the subject matter of the U.S. Proceedings and the Canadian Proceedings, respectively. By approving and implementing this Cross-Border Protocol, neither the U.S. Court, the Canadian Court, the Debtors nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States of America or Canada.

9. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the Chapter 11 Cases and the hearing and determination of matters arising in the Chapter 11 Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceedings and the hearing and determination of matters arising in the Canadian Proceedings.

10. In accordance with the principles of comity and independence recognized herein, nothing contained herein shall be construed to:

- a. increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or “limited notice” basis;
- b. require the U.S. Court to take any action that is inconsistent with its obligations under the laws of the United States;
- c. require the Canadian Court to take any action that is inconsistent with its obligations under the laws of Canada;
- d. require the Debtors, the Creditors Committee, the Estate Representatives or the U.S. Trustee to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law;
- e. authorize any action that requires the specific approval of one or both of the Courts under the Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Cross-Border Protocol); or
- f. preclude the Debtors, the Creditors Committee, the U.S. Trustee, any creditor or other interested party from asserting such party’s substantive rights under the applicable laws of the United States, Canada or any other relevant jurisdiction including, without limitation, the rights of parties in interest to appeal from the decisions taken by one or both of the Courts.

11. The Debtors, the Creditors Committee, the Estate Representative and their respective employees, members, agents and professionals shall respect and comply with the



**D. Cooperation**

12. To assist in the efficient administration of the Insolvency Proceedings and in recognizing that the U.S. Debtors and Canadian Debtors may be creditors of the others' estates, the Debtors and their respective Estate Representatives shall, where appropriate: (a) cooperate with each other in connection with actions taken in both the U.S. Court and the Canadian Court and (b) take any other appropriate steps to coordinate the administration of the Insolvency Proceedings for the benefit of the Debtors' respective estates and stakeholders.

13. To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Court and the Canadian Court each may coordinate activities and consider whether it is appropriate to defer to the judgment of the other Court. In furtherance of the foregoing:

- a. The U.S. Court and the Canadian Court may communicate with one another with respect to any procedural matter relating to the Insolvency Proceedings.
- b. Where the issue of the proper jurisdiction or Court to determine an issue is raised by an interested party in either of the Insolvency Proceedings with respect to a motion or application filed in either Court, the Court before which such motion or application was initially filed may contact the other Court to determine an appropriate process by which the issue of jurisdiction will be determined; which process shall be subject to submissions by the Debtors, the U.S. Trustee, the Creditors Committee, the Monitor and any interested party prior to a determination on the issue of jurisdiction being made by either Court.
- c. The Courts may, but are not obligated to, coordinate activities in the Insolvency Proceedings such that the subject matter of any particular action, suit, request, application, contested matter or other proceeding is determined in a single Court.

- d. The U.S. Court and the Canadian Court may conduct joint hearings with respect to any cross-border matter or the interpretation or implementation of this Cross-Border Protocol where both the U.S. Court and the Canadian Court consider such a joint hearing to be necessary or advisable. With respect to any joint hearings, unless otherwise ordered by both Courts, the following procedures will be followed:
- (i) A telephone or video link shall be established so that both the U.S. Court and the Canadian Court shall be able to simultaneously hear the proceedings in the other Court.
  - (ii) Submissions or applications by any party that are or become the subject of a joint hearing of the Courts (collectively, “Pleadings”) shall be made or filed initially only to the Court in which such party is appearing and seeking relief. Promptly after the scheduling of any joint hearing, the party submitting such Pleadings to one Court shall file courtesy copies with the other Court. In any event, Pleadings seeking relief from both Courts shall be filed with both Courts.
  - (iii) Any party intending to rely on any written evidentiary materials in support of a submission to the U.S. Court or the Canadian Court in connection with any joint hearing or application (collectively, “Evidentiary Materials”) shall file or otherwise submit such materials to both Courts in advance of the joint hearing. To the fullest extent possible, the Evidentiary Materials filed in each Court shall be identical and shall be consistent with the procedural and evidentiary rules and requirements of each Court.
  - (iv) If a party has not previously appeared in or attorned or does not wish to attorn to the jurisdiction of a Court, it shall be entitled to file Pleadings or Evidentiary Materials in connection with the joint hearing without, by the mere act of such filings, being deemed to have attorned to the jurisdiction of the Court in which such material is filed, so long as it does not request in its materials or submissions any affirmative relief from such Court.
  - (v) The Judge of the U.S. Court and the Justice of the Canadian Court who will preside over the joint hearing shall be entitled to communicate with each other in advance of any joint hearing, with or without counsel being present, to establish guidelines for the orderly submission of Pleadings, Evidentiary Materials and other papers and for the rendering of decisions by the Courts, and to address any related procedural, administrative or preliminary matters.

- (vi) The Judge of the U.S. Court and the Justice of the Canadian Court, shall be entitled to communicate with each other during or after any joint hearing, with or without counsel present, for the purposes of determining whether consistent rulings can be made by both Courts, coordinating the terms upon of the Courts' respective rulings, and addressing any other procedural or administrative matters.

14. Notwithstanding the terms of paragraph 13 above, this Cross-Border Protocol recognizes that the U.S. Court and the Canadian Court are independent courts. Accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall be entitled at all times to exercise its independent jurisdiction and authority with respect to: (a) matters presented to such Court; and (b) the conduct of the parties appearing in such matters.

15. Where one Court has jurisdiction over a matter which requires the application of the law of the jurisdiction of the other Court in order to determine an issue before it, the Court with jurisdiction over such matter may, among other things, hear expert evidence or seek the advice and direction of the other Court in respect of the foreign law to be applied, subject to paragraph 26 herein.

**E. Retention and Compensation of Estate Representative and Professionals**

16. The Monitor, its officers, directors, employees, counsel and agents, wherever located, (collectively the "Monitor Parties") and any other estate representatives in the Canadian Proceedings (collectively, the "Canadian Representatives") shall be subject to the sole and exclusive jurisdiction of the Canadian Court with respect to all matters, including: (a) the Canadian Representatives' tenure in office; (b) the retention and compensation of the Canadian Representatives; (c) the Canadian Representatives' liability, if any, to any person or entity, including the Canadian Debtors and any third parties, in connection with the Insolvency

Proceedings; and (d) the hearing and determination of any other matters relating to the Canadian Representatives arising in the Canadian Proceedings under the CCAA or other applicable Canadian law. The Canadian Representatives shall not be required to seek approval of their retention in the U.S. Court for services rendered to the Debtors. Additionally, the Canadian Representatives: (a) shall be compensated for their services to the Debtors solely in accordance with the CCAA, the CCAA Order and other applicable Canadian law or orders of the Canadian Court; and (b) shall not be required to seek approval of their compensation in the U.S. Court.

17. The Monitor Parties shall be entitled to the same protections and immunities in the United States as those granted to them under the CCAA and the CCAA Order. In particular, except as otherwise provided in any subsequent order entered in the Canadian Proceedings, the Monitor Parties shall incur no liability or obligations as a result of the CCAA Order, the appointment of the Monitor, the carrying out of its duties or the provisions of the CCAA and the CCAA Order by the Monitor Parties, except any such liability arising from actions of the Monitor Parties constituting gross negligence or willful misconduct.

18. Any estate representative appointed in the Chapter 11 Cases, including without limitation any official committee appointed pursuant to section 1102 of the Bankruptcy Code, or any examiners or trustees appointed in accordance with section 1104 of the Bankruptcy Code (collectively, the "Chapter 11 Representatives") shall be subject to the sole and exclusive jurisdiction of the U.S. Court with respect to all matters, including: (a) the Chapter 11 Representatives' tenure in office; (b) the retention and compensation of the Chapter 11 Representatives; (c) the Chapter 11 Representatives' liability, if any, to any person or entity, including the U.S. Debtors and any third parties, in connection with the Insolvency Proceedings; and (d) the hearing and determination of any other matters relating to the Chapter 11

Representatives arising in the Chapter 11 Cases under the Bankruptcy Code or other applicable laws of the United States. The Chapter 11 Representatives and their counsel and other professionals retained therefor shall not be required to seek approval of their retention in the Canadian Court. Additionally, the Chapter 11 Representatives and their counsel and such other professionals: (a) shall be compensated for their services to the Debtors solely in accordance with the Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek approval of their compensation for services performed for the Debtors in the Canadian Court.

19. Any professionals retained by the Canadian Debtors but not the U.S. Debtors, including, without limitation, FTI Consulting Canada ULC (collectively, the “Canadian Professionals”), shall be subject to the sole and exclusive jurisdiction of the Canadian Court. Any professionals retained by the U.S. Debtors but not the Canadian Debtors, including, without limitation, FTI Consulting Inc., and any professionals retained by the Creditors Committee (collectively, the “Chapter 11 Professionals”), shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Any professional retained by the Canadian Debtors and the U.S. Debtors shall be subject to the jurisdiction of both courts. The Canadian Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in Canada with respect to services performed on behalf of the Canadian Debtors; and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court with respect to services performed on behalf of the Canadian Debtors. The Chapter 11 Professionals: (a) shall be subject to the procedures and standard for retention and compensation applicable in the U.S. Court under the Bankruptcy Code with respect to services performed on behalf of the U.S. Debtors and any other applicable laws of the United States or orders of the U.S. Court; and (b)

shall not be required to seek approval of their retention or compensation in the Canadian Court with respect to services performed on behalf of the U.S. Debtors. Any professional that has been retained by the Canadian Debtors and the U.S. Debtors: (a) shall be subject to the procedures and standards for retention and compensation applicable in Canada with respect to services performed on behalf of the Canadian Debtors and shall not be required to seek approval of their retention or compensation in the U.S. Court with respect to services performed on behalf of the Canadian Debtors; and (b) shall be subject to the procedures and standard for retention and compensation applicable in the U.S. Court under the Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Court with respect to services performed on behalf of the U.S. Debtors and shall not be required to seek approval of their retention or compensation in the Canadian Court with respect to services performed on behalf of the U.S. Debtors.

**F. Appearances**

20. Subject to paragraph 13(d)(iv), upon any appearance or filing, as may be permitted or provided for by the rules of the applicable Court, the Debtors, their creditors and other interested parties in the Insolvency Proceedings, including the Creditors Committee, the Estate Representatives and the U.S. Trustee, shall be subject to the personal jurisdiction of the Canadian Court or the U.S. Court, as applicable, solely with respect to the particular matters as to which they appear before that Court.

**G. Notice**

21. Notice of any motion, application or other pleading or paper filed in one or both of the Insolvency Proceedings involving or relating to matters addressed by this Cross-Border Protocol and notice of any related hearings or other proceedings shall be given by appropriate means (including, where circumstances warrant, by courier, facsimile, email or other

electronic forms of communication) to the following: (a) creditors and interested parties, in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) of this sentence, counsel to the Debtors, the U. S. Trustee, the Monitor, the Creditors Committee and any other statutory committees appointed in these cases and such other parties as may be designated by either of the Courts from time to time. Notice in accordance with this paragraph shall be given by the party otherwise responsible for effecting notice in the jurisdiction where the underlying papers are filed or the proceedings are to occur. In addition to the foregoing, upon request, the U.S. Debtors or the Canadian Debtors shall provide the U.S. Court or the Canadian Court, as the case may be, with copies of any orders, decisions, opinions or similar papers issued by the other Court in the Insolvency Proceedings.

22. When any cross-border issues or matters addressed by this Cross-Border Protocol are to be addressed before a Court, notices shall be provided in the manner and to the parties referred to in paragraph 21 above.

**H. Effectiveness: Modification**

23. This Cross-Border Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

24. This Cross-Border Protocol may not be supplemented, modified, terminated, or replaced in any manner except upon the approval of both the U. S. Court and the Canadian Court after notice and a hearing. Notice of any legal proceeding to supplement, modify, terminate or replace this Cross-Border Protocol shall be given accordance with the notice provisions set forth in paragraph 21 above.

**I. Procedure for Resolving Disputes Under this Cross-Border Protocol**

25. Disputes relating to the terms, intent or application of this Cross-Border Protocol may be addressed by interested parties to the U.S. Court, the Canadian Court or both Courts upon notice in accordance with the notice provisions outlined in paragraph 21 above. In rendering a determination in any such dispute, the Court to which the issue is addressed: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either; (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to such other Court; or (iii) seek a joint hearing of both Courts in accordance with paragraph D.13 above. Notwithstanding the foregoing, in making a determination under this paragraph, each Court shall give due consideration to the independence, comity and inherent jurisdiction of the other Court established under existing law.

26. In implementing the terms of this Cross-Border Protocol, the U.S. Court and the Canadian Court may, in their sole, respective discretion, provide advice or guidance to each other with respect to legal issues in accordance with the following procedures:

- a. the U.S. Court or the Canadian Court, as applicable, may determine that such advice or guidance is appropriate under the circumstances;
- b. the Court issuing such advice or guidance shall provide it to the non-issuing Court in writing;
- c. copies of such written advice or guidance shall be served by the applicable Court in accordance with paragraph 21 hereof; and
- d. the Courts may jointly decide to invite the Debtors, the Creditors Committee, the Estate Representatives, the U.S. Trustee and any other affected or interested party to make submissions to the appropriate Court in response to or in connection with any written advice or guidance received from the other Court.



**J. Preservation of Rights**

27. Except as specifically provided herein, neither the terms of this Cross-Border Protocol nor any actions taken under the terms of this Cross-Border Protocol shall: (a) prejudice or affect the powers, rights, claims and defenses of the Debtors and their estates, the Creditors Committee, the Estate Representatives, the U.S. Trustee or any of the Debtors' creditors under applicable law, including the Bankruptcy Code and the CCAA, and the orders of the Courts; or (b) preclude or prejudice the rights of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of Canada or the United States.

THE AMERICAN LAW INSTITUTE  
in association with  
THE INTERNATIONAL INSOLVENCY INSTITUTE

**Guidelines Applicable to Court-to-Court  
Communications in Cross-Border Cases**

*As Adopted and Promulgated in Transnational Insolvency:  
Principles of Cooperation Among the NAFTA Countries*

BY

THE AMERICAN LAW INSTITUTE  
At Washington, D.C., May 16, 2000

*And as Adopted by*

THE INTERNATIONAL INSOLVENCY INSTITUTE  
At New York, June 10, 2001



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THE AMERICAN LAW INSTITUTE  
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*And as Adopted by*

THE INTERNATIONAL INSOLVENCY INSTITUTE  
At New York, June 10, 2001

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The *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* were developed by The American Law Institute during and as part of its Transnational Insolvency Project and the use of the *Guidelines* in cross-border cases is specifically permitted and encouraged.

The text of the *Guidelines* is available in English and several other languages including Chinese, French, German, Italian, Japanese, Korean, Portuguese, Russian, Swedish, and Spanish on the website of the International Insolvency Institute at <http://www.iiiglobal.org/international/guidelines.html>.

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# Foreword by the Director of The American Law Institute

In May of 2000 The American Law Institute gave its final approval to the work of the ALI's Transnational Insolvency Project. This consisted of the four volumes eventually published, after a period of delay required by the need to take into account a newly enacted Mexican Bankruptcy Code, in 2003 under the title of *Transnational Insolvency: Cooperation Among the NAFTA Countries*. These volumes included both the first phase of the project, separate Statements of the bankruptcy laws of Canada, Mexico, and the United States, and the project's culminating phase, a volume comprising *Principles of Cooperation Among the NAFTA Countries*. All reflected the joint input of teams of Reporters and Advisers from each of the three NAFTA countries and a fully transnational perspective. Published by Juris Publishing, Inc., they can be ordered on the ALI website ([www.ali.org](http://www.ali.org)).

A byproduct of our work on the Principles volume, these *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* appeared originally as Appendix B of that volume and were approved by the ALI in 2000 along with the rest of the volume. But the *Guidelines* have played a vital and influential role apart from the *Principles*, having been widely translated and distributed, cited and applied by courts, and independently approved by both the International Insolvency Institute and the Insolvency Institute of Canada. Although they were initially developed in the context of a project arrived at improving cooperation among bankruptcy courts within the NAFTA countries, their acceptance by the III, whose members include leaders

of the insolvency bar from more than 40 countries, suggests a pertinence and applicability that extends far beyond the ambit of NAFTA. Indeed, there appears to be no reason to restrict the *Guidelines* to insolvency cases; they should prove useful whenever sensible and coherent standards for cooperation among courts involved in overlapping litigation are called for. See, e.g., American Law Institute, International Jurisdiction and Judgments Project § 12(e) (Tentative Draft No. 2, 2004).

The American Law Institute expresses its gratitude to the International Insolvency Institute for its continuing efforts to publicize the *Guidelines* and to make them more widely known to judges and lawyers around the world; to III Chair E. Bruce Leonard of Toronto, who as Canadian Co-Reporter for the Transnational Insolvency Project was the principal drafter of the Guidelines in English and has been primarily responsible for arranging and overseeing their translation into the various other languages in which they now appear; and to the translators themselves, whose work will make the *Guidelines* much more universally accessible. We hope that this greater availability, in these new English and bilingual editions, will help to foster better communication, and thus better understanding, among the diverse courts and legal systems throughout our increasingly globalized world.

LANCE LIEBMAN

*Director*

*The American Law Institute*

January 2004

# Foreword by the Chair of the International Insolvency Institute

The International Insolvency Institute, a world-wide association of leading insolvency professionals, judges, academics, and regulators, is pleased to recommend the adoption and the application in cross-border and multinational cases of The American Law Institute's *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*. The *Guidelines* were reviewed and studied by a Committee of the III and were unanimously approved by its membership at the III's Annual General Meeting and Conference in New York in June 2001.

Since their approval by the III, the *Guidelines* have been applied in several cross-border cases with considerable success in achieving the coordination that is so necessary to preserve values for all of the creditors that are involved in international cases. The III recommends without qualification that insolvency professionals and judges adopt the *Guidelines* at the earliest possible stage of a cross-border case so that they will be in place whenever there is a need for the courts involved to communicate with each other, e.g., whenever the actions of one court could impact on issues that are before the other court.

Although the *Guidelines* were developed in an insolvency context, it has been noted by litigation professionals and judges that the *Guidelines* would be equally valuable and constructive in any international case where two or more courts are involved. In fact, in multijurisdictional litigation, the positive effect of the *Guidelines* would be even greater in cases where several courts are involved. It

is important to appreciate that the *Guidelines* require that all domestic practices and procedures be complied with and that the *Guidelines* do not alter or affect the substantive rights of the parties or give any advantage to any party over any other party.

The International Insolvency Institute expresses appreciation to its members who have arranged for the translation of the *Guidelines* into French, German, Italian, Korean, Japanese, Chinese, Portuguese, Russian, and Swedish and extends its appreciation to The American Law Institute for the translation into Spanish. The III also expresses its appreciation to The American Law Institute, the American College of Bankruptcy, and the Ontario Superior Court of Justice Commercial List Committee for their kind and generous financial support in enabling the publication and dissemination of the *Guidelines* in bilingual versions in major countries around the world.

Readers who become aware of cases in which the *Guidelines* have been applied are highly encouraged to provide the details of those cases to the III (fax: 416-360-8877; e-mail: [info@iiiglobal.org](mailto:info@iiiglobal.org)) so that everyone can benefit from the experience and positive results that flow from the adoption and application of the *Guidelines*. The continuing progress of the *Guidelines* and the cases in which the *Guidelines* have been applied will be maintained on the III's website at [www.iiiglobal.org](http://www.iiiglobal.org).

The III and all of its members are very pleased to have been a part of the development and success of the *Guidelines* and commend The American Law Institute for its vision in developing the *Guidelines* and in supporting



their worldwide circulation to insolvency professionals, judges, academics, and regulators. The use of the *Guidelines* in international cases will change international insolvencies and reorganizations for the better forever, and the insolvency community owes a considerable debt to The American Law Institute for the inspiration and vision that has made this possible.

E. BRUCE LEONARD

*Chairman*

*The International Insolvency Institute*

Toronto, Ontario

March 2004

## Judicial Preface

We believe that the advantages of co-operation and co-ordination between Courts is clearly advantageous to all of the stakeholders who are involved in insolvency and reorganization cases that extend beyond the boundaries of one country. The benefit of communications between Courts in international proceedings has been recognized by the United Nations through the *Model Law on Cross-Border Insolvency* developed by the United Nations Commission on International Trade Law and approved by the General Assembly of the United Nations in 1997. The advantages of communications have also been recognized in the European Union Regulation on Insolvency Proceedings which became effective for the Member States of the European Union in 2002.

The *Guidelines for Court-to-Court Communications in Cross-Border Cases* were developed in the American Law Institute's Transnational Insolvency Project involving the NAFTA countries of Mexico, the United States and Canada. The *Guidelines* have been approved by the membership of the ALI and by the International Insolvency Institute whose membership covers over 40 countries from around the world. We appreciate that every country is unique and distinctive and that every country has its own proud legal traditions and concepts. The *Guidelines* are not intended to alter or change the domestic rules or procedures that are applicable in any country and are not intended to affect or curtail the substantive rights of any party in proceedings before the Courts. The *Guidelines* are intended to encourage and facilitate co-operation in international cases while observing all applicable rules and procedures of the Courts that are respectively involved.

The *Guidelines* may be modified to meet either the procedural law of the jurisdiction in question or the particular circumstances in individual cases so as to achieve the greatest level of co-operation possible between the Courts in dealing with a multinational insolvency or liquidation. The *Guidelines*, however, are not restricted to insolvency cases and may be of assistance in dealing with non-insolvency cases that involve more than one country. Several of us have already used the *Guidelines* in cross-border cases and would encourage stakeholders and counsel in international cases to consider the advantages that could be achieved in their cases from the application and implementation of the *Guidelines*.

Mr. Justice David Baragwanath  
High Court of New Zealand  
Auckland, New Zealand

Hon. Sidney B. Brooks  
United States Bankruptcy Court  
District of Colorado  
Denver

Chief Justice Donald I. Brenner  
Supreme Court of British Columbia  
Vancouver

Hon. Charles G. Case, II  
United States Bankruptcy Court  
District of Arizona  
Phoenix

Mr. Justice Miodrag Dordević  
Supreme Court of Slovenia  
Ljubljana

Hon. James L. Garrity, Jr.  
United States Bankruptcy Court  
Southern District of New York (Ret'd)  
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High Court of New Zealand  
Auckland, New Zealand

Chief Judge Burton R. Lifland  
United States Bankruptcy Appellate  
Panel for the Second Circuit  
New York

Hon. George Paine II  
United States Bankruptcy Court  
District of Tennessee  
Nashville

Mr. Justice Adolfo A.N. Rouillon  
Court of Appeal  
Rosario, Argentina

Mr. Justice Wisit Wisitsora – At  
Business Reorganization Office  
Government of Thailand  
Bangkok

Mr. Justice J.M. Farley  
Ontario Superior Court of Justice  
Toronto

Hon. Allan L. Gropper  
Southern District of New York  
United States Bankruptcy Court  
New York

Hon. Hyungdu Kim  
Supreme Court of Korea  
Seoul

Mr. Justice Gavin Lightman  
Royal Courts of Justice  
London

Hon. Chiyong Rim  
District Court  
Western District of Seoul  
Seoul, Korea

Hon. Shinjiro Takagi  
Supreme Court of Japan (Ret'd)  
Industrial Revitalization Corporation of Japan  
Tokyo

Mr. Justice R.H. Zulman  
Supreme Court of Appeal of South Africa  
Parklands

# **Guidelines**

## **Applicable to Court-to-Court Communications in Cross-Border Cases**

### ***Introduction:***

One of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

A Court intending to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting

Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

### **Guideline 1**

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

### **Guideline 2**

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

### **Guideline 3**

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

### **Guideline 4**

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an autho-

rized Representative of the foreign Court on such terms as the Court considers appropriate.

#### **Guideline 5**

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

#### **Guideline 6**

Communications from a Court to another Court may take place by or through the Court:

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affect-

ed parties in such manner as the Court considers appropriate;

- (c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

### **Guideline 7**

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both



Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and

- (d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

#### **Guideline 8**

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official tran-

script prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate; and

- (d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

#### **Guideline 9**

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

- (a) Each Court should be able to simultaneously hear the proceedings in the other Court.
- (b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

- (c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.
- (d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.
- (e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

#### **Guideline 10**

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

### **Guideline 11**

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

### **Guideline 12**

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction (“Non-Resident Parties”). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

### **Guideline 13**

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized

Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

#### **Guideline 14**

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

#### **Guideline 15**

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

#### **Guideline 16**

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as

may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

#### **Guideline 17**

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.