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Navigating Intercreditor Arrangements in Commodities and Trade Finance: A Practical Guide – Part III

By Peter J. Lahny, IV

In this multi-part article, the author examines various issues created by different forms of intercreditor agreement in detail, with a specific focus on how the priority of each lender's lien over the assets of the applicable debtor is established. In the first part, published in the October 2025 issue of The Banking Law Journal, the author discussed transactional commodities financing transactions. In the second part, published in the November-December 2025 issue of The Banking Law Journal, the author reviewed additional issues with the form of transactional intercreditor agreement, borrowing base commodities finance lending transactions, and typical provisions negotiated into the form of transactional intercreditor agreement. The final part of the article, published here, contains the article's conclusion as well as the typical form of intercreditor agreement to be used in connection with transactional loan facilities (the Form of Transactional Intercreditor Agreement) and the typical form of intercreditor agreement to be used in connection with borrowing base loan facilities (the Form of Borrowing Base Intercreditor Agreement).

V. CONCLUSION

While this article has focused on certain shortfalls within the standard Form of Transactional Intercreditor Agreement, it is important to note that this article is in no way advocating for discontinuing the use of the Form of Transactional Intercreditor Agreement (or the Form of Borrowing Base Intercreditor Agreement) in bi-lateral commodities and trade financing transactions. This article is simply meant to provide secured creditors operating in commodities and trade finance with actionable strategies to safeguard their interests in transactional and borrowing base financing transactions.

* The author, a partner at Wiggin and Dana LLP in New York, may be contacted at plahny@wiggin.com.

Exhibit A

Form of Transactional Intercreditor Agreement

INTERCREDITOR AGREEMENT

Re:

This Intercreditor Agreement is dated as of _____, 20__ and is among the Creditors (as defined below) that are from time to time parties hereto (this “Agreement”). The subject company (herein called the “Debtor”) from time to time incurs obligations, direct and/or contingent, to each of the undersigned (herein called a “Creditor”), some or all of which obligations are secured, either wholly or partially, by Collateral (as hereinafter defined). Each Creditor has filed or may file a financing statement under the Uniform Commercial Code of one or more states of the United States, and the Creditors desire to agree among themselves as to the relative priority of their respective security interests in the Collateral.

It is hereby agreed:

1. “Collateral” means all personal property and fixtures of the Debtor, whether now or hereafter existing or now owned or hereafter acquired and wherever located, of every kind and description, tangible or intangible, including, but not limited to, all goods (including inventory, equipment and any accessions thereto), instruments (including promissory notes), documents, accounts (including health-care-insurance receivables), chattel paper (whether tangible or electronic), deposit accounts, letter-of-credit rights (whether or not the letter of credit is evidenced by a writing), commercial tort claims, securities and all other investment property, general intangibles, payment intangibles, software, and supporting obligations and including the products and proceeds thereof and accessions thereto, constituting security for obligations of the Debtor, direct or contingent.
2. “Specific Security Interest” means a perfected and enforceable security interest of a Creditor in any of the following Collateral, including the products and proceeds thereof and accessions thereto:
 - (a) Collateral in the possession of the Creditor (or an agent or bailee on its behalf); or
 - (b) Collateral made available to the Debtor by the Creditor (or its agent or bailee) pursuant to a trust receipt or other security agreement the effect of which is to create and/or continue the Creditor’s security interest therein, or the acquisition of which by the Debtor is enabled by any loan, documentary or standby letter of credit or other facility extended or issued by the Creditor to or for the account of the

Debtor; or

- (c) Collateral covered by a non-negotiable document issued in the name of the Creditor or as to which the Creditor (or an agent or bailee on its behalf) controls possession through a negotiable document; or
 - (d) Collateral which is an obligation owed by the Creditor to the Debtor; or
 - (e) Collateral which is specifically identified in a Security Agreement, or in another writing, delivered to the Creditor at or about the time the security interest attaches.
3. “General Security Interest” is any perfected and enforceable security interest of a Creditor in Collateral, however arising, other than a Specific Security Interest.
4. A Specific Security Interest of a Creditor in Collateral has priority to the extent of all obligations, direct or contingent, of the Debtor to such Creditor secured thereby over any General Security Interest of another Creditor in the same Collateral.
5. If Specific Security Interests of two or more Creditors attach to the same Collateral, the Specific Security Interest which is a purchase money security interest under Paragraph 2(b) has priority over any other Specific Security Interest, except that a Specific Security Interest of the type referred to in Paragraph 2(c) hereof has, in the absence of notice of another paramount security interest stamped on or affixed to the document (notwithstanding anything in Paragraph 7 relating to notice), priority over any Specific Security Interest of the type referred to in Paragraph 2(b), and Specific Security Interests of two or more Creditors of the type referred to in Paragraph 2(b) rank equally in priority.
6. The General Security Interest of each Creditor in Collateral ranks equally in priority with the General Security Interest of each other Creditor in the same Collateral.
7. The priorities specified herein are applicable irrespective of the time or order of attachment or perfection of security interests or the time or order of filing of financing statements or the giving or failure to give notice of the acquisition of purchase money or other security interests.
8. Except as herein otherwise specifically provided, priority shall be determined in accordance with applicable law.
9. This Agreement shall terminate as to a given Creditor ten (10) days from the date on which such Creditor gives written notice to each of the other Creditors of its intention to terminate, confirms that it has terminated and released its

security interest in all Collateral and authorizes the filing of UCC termination statements with respect to its UCC filings in effect at that time. Termination shall not impair any Specific or General Security Interest theretofore acquired by any Creditor or affect the priorities thereof hereunder.

10. No amendment or modification of any provision of this Agreement and no consent with respect to any departure by any party hereto therefrom, shall be effective unless the same shall be in writing and signed by all the Creditors who are parties hereto, and then any such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

11. This Agreement shall be governed by the laws of the State of New York without regard to principles of conflicts of law. Unless the context otherwise requires, all terms used herein which are defined in the Uniform Commercial Code of the State of New York as in effect from time to time shall have the meanings therein stated. The parties hereby irrevocably submit and consent to the exclusive jurisdiction of the Courts of the State of New York located in New York County and of the United States District Court for the Southern District of New York in connection with any action or proceeding under, arising from or relating to this Agreement. Each of the Creditors also hereby irrevocably waives, to the fullest extent it may effectively do so, the defense of an inconvenient forum to the maintenance of such action or proceeding. Each of the Creditors agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. To the extent that any Creditor has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process (whether through service or notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise) with respect to itself or its property, such Creditor hereby irrevocably waives such immunity in respect of its obligations under this Agreement. EACH PARTY HERETO IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY).

12. Any person or entity who is not a party to this Agreement initially may, with the consent of each Creditor, become a party hereto by affixing his signature to the executed counterparts of this Agreement held by each Creditor or in any other manner acceptable to each Creditor. This Agreement is solely for the benefit of the Creditors and their respective successors or assigns and no

other person or persons shall have any right, benefit, priority or interest under, or because of the existence of, this Agreement.

13. Each of the executed several counterparts of this Agreement shall be an original. All such counterparts shall together constitute one and the same instrument. Telecopied signatures shall be binding on the parties to the same extent as manually signed signatures.

14. This Agreement supersedes any other intercreditor agreement relating to the Debtor or its predecessor in interest to which any Creditor may be a party, and the Creditors agree that as of the date hereof their respective rights with respect to the relative priority of their security interests in Collateral shall be governed by this Agreement.

IN WITNESS WHEREOF, each Creditor has caused this Agreement to be duly executed as of the ____ day of , 20__.

Creditor

By:
Title:
By:
Title:

Creditor

By:
Title:
By:
Title:

Exhibit B

Form of Borrowing Base Intercreditor Agreement

INTERCREDITOR AGREEMENT

This Intercreditor Agreement is dated _____, 20__ and executed by the undersigned lending institutions (each lending institution herein referred to individually as “Creditor” and collectively as “Creditors”).

WHEREAS, _____, a _____ (the “Debtor”) from time to time has incurred and/or will incur obligations, liabilities and indebtedness, direct or indirect, primary or secondary, fixed or contingent, to the Creditors, some or all of which obligations are secured, either wholly or partially, by the Collateral (hereinafter defined);

WHEREAS, the Debtor has granted security interests in certain Collateral to such Creditors; and

WHEREAS, each Creditor has filed or may file one or more financing statements under the Uniform Commercial Code and the Creditors desire to provide for the relative priority of their respective security interests in the Collateral, wherever located from time to time.

NOW THEREFORE, for and in consideration of the premises hereinafter stated, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the parties hereto, each of the parties hereto agrees as follows:

1. (a) The following terms shall have the meanings specified below for the purposes of this Agreement:

“Borrowing Base” means, as of any date, with respect to the Debtor, an amount equal to the sum of certain asset categories of the Debtor (principally accounts receivable and inventory), adjusted by certain “eligibility criteria” and multiplied by various advance rates, all to be determined from time to time in accordance with the Borrowing Base Report most recently delivered by the Debtor to the Creditors. The foregoing shall not limit the right of any Creditor to determine in its sole discretion whether to modify such asset categories, eligibility criteria and advance rates, whether to make any extension of credit to the Debtor, whether to demand payment of any Obligations or whether to exercise any other rights and remedies available to it.

“Borrowing Base Overadvance” means (a) any additional Obligation owed to a Creditor by the Debtor which is incurred after the time when a Borrowing Base Report of the Debtor last received by the Creditors shows a Borrowing Base Deficiency (which shall mean that the Obligations of the Debtor set forth in such Borrowing Base Report delivered to the Creditors exceeds the

Borrowing Base as set forth therein), or (b) the portion of any additional Obligation owed to a Creditor by the Debtor which is incurred after the time when a Borrowing Base Report is received by such Creditor and which, when added to the Obligations of the Debtor set forth in such Borrowing Base Report, would cause the Obligations to the Creditors to exceed the Borrowing Base as set forth therein; provided that: (i) any extension, renewal or refinancing by a Creditor (including any financings of reimbursement obligations due under letters of credit) of any Outstanding Obligations of the Debtor that were outstanding before delivery of such a Borrowing Base Report of the Debtor and were not Borrowing Base Overadvances shall not be a Borrowing Base Overadvance; (ii) a Borrowing Base Overadvance to the Debtor shall cease to be a Borrowing Base Overadvance if, at any time after the date such Borrowing Base Overadvance is made, the Debtor delivers to the Creditors a Borrowing Base Report of the Debtor, which is materially accurate, reflecting that the Borrowing Base of the Debtor exceeds all Outstanding Obligations and all Borrowing Base Overadvances; and (iii) no loan or extension of credit by any Creditor shall be deemed to be a Borrowing Base Overadvance if prior to making such loan or extension of credit, such Creditor receives a new Borrowing Base Report of the Debtor, which is materially accurate, reflecting that after giving effect to such loan or extension of credit, the outstanding loans and extensions of credit owing to all Creditors are less than the Borrowing Base as of the date of such loan or extension of credit.

“Borrowing Base Report” means a report in substantially the form of Exhibit A hereto, with such changes therein as shall be approved from time to time in writing by all Creditors, completed by the Debtor and delivered to the Creditors from time to time. Nothing contained herein shall limit the right of any Creditor at any time and from time to time to require that the Debtor deliver other reports to such Creditor.

“Business Day” means any day other than (i) a Saturday, (ii) a Sunday or (iii) an other day on which commercial banks in New York City are required or authorized by law to close.

“Collateral” means all personal property, real property, and fixtures of the Debtor, of every kind and description, tangible or intangible, whether now or hereafter existing or arising, whether now owned or hereafter acquired or created, and wherever located, including, but not limited to, all goods, equipment, inventory, farm products, documents, promissory notes and other instruments, chattel paper (whether tangible or electronic), accounts, deposit accounts (general or special) and certificates of deposit, contract rights, letters of credit and proceeds thereof, advices of credit, letter of credit rights (whether or not evidenced by writing), securities and other investment property and

general intangibles, tax refund claims, patents, trademarks, intellectual property, payment intangibles, software, supporting obligations, commercial tort claims, cash, credits, deposits, and including further, and without limitation, any and all products and proceeds of any of the foregoing and any and all accessions and additions thereto.

“Credit Documents” means all loan agreements, notes, letter of credit applications and reimbursement agreements, agreements and drafts relating to bankers acceptances, letters of indemnity and any agreements relating thereto, guaranties and any other agreements, documents and instruments evidencing, securing or relating to any Obligations.

“Direct Obligations” means (without duplication) (i) Obligations arising from loans or advances (whether or not payable upon demand or at a specified maturity date) made by any Creditor to, or for the account of, or overdrafts paid by any Creditor for, the Debtor; (ii) actual and contingent Obligations of the Debtor in respect of documentary and standby letters of credit issued or confirmed by any Creditor for the account of the Debtor; and (iii) Obligations of the Debtor in respect of bankers acceptance facilities (including unmatured drafts) or letters of indemnity or steamship guaranties created or provided by any Creditor for the Debtor. Without limitation of the foregoing, Direct Obligations shall exclude Obligations of the Debtor under a guaranty in favor of any Creditor of the obligations of another person, firm, corporation or other entity to such Creditor.

“Event of Default” shall have the meaning ascribed thereto in Section 9(b).

“Extraordinary Actions” shall have the meaning ascribed thereto in Section 9(a).

“Net Realizations” means, with respect to the Debtor, any amounts realized by any Creditor after an Event of Default from the Collateral of the Debtor or any portion thereof and from any collections or realizations thereof or thereon under any Security Instrument executed by the Debtor, and any amounts or proceeds derived or resulting directly from the Collateral of the Debtor or any portion thereof, whether or not such Creditor is perfected or unperfected with respect to the Collateral or any portion thereof, less any costs reasonably incurred by such Creditor, or any other party on such Creditor’s behalf, in obtaining or collecting such amounts. Without limiting Section 15 hereof or the obligations of any Creditor under Section 15 hereof, Net Realizations shall be deemed to exclude any voluntary or scheduled payments made by or on behalf of the Debtor to a Creditor during any period (a) prior to the occurrence of an Event of Default or (b) after such Event of Default has occurred, if all Creditors agree in writing to waive such Event of Default.

“Obligations” means (without duplication) all indebtedness, liabilities and obligations, whether now existing or hereafter arising, direct or indirect, fixed or contingent, primary or secondary, of the Debtor to any Creditor, whether for principal, interest, fees, expenses or otherwise.

“Outstanding Obligations” at any time and with respect to any one or more of the Creditors means the aggregate amount (without duplication) of Direct Obligations of the Debtor to such Creditor(s) outstanding and unpaid at such time, provided, however, that Outstanding Obligations shall be deemed to exclude:

- (i) any Obligations of the Debtor to a Creditor arising after the occurrence of any Event of Default, unless such Obligations arise (A) pursuant to legal commitments existing at the time such Event of Default occurs, (B) in connection with extensions or renewals or refinancings of Outstanding Obligations in existence at the time such Event of Default occurs (including any financings of reimbursement obligations due under letters of credit or bankers acceptances issued prior to the time of such Event of Default), or (C) after such Event of Default is waived in writing by all Creditors;
- (ii) Borrowing Base Overadvances; and
- (iii) any Obligations to a Terminating Creditor (as defined in Section 7), except those described in clause (a) or (b) of Section 7.

“Ratio” shall have the meaning set forth in paragraph 5(a).

“Security Instruments” means any and all security agreements, mortgages, deeds of trust and other security instruments creating a Security Interest on or in the Collateral or any portion thereof in favor of any Creditor.

“Security Interest” means any perfected and enforceable security interest, mortgage, lien or other encumbrance in favor of a Creditor in the Collateral or any portion thereof, in each case, including, without limitation, purchase money security interests.

(b) Definitions in this Agreement shall apply equally to both the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words “include”, “includes”, and “including” as used in this Agreement shall be deemed in each case to be followed by the phrase “without limitation”. References to paragraphs and Exhibits shall be deemed to be references to paragraphs of and Exhibits to this Agreement, unless otherwise specified.

2. The Security Interest of each Creditor in the Collateral of the Debtor or any portion thereof, whether now held or hereafter taken or acquired, is and

shall remain equal in priority with the Security Interest of every other Creditor in the Collateral of the Debtor or any portion thereof, except as otherwise expressly provided herein. This Section 2 shall be applicable before and after the commencement of a case by or against the Debtor under the United States Bankruptcy Code.

3. The equal priority of each Security Interest provided for hereunder is and shall be applicable without regard to (a) the time or order of attachment or perfection of the respective Security Interests, (b) the time or order of filing of financing statements in connection therewith, (c) the giving or failure to give notice by any Creditor to any other Creditor of the acquisition or expected acquisition of purchase money or other Security Interests, or (d) any other fact or factor or circumstance affecting a determination of the priority of the Security Interests of the Creditors.

4. Except as specifically provided herein, the priority of Security Interests in the Collateral shall be determined in accordance with applicable law.

5. (a) Net Realizations of Collateral of the Debtor or under Security Instruments executed by the Debtor received by or the possession of which is obtained by any Creditor after the occurrence of an Event of Default which has not been waived in writing by all Creditors shall be held by such Creditor in trust for the benefit of all Creditors who hold a Security Interest therein (including, without limitation, by virtue of Section 6(a) hereof), irrespective of the relative priority of the Security Interests of each Creditor in the Collateral under applicable law, and each Creditor who holds a Security Interest therein (including, without limitation, by virtue of Section 6(a) hereof) shall be entitled to receive a pro rata portion of such Net Realizations equal to the ratio of the principal amount of Outstanding Obligations owed to such Creditor by the Debtor to the aggregate principal amount of Outstanding Obligations owed by the Debtor to all Creditors who hold Security Interests therein, said ratio to be calculated on the basis of such Outstanding Obligations as of each date Net Realizations are distributed or participations are purchased under Section 15 (said ratio, as determined from time to time in accordance with the provisions of this Agreement, the "Ratio"). If the principal amount of Outstanding Obligations owed by the Debtor to all Creditors shall at any time be paid in full, the Ratio after such payment in full, and until all interest, fees and other amounts owing in respect of Outstanding Obligations owed by the Debtor have been paid in full, shall be the Ratio in effect on the first date of distributions of Net Realizations under this paragraph 5(a).

(b) If the contingent liability of a Creditor in respect of a letter of credit, letter of indemnity, steamship guaranty or a banker's acceptance that is outstanding as of the date of any distribution of Net Realizations shall thereafter

be terminated in whole or in part without full payment by, or further exposure to, such Creditor, then the Outstanding Obligations shall be appropriately adjusted by eliminating the amount of such terminated contingent liability from the Outstanding Obligations to such Creditor and from the aggregate Outstanding Obligations to all Creditors, and the Ratio and any prior distribution of Net Realizations or purchase of participations under Section 15 shall also be appropriately adjusted.

6. (a) The Creditors agree that, to the fullest extent permitted by law, all Security Instruments shall secure all Obligations of the Debtor to all Creditors, as if such Security Instruments specifically described the Obligations and specifically granted a lien or security interest on or in the property covered thereby to secure same. The Creditors further agree that Net Realizations shall be collected and held by each Creditor for the benefit of all Creditors entitled thereto pursuant to the terms of this Agreement and that such Net Realizations shall be applied to and shall discharge the Outstanding Obligations to the extent, but only to the extent, such Net Realizations are actually received and retained by each such Creditor for its own account as herein set out.

(b) Each Creditor shall hold all documents of title, letters of credit and other Collateral, liens upon which are perfected by possession, for itself and as agent for the other Creditors for the sole limited purpose of perfecting the Security Interest of the other Creditors therein, but shall have no duty, liability or responsibility to the other Creditors in so acting as agent.

7. Except as provided for in paragraph 15 hereof, this Agreement shall terminate as to any Creditor (hereinafter referred to as the “Terminating Creditor”) ten (10) days from the date on which such Terminating Creditor gives written notice to each other Creditor of its intention to terminate; provided, however, that such termination shall be effective only as to Obligations to such other Creditors arising after the effective date of such termination. Notwithstanding anything to the contrary herein, termination of this Agreement by any Terminating Creditor in accordance with the terms hereof will not impair the priority provided for herein of all Security Interests which secure Obligations arising before or, in accordance with the final sentence of this Paragraph 7, after termination, nor will such termination be effective as to (a) Obligations incurred pursuant to legal commitments existing on the effective date of such termination or (b) Obligations in existence on the effective date of such termination, and all extensions, renewals or refinancings of such Obligations (including any financings of reimbursement obligations due under letters of credit or in connection with bankers acceptances issued prior to the effective date of such termination). Except for Security Interests of the Terminating Creditor which secure Obligations in existence as of the

effective date of termination by the Terminating Creditor and the Obligations referred to in clauses (a) and (b) above, the Security Interests of the Terminating Creditor securing Obligations arising after the effective date of such termination shall be subordinate to the Security Interests of the other Creditors.

8. When a Creditor receives any Net Realizations, such Creditor shall apply (to the extent permitted by law) same first to the payment of its reasonable costs of collecting, seizing, storing, selling, leasing, or otherwise disposing of the Collateral attributable to such Net Realizations, together with its reasonable costs of enforcing its rights under any Security Instrument and/or Credit Document relating thereto, and shall then remit to each Creditor entitled thereto under paragraph 5(a) its pro rata portion, in accordance with the Ratio, of the balance of such Net Realizations. Any Net Realizations received by any Creditor shall be applied promptly to the payment of the Obligations owed to such Creditor by the Debtor in accordance with the express provisions of the instruments and agreements from time to time evidencing or securing the Obligations owed to such Creditor, provided, however, that for purposes of determining the Ratio, such Net Realizations shall be deemed to be applied, first, to the principal of Outstanding Obligations, second, to interest thereon, and, third, to any other Obligations. Each Creditor shall (a) permit reasonable inspection and copying by the other Creditors of all books and records maintained by such Creditor pertaining to the Collateral or any portion thereof and the Obligations to such Creditor and (b) provide a statement of account with respect to the Obligations of the Debtor to such Creditor if such a statement is requested in writing by any other Creditor.

9. (a) If the Debtor fails to pay any of the Obligations within five Business Days after the date when due or otherwise defaults in any material respect under a Credit Document or under a Security Instrument, or a Creditor proposes to take or commence any proceedings or actions (whether or not through judicial process or the filing of suit) to take possession of (other than documents of title and letters of credit delivered to a Creditor in the ordinary course), seize, perfect (other than by filing of financing statements) its Security Interest in, dispose of, collect upon, set-off, sell, compromise or take other extraordinary action under its Security Instruments, with respect to all or any portion of the Collateral or otherwise exercise or commence any enforcement or collection action or proceeding (including, without limitation, institution of litigation) under any Credit Document or Security Instrument (hereinafter referred to as "Extraordinary Actions"), such Creditor shall reasonably promptly after it has knowledge of such default but before the taking of such Extraordinary Action give the other Creditors written notice of the occurrence of such default or of the proposed taking of such Extraordinary Action. The

foregoing shall not apply to any Creditor's exercise of a right of setoff, banker's lien or similar right, but any Creditor which exercises such right shall promptly notify the other Creditors thereafter and any amounts realized therefrom shall be subject to the provisions of Section 15 hereof regardless of whether such exercise occurs before or after the occurrence of any Event of Default.

(b) An Event of Default hereunder shall be deemed to have occurred upon the receipt of such notice provided for in Section 9(a) by all Creditors, or upon such other date on which the Creditors agree in writing (herein referred to as an "Event of Default") and shall be deemed to continue until such date as to which all Creditors agree in writing that such Event of Default has terminated. If any Creditor obtains possession of or control over any Net Realizations after the occurrence and during the continuance of an Event of Default, such Creditor shall promptly notify the other Creditors.

(c) At all times, each of the Creditors may exercise its independent judgment whether to act or to refrain from acting with respect to the exercise or non-exercise of its rights and remedies under its Security Instruments or Credit Documents. Further, each Creditor may exercise its discretion in determining the manner or method of exercising the rights or remedies of such Creditor under any Security Instrument or Credit Documents taken by such Creditor including, but not limited to, the determination of the amount to be bid by such Creditor at any foreclosure sale of any Collateral, provided, however, that such Creditor shall act in a commercially reasonable manner in realizing on the Collateral under its Security Instruments. However, without limiting any obligations of any Creditor provided herein, with regard to their respective Obligations, each Creditor shall be solely responsible for the manner or method in which it exercises its right and remedies. No Creditor shall have any liability to any person or entity by reason of the actions or failure to act of any other Creditor.

(d) The Creditors shall owe no duties to each other with respect to the taking of, or the forbearing from or the taking of, any action under their Security Instruments or the Credit Documents. Further, the Creditors are not and shall not be deemed to be trustees, agents, partners, joint venturers, or fiduciaries to one another (except as and to the extent set forth in Section 6 and to the extent one Creditor holds or will hold Net Realizations for the benefit of another). No Creditor shall be liable to another Creditor for the manner or method in which it has conducted its relationship with the Debtor or as a result of the exercise or manner of exercise of its rights and remedies under any Security Instrument in which it is named as Creditor, except for failure to act in a commercially reasonable manner when realizing on Collateral under Security Instruments and failure to comply with its obligations under this Agreement.

10. If all or any portion of the Net Realizations received by any Creditor is held to constitute a preference under any applicable bankruptcy or similar laws, or if for any other reason any Creditor is required to refund or disgorge part or all of any Net Realizations or otherwise pay part or all of any Net Realizations to any person or entity not a party hereto (the amount of such refund, disgorgement or payment being referred to hereinafter as "Refunded Net Realizations"), then for all purposes hereunder Net Realizations shall be deemed to exclude such Refunded Net Realizations and the allocation of Net Realizations provided for hereunder shall be rescinded and the amount thereof restored to such Creditor by the other Creditors to the extent necessary to compensate such Creditor for such refund, disgorgement or payment made by it, but without interest thereon (other than interest included in the Refunded Net Realizations) and to the date upon which demand is made for any payment required to be made in order to effectuate the provisions of this paragraph 10. Interest shall accrue on any amount for which a demand is made hereunder and payment is not made within 2 Business Days after demand from the date that is 2 Business Days after such demand until (but not including) the date such payment is made at the overnight federal funds rate for the first 3 Business Days and thereafter at such rate plus 2%.

11. Any notice to any Creditor hereunder may be given in writing by personal delivery, telecopier, or telex, and shall be confirmed by depositing the same in the United States mail, certified or registered mail, postage prepaid, or by recognized overnight delivery service addressed to such Creditor at the address set forth below its signature or to such other address as may be designated by such Creditor in a written notice to all other Creditors.

12. (a) THIS AGREEMENT SHALL BE GOVERNED BY, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK, EXCEPT AS REQUIRED BY MANDATORY PROVISIONS OF LAW AND EXCEPT TO THE EXTENT THAT THE VALIDITY OR PERFECTION OF ANY SECURITY INTEREST IN, OR REMEDIES IN RESPECT OF, ANY PARTICULAR COLLATERAL ARE GOVERNED BY THE LAWS OF A JURISDICTION OTHER THAN THE STATE OF NEW YORK. Unless otherwise defined herein, terms defined in Article 9 of the Uniform Commercial Code as in effect in the State of New York from time to time are used herein as therein defined.

(b) The parties hereby irrevocably submit and consent to the non-exclusive jurisdiction of the Courts of the State of New York located in New York County and of the United States District Court for the Southern District of New York in connection with any action or proceeding under, arising from or relating to this Agreement. Each of the Creditors also hereby irrevocably waives, to the

fullest extent it may effectively do so, the defense of an inconvenient forum to the maintenance of such action or proceeding. Each of the Creditors agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. To the extent that any Creditor has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process (whether through service or notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise) with respect to itself or its property, such Creditor hereby irrevocably waives such immunity in respect of its obligations under this Agreement.

13. This Agreement is solely for the benefit of the Creditors and their successors, designees or assigns, and no other person or persons (including the Debtor) shall have any right, benefit, priority or interest under, or as a result of the existence of, this Agreement.

14. Each of the executed several counterparts of this Agreement shall be an original. All such counterparts shall together constitute one and the same instrument. Signatures may appear on separate counterparts. Telecopied signatures on this Agreement or any amendment shall be binding on the parties to the same extent as original signatures.

15. If any Creditor shall obtain a payment on account of any Obligations of the Debtor to such Creditor after the occurrence of an Event of Default (except as otherwise provided in the last sentence of Section 9(a) and whether before or after the occurrence of an Event of Default in the case of clauses (a) and (c) below) (a) through a banker's lien, right of set-off or counterclaim, (b) from any security for such Obligations other than the Collateral or any security from any guarantor or surety referred to in the following clause (c), (c) from any guarantor or surety of such Obligations, (d) pursuant to any subordination agreement or other credit support document, or (e) through a payment, including, without limitation, a regularly scheduled or other voluntary payment of an Obligation, such Creditor (the "Purchasing Creditor") shall, after payment of reasonable out-of-pocket costs incurred by the Purchasing Creditor in obtaining such payment, promptly purchase from the other Creditors an undivided participating interest in the Outstanding Obligations (including undrawn letters of credit and unmatured bankers acceptances) owing to such other Creditors, in such amount as will insure that all Creditors share such payment (after deducting such expenses) in accordance with the Ratio, provided that if all or any portion of such payment received and so distributed by the Purchasing Creditor is thereafter rescinded or otherwise restored or recovered, each of the other Creditors which shall so share such payment shall by repurchase of the participating interest theretofore sold or other equitable

adjustments, return its share of that payment to the Purchasing Creditor together with its ratable share of any interest payable by the Purchasing Creditor on the amount recovered. The Outstanding Obligations in which such participating interest shall be purchased shall be, to the extent possible, Outstanding Obligations which have the same terms and conditions as the Obligations paid pursuant to clauses (a) through (e) above, including, without limitation, obligor, interest rate, maturity, collateral and guaranties and such participating interest shall afford to the Purchasing Creditor the right to receive a pro rata share of all payments and collections received by the selling Creditor in respect of the Outstanding Obligations in which such participating interest was purchased.

16. Notwithstanding anything to the contrary herein, each Creditor acknowledges that Obligations to a Creditor excluded from Outstanding Obligations pursuant to clauses (i), (ii) or (iii) of the definition of such term herein (the "Excluded Obligations") shall be disregarded in computing the Ratio and such Creditor's pro rata share of any Net Realizations and recoveries under Section 15. After all principal, interest, fees and other amounts due in respect of Outstanding Obligations have been paid in full, Net Realizations shall be applied to, and participations in accordance with Section 15 shall be purchased in, Excluded Obligations and other Obligations ratably in accordance with the principal amount of all such Excluded Obligations and other Obligations due to Creditors and outstanding from time to time.

17. No Creditor shall sell, assign, or transfer its Security Interest in any Collateral unless it shall first have (a) given notice thereof to the other Creditors, (b) delivered a copy of this Agreement to the prospective transferee, and (c) delivered to the other Creditors an agreement, in form, scope and substance satisfactory to such other Creditors, to the effect that such prospective transferee agrees to be bound by the terms of this Agreement.

18. Except as otherwise provided therein, each Creditor may, without notice to or consent of the other Creditors, amend, modify, waive any term of, exercise any rights under, and otherwise deal with any note, loan agreement, consignment agreement, guaranty agreement, security agreement or other agreement which it may have entered into with the Debtor or any other party in connection with any Outstanding Obligations of the Debtor to such Creditor. Nothing in this Agreement shall be construed as obligating any Creditor to make, renew, continue or extend any financial accommodations to the Debtor or its affiliates or subsidiaries or as modifying the provisions of any note or other instrument evidencing or creating any indebtedness or other liability or obligation of the Debtor or its affiliates or subsidiaries or any lien or security interest granted by the Debtor or its affiliates or subsidiaries.

19. THE CREDITORS IRREVOCABLY WAIVE TRIAL BY JURY IN ANY LITIGATION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT.

20. Any bank or financial institution which is not a party to this Agreement initially may, with the consent of each of the other Creditors, become a party hereto and thereafter be deemed a Creditor hereunder entitled to all rights of a Creditor and subject to all obligations of a Creditor, by executing an amendment hereto signed by all the Creditors, provided, however, that if there is any perfected intervening security interest (an "Intervening Security Interest") with priority over that of such bank or financial institution, other than Security Interests of Creditors, the amount to which such bank or financial institution shall be entitled by virtue of the provisions herein shall be reduced by the amount of indebtedness or obligations secured by such Intervening Security Interests.

IN WITNESS WHEREOF, each Creditor has caused this Agreement to be duly executed and effective as of the date first above written.

By:
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