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

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**FORM 10-K**

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

For the Fiscal Year Ended December 31, 2015

OR

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

For the transition period from to Commission File Number: 001-35232

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**WAGeworks, INC.**  
(Exact name of Registrant as specified in its charter)

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Delaware  
(State or other jurisdiction of  
incorporation or organization)

94-3351864  
(I.R.S. Employer  
Identification No.)

1100 Park Place, 4th Floor  
San Mateo, California  
(Address of principal executive offices)

94403  
(Zip Code)

(650) 577-5200

(Registrant's telephone number, including area code)

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**Securities registered pursuant to Section 12(b) of the Act:**

Title of each class	Name of each exchange on which registered
Common Stock, \$0.001 par value per share	The New York Stock Exchange

**Securities registered pursuant to Section 12(g) of the Act:**

None.

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Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes  No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes  No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes  No

Indicate by check mark whether the registrant has submitted electronically and posted to its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes  No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer	<input checked="" type="checkbox"/>	Accelerated filer	<input type="checkbox"/>
Non-accelerated filer	<input type="checkbox"/> (Do not check if a smaller reporting company)	Smaller reporting company	<input type="checkbox"/>

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes  No

The aggregate market value of the registrant's common stock, \$0.001 par value per share, held by non-affiliates of the registrant on June 30, 2015, the last business day of the registrant's most recently completed second fiscal quarter, was \$1,445,472,210 (based on the closing sales price of the registrant's common stock on that date). This determination of affiliate status is not necessarily a conclusive determination for other purposes.

As of February 19, 2016, there were 35,942,945 shares of the registrant's common stock outstanding.

**DOCUMENTS INCORPORATED BY REFERENCE**

Portions of the registrant's Proxy Statement for its 2015 Annual Meeting of the Stockholders (the "2015 Proxy Statement"), to be filed with the Securities and Exchange Commission are incorporated by reference into Part III of this Annual Report where indicated.

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**WAGeworks, INC.**  
**FORM 10-K**  
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## Forward Looking Statements

*This Annual Report on Form 10-K contains forward-looking statements that involve risks and uncertainties, as well as assumptions that, if they never materialize or prove incorrect, could cause our results to differ materially from those expressed or implied by such forward-looking statements. Statements that are not purely historical are forward-looking statements within the meaning of Section 27A of the Securities Act, and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Forward-looking statements are often identified by the use of words such as, but not limited to, "anticipate," "believe," "can," "continue," "could," "estimate," "expect," "intend," "may," "plan," "project," "seek," "should," "target," "will," "would" and similar expressions or variations intended to identify forward-looking statements. Such statements include, but are not limited to, statements concerning tax-advantaged consumer-directed benefits, market opportunity, our future financial and operating results, investment strategy, sales and marketing strategy, management's plans, beliefs and objectives for future operations, technology and development, economic and industry trends or trend analysis, expectations about seasonality, opportunity for portfolio purchases, channel partnerships, private exchanges, operating expenses, anticipated income tax rates, capital expenditures, cash flows and liquidity. These statements are based on the beliefs and assumptions of our management based on information currently available to us. Such forward-looking statements are subject to risks, uncertainties and other important factors that could cause actual results and the timing of certain events to differ materially from future results expressed or implied by such forward-looking statements. You should not place undue reliance on these forward-looking statements which speak only as of the date of this Annual Report on Form 10-K. Except as required by law, we undertake no obligation to update any forward-looking statements to reflect events or circumstances after the date of such events.*

## PART I

### Item 1. Business

#### Available Information

WageWorks, Inc. was incorporated as a Delaware corporation in 2000. Our website address is [www.wageworks.com](http://www.wageworks.com). We make available on our website, free of charge, our Annual Report on Form 10-K, Quarterly Reports on Form 10-Q, Current Reports on Form 8-K, and any amendments to those reports, as soon as reasonably practicable after we electronically file such material with, or furnish it to, the Securities and Exchange Commission, or SEC. Our SEC reports can be accessed through the Investor Relations section of our website. The information found on our website is not part of this or any other report we file with or furnish to the SEC. As used herein, "WageWorks," "we," "us" and "our" and similar terms include WageWorks, Inc. and its wholly-owned subsidiaries, unless the context indicates otherwise.

#### Overview

We are a leader in administering Consumer-Directed Benefits, or CDBs, which empower employees to save money on taxes and provide corporate tax advantages for employers. We are solely dedicated to administering CDBs, including pre-tax spending accounts, such as Health Savings Accounts, or HSAs, health and dependent care Flexible Spending Accounts, or FSAs, Health Reimbursement Arrangements, or HRAs, as well as Commuter Benefit Services, including transit and parking programs, wellness programs, Consolidated Omnibus Budget Reconciliation Act, or COBRA, and other employee benefits.

Our CDB programs assist employees and their families in saving money by using pre-tax dollars to pay for certain of their healthcare, dependent care and commuter expenses. Employers financially benefit from our programs through reduced payroll taxes, the benefits are realized even after factoring in our fees. Under our FSA, HSA and commuter programs, employee participants contribute funds from their pre-tax income to pay for qualified out-of-pocket healthcare expenses not fully covered by insurance, such as co-pays, deductibles and over-the-counter medical products or for commuting costs.

We price our services based on the estimated number and types of claims, whether payment processing and client support activities will be provided within or outside of the United States, the estimated number of calls to our customer support center and any specific client requirements. In addition, we derive a portion of our revenues from interchange fees that we receive when employee participants use the prepaid debit cards we provide to them for healthcare and commuter expenses.

At January 31, 2016, we had almost 4.5 million employee participants from approximately 58,000 employer clients. In 2015, employee participants used approximately 5.0 million WageWorks prepaid debit cards. Our participant counts do not include our TransitChek Basic program participants, as that fare media is shipped directly to employers which then distribute the products to their employee's based on demand. We believe that January 31 is the most appropriate point-in-time measurement date for annual plan metrics. Although plan changes and the entry and exit of employers and participants from our programs are usually decided late in the calendar year during open enrollment to be effective on January 1, it is not unusual for employers to submit updated participant files in early January. While updates can be delayed past January, any changes from such late updates are usually minimal. Consequently, we believe the January 31 point-in-time measurement date is the most appropriate date to use as a baseline.

## **Our Services**

### ***Health Savings Accounts***

We administer HSAs for employers that allow employee participants to invest funds to be used for qualified healthcare expenses at any time without federal tax liability or penalty. In order to be eligible for an HSA, an employee must be enrolled in a qualified High Deductible Health Plan, or HDHP, that is HSA-compatible and not have any other impermissible coverage. The funds in the HSAs are exempt from payroll taxes for employers and both employees and employers can make contributions to an HSA. Withdrawals for non-medical expenses are treated similarly to those in an individual retirement account, specifically, such withdrawals may provide tax advantages if taken after retirement age, and may incur penalties if taken earlier. HSA funds are held by a custodian, which accumulate year-to-year if not spent and are portable if a participant leaves his employer. Our HSA programs are designed to offer employers a choice of third-party custodian as well as a variety of investment options within each custodial offering that enables employers the opportunity to explore a broader assortment of funds to offer their employees.

### ***Flexible Spending Accounts***

#### *Healthcare*

We also offer FSAs, which are employer-sponsored CDBs that enable employees to set aside pre-tax dollars to pay for eligible healthcare expenses that are not generally covered by insurance, such as co-pays, deductibles and over-the-counter medical products, as well as vision expenses, orthodontia, medical devices and autism treatments. Employers benefit from payroll tax savings on the pre-tax FSA contributions made by the employee. As an example, based on our average employee participant's annual FSA contribution of approximately \$1,300 and an assumed personal combined federal and state income tax rate of 35%, an employee participant will reduce his or her taxes by approximately \$455 per year by participating in an FSA. Our employer clients also realize payroll tax (i.e., FICA and Medicare) savings on the pre-tax contributions made by their employees. In the above FSA example, an employer client would save approximately \$55 per participant per year, even after the payment of our fees.

The IRS imposes a limit, indexed to inflation, on pre-tax dollar employee contributions made to a healthcare FSAs. The IRS also allows a carryover of up to \$500 that does not count against or otherwise affect the indexed salary reduction limit applicable to each plan year. Employers are able to contribute additional amounts in excess of this statutory limit, and may choose to do so in an effort to mitigate the impact of rising healthcare costs on their employees.

#### *Dependent Care*

We also administer FSA programs for dependent care plans. These plans allow employees to set aside pre-tax dollars to pay for eligible dependent care expenses, which typically include child care or day care expenses but may also include expenses incurred from adult and elder care. Current laws and regulations impose a statutory limit on the amount of pre-tax dollars employees can contribute to dependent care FSAs with no carryover allowed. Like healthcare FSAs, employers can also contribute funds to employees' dependent care FSAs, subject to the statutory annual limit on total contributions. As with healthcare FSAs, employers realize payroll tax savings on the pre-tax dependent care FSA contributions made by their employees.

### ***Health Reimbursement Arrangements***

We offer employer-funded HRAs. Under HRAs, employers provide their employees with a specified amount of reimbursement funds that are available to help employees defray their out-of-pocket healthcare expenses, such as deductibles, co-insurance and co-payments. HRAs may only be funded by employers and, while there is no limitation on how much employers may contribute, employers are required to establish the programs in such a way as to prevent discrimination in favor of highly compensated employees. HRAs must either be considered an excepted benefit (for example, a dental-only HRA or a vision-only HRA), retiree HRA or be integrated with another group health plan. HRAs can be customized by employers so employers have the freedom to determine what expenses are eligible for reimbursement under these arrangements. At the end of the plan year, employers have the option to allow all, or a portion, of the unused funds to roll over and accumulate year-to-year if not spent. All amounts paid by employers into HRAs are deductible for tax purposes by the employer and tax-free to the employee.

### ***Commuter Programs***

We administer pre-tax commuter benefit programs. Employers are permitted to provide employees with commuter benefits including; qualified parking, transit passes, vanpooling and bicycle commuting reimbursement. The maximum monthly federal (and sometimes state) tax free exclusion is adjusted for inflation. The Protecting Americans from Tax Hikes Act of 2015, which was signed into law on December 18, 2015, retroactively adjusted the pre-tax monthly limit for transit passes and vanpooling for 2015 to \$250 and prospectively adjusted the pre-tax monthly limit for transit and vanpooling to be the same as parking, which will be \$255 for 2016.

## **COBRA**

We offer COBRA continuation services to employer clients to meet the employer's obligation to make available continuation of coverage for participants who are no longer eligible for the employer's COBRA covered benefits which includes medical, dental, vision, HRAs and certain healthcare FSAs. COBRA requires employers to make health coverage available for terminated employees for a period of up to 36 months post-termination. As part of our COBRA program, we offer a direct billing service where former employee participants pay WageWorks directly versus to their employers for coverage they elect to continue. We handle the accounting and customer service for these separated employees, as well as interfacing with the carrier regarding the employees' eligibility.

### **Our Employer Clients**

As of January 31, 2016, we had approximately 58,000 employer clients across a broad range of industries with almost 4.5 million participating employees in all 50 states. Our employer clients include many of the Fortune 100 and Fortune 500 companies.

### **Our Technology Platforms**

We run our services primarily on three enterprise platforms that have been designed to be highly scalable, and we closely monitor utilization of all aspects of our platforms for capacity planning purposes. Our existing infrastructure has been designed with sufficient capacity to meet our current and planned future needs.

The majority of our accounts run on our proprietary platform, which we call our v5 platform. We generally use our v5 platform for medium-sized and enterprise clients. Our v5 platform supports all account administrative functions and provides integration with the systems used by employer clients, payment networks, health plans and key suppliers. Our v5 platform features a flexible, rules-based engine that includes multi-wallet functionality and is highly configurable to accommodate custom client plan designs and service requests. This multi-wallet functionality allows us to include more than one type of healthcare account (FSA, HRA and HSA) on one card, and helps ensure that funds that are otherwise subject to forfeiture at the end of a plan year are used first to pay for eligible expenses.

We also operate a technology platform known as WinFlexOne, which has been specifically designed and enhanced to address the needs of small-and medium-sized business, or SMBs. While the overall features and capabilities of WinFlexOne are comparable to v5, WinFlexOne utilizes a simpler set of interfaces and product configurations that better accommodate the more limited administrative capabilities and needs of small employers.

Our third primary technology platform, known as Complink, is used to provide COBRA and direct bill services to our SMB and enterprise clients. This feature-rich, integrated platform automates COBRA and direct bill administration activities and operations, and helps to ensure the administration of these programs is in compliance with applicable laws.

In 2015, we continued to develop and implement new features to enhance the participant and client user experience on our enterprise platform. These efforts touched all areas, including the participant website, mobile application, or mobile app, client website, reporting, plan design and administration.

## **Operations**

### ***Operation Support Services***

We provide operational support services to our clients and our cross-functional teams including customer support and claims processing. We believe our strict quality standards differentiate us from our competitors and enable us to attract and maintain a broad base of loyal customers. Our client support groups include; customer support, claims servicing, operations support and professional services teams.

Our customer support team handles all incoming interactions from our employee participants, responsible for resolving any issues they may encounter. The team serviced approximately 5.0 million calls in 2015. Our claims servicing team works directly with providers or participants and reviews, adjudicates and processes claims for payment or reimbursement. In 2015, the claims servicing team handled more than 10 million claims and card use verification forms. Our operations support team processes and coordinates activities, delivers healthcare and commuter cards to participants and ensures that prepaid funds and reimbursement payments are accurate. In 2015, our operations team delivered approximately 5.0 million healthcare and commuter prepaid debit cards, and we fulfill over 12 million commuter orders each calendar year. Lastly, our professional services team is responsible for coordinating all activities related to the implementation, transition and on-boarding of new employer clients, assisting our existing clients with the addition of new services to their accounts and transitioning clients that we acquire from portfolio purchases to our platforms.

### ***Employer Relationship Management***

Each employer client is regionally aligned to an account team with an experienced relationship manager. Our relationship managers act as a client's single point of contact and are trained on all of our account offerings, working closely with our internal partners and subject matter experts to understand how regulatory or operational changes may impact a particular program or procedure.

We enhance the employer client enrollment process by providing tools such as educational information, webinars and onsite support to help facilitate open enrollment and drive employee participation. We also provide consultation services to employer clients which include providing robust data regarding spend patterns, participation and service utilization, online claims submissions and participant feedback.

Our Employer Relationship Management team also ensures that any platform or product changes, such as website or service enhancements, online claims processing, or the launch of our mobile application are properly communicated and adopted by our clients. The team also works to keep our commuter client's employee participants well informed about any rate changes, new pricing schemes or new technologies as we have relationships with a significant number of regional transit authorities.

### **Sales and Business Development**

We grow our employer client base through our various sales channels and through other business development efforts.

#### ***Sales***

We sell our CDB programs to our employer clients through direct and indirect sales channels. Each of these approaches targets a distinct group of clients. Our average sales cycle ranges from approximately two months for smaller opportunities to over a year for large institutional clients and significant new indirect business.

Our direct sales force targets Fortune 1000 companies, which we refer to as enterprise clients, and generates new large account relationships through employer prospecting. Our indirect sales channel consists of channel partnerships, private exchange partners, institutional brokers and other third parties who refer or resell our CDB programs.

Our channel partnerships usually involve an existing provider agreeing to transition its CDB clients to us over a defined period of time for an agreed upon purchase price. These channel partnerships also have a resale and referral component to them so we stand to derive additional opportunities from these arrangements. The private exchange marketplace offers another opportunity for us to sell our CDB programs to companies of all sizes that participate in such exchanges. Our broker relationships provide another avenue for us to market and sell our CDB programs.

In addition, we sell our customer service, enrollment, eligibility, billing and payment processing services to a customer for purposes of assisting in the administration of their public health insurance exchange business.

#### ***Business Development***

In addition to our sales channels, we utilize portfolio purchases as a business development strategy to broaden our employer client base and to acquire new employer clients. Since 2007, we have purchased CDB portfolios of seven third-party administrators, or TPAs and completed two acquisitions. In connection with these portfolio purchases, we have leveraged the ease of integration and efficiencies afforded by our on-demand software platforms and cross-sold additional CDB products and services to many acquired employer clients. There are several hundred regional TPA portfolios that we continually monitor and evaluate in order to maintain a robust pipeline of potential candidates for purchase.

### **Government Regulation**

Our business is subject to extensive, complex and rapidly changing federal and state laws and regulations. We have implemented and continue to enhance compliance programs and policies to monitor and address the legal and regulatory requirements applicable to our operations, including dedicated compliance personnel and training programs. For additional information regarding laws and regulations impacting our business, refer to Part I, Item 1, "Risk Factors," of this Annual Report on Form 10-K.

### **Competition**

The market for CDBs, as well as COBRA and direct bill services is highly competitive, rapidly evolving and fragmented. Key categories of competitors include national CDB specialists, health insurance carriers, human resource consulting firms, payroll providers, small regional TPAs, and commercial banks.

We believe our focus on CDB and benefit continuation programs, our high quality service and our highly scalable delivery model are our key competitive advantages in the market.

## Intellectual Property

Our success depends in part on our ability to protect our core technology and intellectual property. To accomplish this, we rely on a combination of patent laws, trade secrets, including know-how, employee and third-party nondisclosure agreements, copyright laws, trademarks, intellectual property licenses and other contractual rights to establish and protect our proprietary rights in our technology. We have one issued patent which expires in 2022.

Despite our efforts to preserve and protect our proprietary and intellectual property rights, unauthorized third parties may attempt to copy, reverse engineer, or otherwise obtain portions of our products. Competitors may attempt to develop similar products that could compete in the same market as our products. Unauthorized disclosure of our confidential information by our employees or third parties could occur.

Third-party infringement claims are also possible in our industry, especially as software functionality and features expand, evolve, and overlap with other industry segments. Current and future competitors, as well as non-practicing patent holders, could claim at any time that some or all of our products infringe on patents they now hold or might obtain, or be issued in the future.

## Employees

At December 31, 2015, we had 1,480 employees, including 1,335 full-time employees, 13 part-time employees and 132 temporary or seasonal employees. There are 113 employees located in our Northern California headquarters and the remainder are located in our various other offices throughout the U.S. or work remotely from various locations. None of our employees are currently represented by labor unions or are covered by a collective bargaining agreement with respect to his or her employment. To date, we have not experienced any work stoppages, and we consider our relationship with our employees to be good.

## Legal Proceedings

From time-to-time, we are subject to various legal proceedings that arise in the normal course of our business activities. In addition, from time-to-time, third parties may assert intellectual property infringement claims against us in the form of letters and other forms of communication. As of December 31, 2015, we are not a party to any litigation whereby the outcome of which, if determined adversely to us, would individually or in the aggregate be reasonably expected to have a material adverse effect on our results of operations, prospects, cash flows, financial position or brand.

## Item 1A. Risk Factors

### RISK FACTORS

*You should carefully consider the risks described below together with the other information set forth in this report, which could materially affect our business, financial condition and future results. The risks described below are not the only risks facing our company. Risks and uncertainties not currently known to us or that we currently deem to be immaterial also may materially adversely affect our business, financial condition and operating results. If any of the following risks is realized, our business, financial condition, results of operations and prospects could be materially and adversely affected. In that event, the trading price of our common stock could decline.*

***Our business is dependent upon the availability of tax-advantaged Consumer-Directed Benefits to employers and employees and any diminution in, elimination of, or change in the availability of these benefits would materially adversely affect our results of operations, financial condition, business and prospects.***

Our business fundamentally depends on employer and employee demand for tax-advantaged Consumer-Directed Benefits, or CDBs. Any diminution in or elimination of the availability of CDBs for employees would materially adversely affect our results of operations, financial condition, business and prospects. In addition, incentives for employers to offer CDBs may also be reduced or eliminated by changes in laws that result in employers no longer realizing financial gain from the implementation of these benefits. If employers cease to offer CDB programs or reduce the number of programs they offer to their employees, our results of operations, financial condition, business and prospects would also be materially adversely affected. We are not aware of any reliable statistics on the growth of CDB programs and cannot assure you that participation in CDB programs will grow.



In addition, if the payroll tax savings employers currently realize from their employees' utilization of CDBs become reduced or unavailable, employers may be less inclined to offer these programs to their employees. If the tax savings currently realized by employee participants by utilizing CDBs were reduced or unavailable, we expect employees would correspondingly reduce or eliminate their participation in such CDB plans. Any such reduction in employer or employee incentives would materially adversely affect our results of operations, financial condition, business and prospects.

***Future portfolio purchases and acquisitions are an important aspect of our growth strategy, and any failure to successfully identify, acquire or integrate acquisitions or additional portfolio targets could materially adversely affect our ability to grow our business. In addition, costs of integrating acquisitions and portfolio purchases may adversely affect our results of operations in the short term.***

Our recent growth has been, and our future growth will be, substantially dependent on our ability to continue to make and integrate acquisitions and complementary portfolio purchases to expand our employer client base and service offerings. Since 2007, we have completed seven portfolio purchases and two acquisitions. Our successful integration of these portfolio purchases and acquisitions into our operations on a cost-effective basis is critical to our future financial performance. While we believe that there are numerous potential portfolio purchases and acquisitions that would add to our employer client base and service offerings, we cannot assure you that we will be able to successfully make a sufficient number of such portfolio purchases or acquisitions in a timely and effective manner in order to support our growth objectives. In addition, the process of integrating portfolio purchases and acquisitions may create unforeseen difficulties and expenditures. We face various risks in making portfolio purchases and any acquisitions, including:

- our ability to retain acquired employer clients and their associated revenues;
- diversion of management's time and focus from operating our business to address integration challenges;
- our ability to retain or replace key employees from acquisitions and portfolios we acquire;
- cultural and logistical challenges associated with integrating employees from acquired portfolios into our organization;
- our ability to integrate the combined products, services and technology;
- the migration of acquired employer clients to our technology platforms;
- our ability to cross-sell additional CDB programs to acquired employer clients;
- our ability to realize expected synergies;
- the need to implement or improve internal controls, procedures and policies appropriate for a public company at businesses that, prior to the portfolio purchase or acquisition, may have lacked effective controls, procedures and policies, including, but not limited to, processes required for the effective and timely reporting of the financial condition and results of operations of the acquired business, both for historical periods prior to the acquisition and on a forward-looking basis following the acquisition;
- possible write-offs or impairment charges that result from acquisitions and portfolio purchases;
- unanticipated or unknown liabilities that relate to purchased businesses;
- the need to implement or improve internal controls relating to privacy, security and data protection;
- the need to integrate purchased businesses' accounting, management information, human resources, and other administrative systems to permit effective management; and
- any change in one of the many complex federal or state laws or regulations that govern any aspect of the financial or business operations of our business and businesses we acquire, such as state escheatment laws.

Portfolio purchases and acquisitions may have a short-term material adverse impact on our results of operations, including a potential material adverse impact on our cost of revenues, as we seek to migrate acquired employer clients to our proprietary technology platforms, typically over the succeeding 12 to 24 months, in order to achieve additional operating efficiencies. Additionally, from time to time, we may incur material costs and charges related to consolidating our operations following our portfolio purchases and acquisitions.

***If we are unable to retain and expand our employer client base, establish new channel partnerships and exchange relationships, our results of operations, financial condition, business and prospects would be materially adversely affected.***

Most of our revenue is derived from the long term, multi-year agreements that we typically enter into with our employer clients. The initial subscription period is typically three years for our enterprise clients and one to three years for our SMB and mid-market clients. We also derive revenue from our channel partner agreements with Aflac Incorporated, or Aflac, and Ceridian. We anticipate in the future establishing new channel partnerships with other companies. Our employer clients, however, have no obligation to renew their agreements with us after the initial term and we cannot assure you that our employer clients will continue to renew their agreements at the same rate, if at all. In addition, employer clients transitioning to us from a channel partner have no obligation to



enter into agreements with us and, if they do, there is no guarantee that they will renew their agreements with us after the initial transition period. In addition, our exchange relationships contribute development revenue as well as monthly subscriber fees to our revenue and there is no guarantee that we will be able to retain and maintain these relationships in their current form or add additional exchange partners.

Moreover, most of our employer clients have the right to cancel their agreements for convenience, subject to certain notice requirements. While few employer clients have terminated their agreements with us for convenience, some of our employer clients have elected not to renew their agreements with us. Our employer clients' renewal rates may decline or fluctuate as a result of a number of factors, including the prices of competing products or services or reductions in our employer clients' spending levels.

Another important aspect of our growth strategy depends upon our ability to maintain our existing channel partner relationships and exchange relationships and develop new relationships. No assurance can be given that new channel partners or exchange opportunities will be found, that any such new relationships will be successful when they are in place, or that business with our current channel partners or exchange opportunities will increase at the level necessary to support our growth objectives. If our employer clients do not renew their agreements with us, and we are unable to attract new employer clients, channel or exchange partners, our revenue may decline and our results of operations, financial condition, business and prospects may be materially adversely affected.

***The market for our services and our business may not grow if our marketing efforts do not successfully raise awareness among employers and employees about the advantages of adopting and participating in CDB programs.***

Our revenue model is substantially based on the number of employee participants enrolled in the CDB programs that we administer. We devote significant resources to educating both employers and their employees on the potential cost savings available to them from utilizing CDB programs. We have created various marketing, educational and awareness tools to inform employers about the benefits of offering CDB programs to their employees and how our services allow them to offer these benefits in an efficient and cost effective manner. We also provide marketing information to employees that informs them about the potential tax savings they can achieve by utilizing CDB programs to pay for their healthcare, commuter and other benefit needs. However, if more employers and employees do not become aware of or understand these potential cost savings and choose to adopt CDB programs, our results of operations, financial condition, business and prospects may be materially adversely affected.

In addition, there is no guarantee that the market for our services will grow as we expect. For example, the value of our services is directly related to the complexity of administering CDB programs and government action that significantly reduces or simplifies these requirements could reduce demand or pricing for our services. Further, employees may not participate in CDB programs because they have insufficient funds to set aside into such programs, find the rules regarding the use of such programs too complex, or otherwise. If the market for our services declines or develops more slowly than we expect, or the number of employer clients that select us to provide CDB programs to their employee participants declines or fails to increase as we expect, our results of operations, financial condition, business and prospects could be materially adversely affected.

***Our business and prospects may be materially adversely affected if we are unable to cross-sell our products and services.***

A significant component of our growth strategy is the increased cross-selling of products and services to current and future employer clients. In particular, many of our employer clients use only one of our products so we expect our ability to cross-sell our commuter programs to our healthcare program clients and our healthcare programs to our commuter employer clients to be an important part of this strategy. We may not be successful in cross-selling our products and services if our employer clients find our additional products and services to be unnecessary or unattractive. Any failure to sell additional products and services to current and future clients could materially adversely affect our results of operations, financial condition, business and prospects.

***Failure to ensure and protect the confidentiality and security of participant data could lead to legal liability, adversely affect our reputation and have a material adverse effect on our results of operations, business or financial condition.***

We must collect, store and use employee participants' confidential information and transmit that data to third parties, to provide our services. For example, we collect names, addresses, social security numbers and other personally identifiable information from employee participants. In addition, we facilitate the issuance and funding of prepaid debit cards and, in some cases, collect bank routing information, account numbers and personal credit card information for purposes of funding an account or issuing a reimbursement. We have invested significantly in preserving the security of this data.

In addition, we utilize third-party platforms and outsource customer support center services and claims processing services to third-party service providers to whom we transmit certain confidential information of our employee participants. We have security measures in place with each of these service providers to help protect this confidential information, including written agreements that outline how protected health information will be handled and shared. However, there are no assurances that these measures, or any additional security measures that our service providers may have in place, will be sufficient to protect this outsourced confidential information from unauthorized security breaches.

We cannot assure you that, despite the implementation of these security measures, we will not be subject to a security incident or other data breach or that this data will not be compromised. We may be required to expend significant capital and other resources to protect against security breaches or to alleviate problems caused by security breaches, or to pay penalties as a result of such breaches. Despite our implementation of security measures, techniques used to obtain unauthorized access or to sabotage systems change frequently. As a result, we may be unable to anticipate these techniques or implement adequate preventative measures to protect this data. In addition, security breaches can also occur as a result of non-technical issues, including intentional or inadvertent breaches by our employees or service providers or by other persons or entities with whom we have commercial relationships. Any compromise or perceived compromise of our security could damage our reputation with our clients, brokers and channel partners, and could subject us to significant liability, as well as regulatory action, including financial penalties, which would materially adversely affect our brand, results of operations, financial condition, business and prospects.

***We have incurred, and expect to continue to incur, significant costs to protect against and respond to security breaches. We may incur significant additional costs in the future to address problems caused by any actual or perceived security breaches.***

Breaches of our security measures or those of our third-party service providers or security incidents could result in unauthorized access to our sites, networks and systems; unauthorized access to, misuse or misappropriation of employer client or employee participants' information, including personally identifiable information, or other confidential or proprietary information of ourselves or third parties; viruses, worms, spyware or other malware being served from our sites, networks or systems; deletion or modification of content or the display of unauthorized content on our sites; interruption, disruption or malfunction of operations; costs relating to notification of individuals, or other forms of breach remediation; deployment of additional personnel and protection technologies; response to governmental investigations and media inquiries and coverage; engagement of third-party experts and consultants; litigation, regulatory investigations, prosecutions, and other actions, and other potential liabilities. If any of these events occurs, or is believed to occur, our reputation and brand could be damaged, our business may suffer, we could be required to expend significant capital and other resources to alleviate problems caused by such actual or perceived breaches, we could be exposed to a risk of loss, litigation or regulatory action and possible liability, and our ability to operate our business, including our ability to provide access, usage or maintenance and support services to our customers, may be impaired. If current or prospective employer clients or employee participants believe that our systems and solutions do not provide adequate security for the storage of personal or other sensitive information or its transmission over the Internet, our business and our financial results could be harmed. Additionally, actual, potential or anticipated attacks may cause us to incur increasing costs, including costs to deploy additional personnel and protection technologies, train employees and engage third-party experts and consultants.

Although we maintain privacy, data breach and network security liability insurance, we cannot be certain that our coverage will be adequate for liabilities actually incurred or that insurance will continue to be available to us on economically reasonable terms, or at all. Any actual or perceived compromise or breach of our security measures, or those of our service providers, or any unauthorized access to, misuse or misappropriation of consumer information or other confidential business information, could violate applicable laws and regulations, contractual obligations or other legal obligations and cause significant legal and financial exposure, adverse publicity and a loss of confidence in our security measures, any of which could have a material adverse effect on our business, financial condition and operating results.

***Our business is subject to a variety of laws and regulations, including those regarding privacy, data protection and information security, and our customers, channel partners and service providers are subject to regulations related to the handling and transfer of certain types of sensitive and confidential information. Any failure of our infrastructure, our platform, third-party platforms that we utilize, or our solutions to enable us or our customers, channel partners and service providers to comply with applicable laws and regulations would harm our business, financial condition and operating results.***

As part of our business, we collect employee participants' personal data for the sole purpose of processing their benefits. Our services and solutions are subject to privacy- and data protection-related laws and regulations that impose obligations in connection with the collection, processing and use of personal data, financial data, health data or other similar data. Among other things, we have access to, and our employer clients and employee participants are able to use our solutions to handle and transfer, personally identifiable information and other data of our current and prospective employee participants and others. The U.S. federal and various state and other jurisdictional governments have adopted or proposed limitations on, or requirements regarding, the collection, distribution, use, security and storage of personally identifiable information and other data, and the Federal Trade Commission and numerous state attorneys general are applying federal and state consumer protection laws to impose standards on the online collection, use and dissemination of data, and to the security measures applied to such data. In addition, we may find it necessary or desirable to join industry or other self-regulatory bodies or other privacy- or data protection-related organizations that require compliance with their rules pertaining to privacy and data protection. We are also bound by contractual obligations relating to our collection, use and disclosure of personal, financial and other data. Although we are comply with applicable laws, regulations, industry standards, contractual obligations and other legal obligations that apply to us, these are constantly evolving and may be modified, may be interpreted and applied in an inconsistent manner from one jurisdiction to another, and may conflict with one another, other requirements or legal obligations or our practices.

In addition, various federal, state and other legislative or regulatory bodies have in place and may enact new or additional laws and regulations mandating certain disclosures, including disclosures of personally identifiable information, to domestic enforcement bodies, which could adversely impact our business, our brand or our reputation with employer clients and employee participants. Despite our efforts to protect customer data, perceptions that the privacy of personal information is not satisfactorily protected in connection with our products or services could inhibit sales of our products or services, could limit adoption of our services by consumers, businesses, and government entities, and could expose us to claims or litigation. Additional privacy- or data security-related measures we may take to address such customer concerns, constraints on our flexibility to determine how to respond to customer expectations or governmental rules or actions, or costs associated with compliance with law enforcement or other regulatory authority demands or requests may adversely affect our business and operating results.

Any failure or perceived failure by us to comply with applicable laws, regulations, policies, industry standards, contractual obligations or other legal obligations relating to privacy or data security, or any security incident that results in the unauthorized access to, or acquisition, release or transfer of, personally identifiable information or other customer data may result in governmental or regulatory investigations, inquiries, enforcement actions and prosecutions, private litigation, fines and penalties or adverse publicity and could cause our employer clients, employee participants, and others to lose trust in us, which could have an adverse effect on our reputation, business, financial condition and results of operations.

Our services and solutions are subject to numerous laws and regulations related to the privacy and security of personal health information, including those promulgated pursuant to HIPAA, as well as HITECH, which was enacted as part of the American Recovery and Reinvestment Act of 2009, which require the implementation of administrative, physical and technological safeguards to ensure the confidentiality and integrity of individually identifiable health information in electronic form. Further, our services and solutions are subject to Payment Card Industry, or PCI, data security standards that impose requirements regarding the storage and processing of payment card information. If we cannot comply with, or if we incur a violation of, any of these obligations, we could incur significant liability or our growth could be adversely impacted, either of which could have an adverse effect on our reputation, business, financial condition and operating results.

We expect that there will continue to be new proposed laws, regulations, industry standards, contractual obligations and other obligations concerning privacy, data protection and information security and we cannot yet determine the impact of such future laws, regulations, standards and obligations may have on our business. Future laws, regulations, standards and other obligations, or changed interpretations of the foregoing, could, for example, impair our ability to collect, use or store information that we utilize to provide our services, thereby impairing our ability to maintain and grow our total customer base and increase revenues. New laws, amendments to or re-interpretations of existing laws and regulations, industry standards, contractual obligations and other obligations may impact our business and practices. We may be required to expend significant resources to modify our solutions and otherwise adapt to these changes, which we may be unable to do on commercially reasonable terms or at all, and our ability to develop new solutions and features could be limited. These developments could harm our business, financial condition and results of operations.

Any such new laws, regulations, industry standards, or other legal obligations or any changed interpretation of existing laws, regulations, industry standards, or other obligations may require us to incur additional costs and restrict our business operations. If our privacy or data security measures fail to comply with current or future laws, regulations, policies, legal obligations or industry standards, or any changed interpretations of the foregoing, we may be subject to litigation, regulatory investigations, enforcement actions, inquiries, prosecutions, fines or other liabilities, as well as negative publicity and a potential loss of business. Moreover, if future laws, regulations, industry standards, or other legal obligations, or any changed interpretations of the foregoing, limit the ability of our customers, channel partners or service providers to use and share personally identifiable information or other data or our ability to store, process and share personally identifiable information or other data, demand for our solutions could decrease, our costs could increase and our business, financial condition and operating results could be harmed.

***A breach of our IT security, loss of customer data or system disruption could have a material adverse effect on our results of operations, business or financial condition and reputation.***

Our business is dependent on our transaction, financial, accounting and other data processing systems, as well as instances of third-party service provider systems that we use to provide our services. We rely on these systems to process, on a daily basis, a large number of complicated transactions. Any security breach in our business processes and/or systems, or those third-party systems that we use, has the potential to impact our customer information and our financial reporting capabilities which could result in the potential loss of business and our ability to accurately report information. If any of these systems fail to operate properly or become disabled even for a brief period of time, we could potentially lose control of customer data and we could suffer financial loss, a disruption of our businesses, liability to clients, regulatory intervention or damage to our reputation. In addition, any issue of data privacy as it relates to unauthorized access to or loss of employer client and/or employee participant information could result in the potential loss of business, damage to our market reputation, litigation and regulatory investigation and penalties. Our continued investment in the security of our IT systems, continued efforts to improve the controls within our IT systems and those of any service providers that we use to provide our services, business processes improvements, and the enhancements to our culture of information security may not successfully prevent attempts to breach our security or unauthorized access to confidential, sensitive or proprietary information.

In addition, we depend on information technology networks and systems to collect, process, transmit and store electronic information and to communicate among our locations and with our channel partners, service providers, employer clients and employee participants. Security breaches could lead to shutdowns or disruptions of our systems and potential unauthorized disclosure of confidential information. We also are required at times to manage, utilize and store sensitive or confidential employer client and employee participant data, as well as our own employee data in the regular course of business. As a result, we are subject to numerous laws and regulations designed to protect this information, including various U.S. federal and state laws governing the protection of health or other individually identifiable information, all of which are further described in Part I, Item 1, “*Business- Government Regulation*” of this Annual Report on Form 10-K. If any person, including any of our personnel, fails to comply with, disregards or intentionally breaches our established controls with respect to such data or otherwise mismanages or misappropriates that data, we could be subject to monetary damages, fines or criminal prosecution. Unauthorized disclosure of sensitive or confidential data, whether through systems failure, accident, employee negligence, fraud or misappropriation, could damage our reputation and cause us to lose customers. Similarly, unauthorized access to or through our information systems or those we develop or utilize in connection with our provision of services, whether by our personnel or third parties, could result in significant additional expenses (including expenses relating to notification of data security breaches and costs of credit monitoring services), negative publicity, legal liability and damage to our reputation, as well as require substantial resources and effort of management, thereby diverting management’s focus and resources from business operations.

***We may be unable to compete effectively against our current and future competitors.***

The market for our products and services is highly competitive, rapidly evolving and fragmented. We have numerous competitors, including health insurance carriers, human resources consultants and outsourcers, payroll providers, national CDB specialists, regional third party administrators and commercial banks. Many of our competitors, including health insurance carriers, have longer operating histories and significantly greater financial, technical, marketing and other resources than we have. As a result, some of these competitors may be in a position to devote greater resources to the development, promotion, sale and support of their products and services.

In addition, if one or more of our competitors were to merge or partner with another of our competitors, the change in the competitive landscape could materially adversely affect our ability to compete effectively. Our competitors may also establish or strengthen cooperative relationships with our current or future strategic brokers, insurance carriers, payroll services companies, private exchanges, third-party advisors or other parties with which we have relationships, thereby limiting our ability to promote our CDB programs with these parties and limiting the number of brokers available to sell or market our programs. If we are unable to compete effectively with our competitors for any of the foregoing reasons, our results of operations, financial condition, business and prospects could be materially adversely affected.

***Changes in healthcare, security and privacy laws and other regulations applicable to our business may constrain our ability to offer our products and services.***

Changes in healthcare or other laws and regulations applicable to our business may occur that could increase our compliance and other costs of doing business, require significant systems enhancement, or render our products or services less profitable or obsolete, any of which could have a material adverse effect on our results of operations.

The PPACA signed into law on March 23, 2010 and related regulations or regulatory actions could adversely affect our ability to offer certain of our CDBs in the manner that we do today or may make CDBs less attractive to some employers. For example, any new laws that increase reporting and compliance burdens on employers may make them less likely to offer CDBs to their employees and instead offer employees benefit coverage through public exchanges. In addition, it is unclear whether the “Cadillac Tax”, now delayed until 2020, will be modified so that employee contributions to FSAs and HSAs are excluded from the calculation or if the entire tax will be repealed. If employers are less incentivized to offer our CDB programs to employees because of the Cadillac Tax increased regulatory burdens, costs or otherwise, our results of operations and financial condition could be materially adversely affected.

In addition, the numerous federal and state laws and regulations related to the privacy and security of personal health information, in particular those promulgated pursuant to HIPAA require the implementation of administrative, physical and technological safeguards to ensure the confidentiality and integrity of individually identifiable health information in electronic form. We are required to enter into written agreements with all of our employer clients known as Business Associate Agreements. Pursuant to these agreements, and as our employer client’s “Business Associate” thereunder, we are required to safeguard all individually identifiable health information of their participating employees and are restricted in how we use and disclose such information. These agreements also contain data security breach notification requirements which, in some circumstances, may be more stringent than HIPAA requirements. As we are unable to predict what changes to HIPAA or other privacy and security laws or regulations might be made in the future, we can’t be certain how those changes could affect our business or the costs of compliance.

***We plan to extend and expand our products and services and introduce new products and services, and we may not accurately estimate the impact of developing and introducing these products and services on our business.***

We intend to continue to invest in technology and development to create new and enhanced products and services to offer our employer clients and their participating employees. Scalability of our platform remains an on-going focus as our platform volume increases. We continue to make investments in technology upgrades to ensure stability and performance of our applications for our clients and participants. Despite quality testing of technology prior to use, it may contain errors that impact its function and performance and this may result in negative consequences. We have limited experience in these areas and so we may not be able to anticipate or manage new risks and obligations or legal, compliance or other requirements that may arise. The anticipated benefits of such new and improved products and services may not outweigh the costs and resources associated with their development.

Our ability to attract and retain new employer clients and increase revenue from existing employer clients will depend in large part on our ability to enhance and improve our existing products and services and to introduce new products and services. The success of any enhancement or new product or service depends on several factors, including the timely completion, introduction and market acceptance of the enhancement or new product or service. Any new product or service we develop or acquire may not be introduced in a timely or cost-effective manner and may not achieve the broad market acceptance necessary to generate significant revenue. If we are unable to successfully develop or acquire new products or services or enhance our existing products or services to meet client requirements, our results of operations, financial condition, business or prospects may be materially adversely affected.

***If we fail to manage future growth effectively, we may not be able to market and sell our products and services successfully.***

We have expanded our operations significantly in recent years and anticipate that further expansion will be required in order for us to grow our business. If we do not effectively manage our growth, the quality of our services could suffer, which could materially adversely affect our results of operations, financial condition, business and prospects, and damage our brand and reputation among existing and prospective clients. In order to manage our future growth, we will need to hire, integrate and retain highly skilled and motivated employees. We will also be required to continue to improve our existing systems for operational and financial information management, including our reporting systems, procedures and controls and regulatory compliance processes. These improvements may require significant capital expenditures and will place increasing demands on our management. We may not be successful in managing or expanding our operations, or in maintaining adequate operating and financial information systems and controls. If we are not successful in implementing improvements in these areas, our results of operations, financial condition, business and prospects would be materially adversely affected.

***General economic and other conditions may adversely affect trends in employment and hiring patterns, which could result in lower employee participation in CDB programs, which would materially adversely affect our results of operations, financial condition, business and prospects.***

Our revenue is attributable to the number of employee participants at each of our employer clients, which in turn is influenced by the employment and hiring patterns of our employer clients. To the extent our employer clients freeze or reduce their headcount or wages paid because of general economic or other conditions, demand for our programs may decrease, which could materially adversely affect our results of operations, financial condition, business and prospects.

***Failure to effectively develop and expand our direct and indirect sales channels may materially adversely affect our results of operations, financial condition, business and prospects and reduce our growth.***

We will need to continue to expand our sales and marketing infrastructure in order to grow our employer client base and our business. We rely on our enterprise sales force to target new Fortune 1000 client accounts and sell into the private exchanges, as well as to cross-sell additional products and services to our existing enterprise clients. Effectively training our sales personnel requires significant time, expense and attention. In addition, we utilize various channel brokers, including insurance agents, benefits consultants, regional and national insurance carriers, health plans, payroll companies, banks and regional third party administrators, to sell and market our programs to employers. If we are unable to develop and expand our direct sales team, our indirect sales channels, or become a partner to more private exchanges, our ability to attract new employer clients may be negatively impacted and our growth opportunities will be reduced, each of which would materially adversely affect our results of operations, financial condition, business and prospects.

If our efforts to develop and expand our direct and indirect sales channels do not generate a corresponding increase in revenue, our business may be materially adversely affected. In particular, if we are unable to effectively train our sales personnel or if our direct sales personnel are unable to achieve expected productivity levels in a reasonable period of time, we may not be able to increase our revenue and grow our business.

***Long sales cycles make the timing of our long-term revenues difficult to predict.***

Our average sales cycle ranges from approximately two months for small opportunities to over a year for large and significant new indirect business. Factors that may influence the length of our sales cycle include:

- the need to educate potential employer clients about the uses and benefits of our CDB programs;
- the relatively long duration of the commitment clients make in their agreements with us or with pre-existing plan administrators;
- the discretionary nature of potential employer clients' purchasing and budget cycles and decisions;
- the competitive nature of potential employer clients' evaluation and purchasing processes;
- fluctuations in the CDB program needs of potential employer clients; and
- lengthy purchasing approval processes of potential employer clients.

If we are unable to close an expected significant transaction with one or more of these potential clients in the anticipated period, our operating results for that period, and for any future periods in which revenue from such transaction would otherwise have been recognized, would be harmed.

***Our business and operational results are subject to seasonality as a result of open enrollment for CDB programs and decreased use of commuter program offerings during typical vacation months.***

The number of accounts that generate revenue is typically greatest during our first calendar quarter. This is primarily due to two factors. First, new employer clients and their employee participants typically begin service on January 1. Second, during the first calendar quarter, we are also servicing the end of plan year activity for existing clients, including assisting our clients with initiating the deduction of healthcare premiums on a tax deferred basis, and employee participants who do not continue participation into the next plan year.

Generally, in comparison to other quarters, our revenue is highest in the first quarter and lowest in the second and third quarters. Thereafter, our revenue generally grows gradually in the fourth quarter as our employer clients hire new employees who then elect to participate in our programs, thereby increasing our monthly minimum billing amount. The minimum billing amount is not, however, generally subject to downward revision when employees leave their employers because we continue to administer those former employee participants' accounts for the remainder of the plan year. Revenue from commuter programs may vary from month-to-month because employees may elect to participate in our commuter programs at any time during the year and may change their election to participate or the amount of their contribution on a monthly basis; however, participation rates in our commuter business typically slow during the summer as people take vacations and do not purchase transit passes or parking passes during that time.

Our operating expenses increase during the fourth quarter because of increased debit card production and because we increase our customer support center capacity to answer questions from employee participants during the open enrollment periods related to their CDB participation decisions. The cost of providing services peaks in the first quarter as new employee participants contact us for information about their CDBs, and as terminating employee participants submit their final claims for reimbursement.

***Our operating results can fluctuate from period to period, which could cause our share price to fluctuate.***

Fluctuations in our quarterly operating results could cause our stock price to decline rapidly, may lead analysts to change their long-term models for valuing our common stock, could cause short-term liquidity issues, may impact our ability to retain or attract key personnel or cause other unanticipated issues. If our quarterly operating results or guidance fall below the expectations of research analysts or investors, the price of our common stock could decline substantially. Our quarterly operating expenses and operating results may vary significantly in the future and period-to-period comparisons of our operating results may not be meaningful. You should not rely on the results of one quarter as an indication of future performance.

***If employee participants do not continue to utilize our prepaid debit cards or choose to use PIN rather than signature enabled prepaid debit cards, our results of operations, business and prospects could be materially adversely affected.***

We derive a portion of our revenue from interchange fees that are paid to us when employee participants utilize our prepaid debit cards to pay for certain healthcare and commuter expenses under our CDB programs. These fees represent a percentage of the expenses transacted on each debit card. If our employer clients do not adopt these prepaid debit cards as part of the benefits programs they offer, if the employee participants do not use them at the rate we expect, if employee participants choose to process their transactions over PIN networks rather than signature networks or if other alternatives to prepaid tax-advantaged benefit cards develop, our results of operations, business and prospects could be materially adversely affected.



***If we are unable to maintain and enhance our brand and reputation, our ability to sustain and grow our business may be materially adversely affected.***

Maintaining and strengthening our brand is critical to attracting new clients and growing our business. Our ability to maintain and strengthen our brand and reputation will depend heavily on our capacity to continue to provide high levels of customer service to our employer clients and their employee participants at cost effective and competitive prices, which we may not do successfully. In addition, our continued success depends, in part, on our reputation as an industry leader in promoting awareness and understanding of the positive impact of CDBs among employers and employees. If we fail to successfully maintain and strengthen our brand, our results of operations, financial condition, business and prospects will be materially adversely affected.

***Some plan providers with which we have relationships also provide, or may provide, competing services.***

We face competitive risks in situations where some of our strategic partners are also current or potential competitors. For example, certain of the banks we utilize as custodians of the funds for our HSA employee participants also offer their own HSA products. To the extent that these partners choose to offer competing products and services that they have developed or in which they have an interest to our current or potential clients, our results of operations, business and prospects could be materially adversely affected.

***We are subject to complex regulation, and any compliance failures or regulatory action could materially adversely affect our business.***

The plans we administer and, as a result, our business are subject to extensive, complex and continually changing federal and state laws and regulations, including IRS regulations; ERISA, HIPAA, HITECH and other privacy and data security regulations; and the PPACA, all of which are further described in Part I, Item 1, “*Business — Government Regulation*” of this Annual Report on Form 10-K. If we fail to comply with any applicable law, rule or regulation, we could be subject to fines and penalties, indemnification claims by our clients, or become the subject of a regulatory enforcement action, each of which would materially adversely affect our business and reputation.

We may also become subject to additional regulatory and compliance requirements as a result of changes in laws or regulations, or as a result of any expansion or enhancement of our existing products and services or the development of any new products or services in the future. For example, if we expand our product and service offerings into the health insurance market in the future, we would become subject to state Department of Insurance regulations. Compliance with any new regulatory requirements may divert internal resources and take significant time and effort.

Any claims of noncompliance brought against us, regardless of merit or ultimate outcome, could subject us to investigation by the DOL, the IRS, the Centers for Medicare and Medicaid Services, the U.S. Department of the Treasury or other federal and state regulatory authorities, which could result in substantial costs to us and divert management’s attention and other resources away from our operations. In addition, investor perceptions of us may suffer and could cause a decline in the market price of our common stock. Our compliance processes may not be sufficient to prevent assertions that we failed to comply with any applicable law, rule or regulation.

***Our inability to successfully recover should we experience a disaster or other business continuity problem could cause material financial loss, loss of human capital, breach of confidential information, regulatory actions, reputational harm or legal liability.***

Should we experience a disaster or other business continuity problem, either natural or man-made, our ability to protect our infrastructure, including customer data, and maintain ongoing operations will depend, in part, on the availability of our personnel, our office facilities, and the proper functioning of our computer, telecommunication and other related systems and operations. In such an event, we could experience near-term operational challenges with regard to particular areas of our operations.

In particular, our ability to recover from any disaster or other business continuity problem will depend on our ability to protect our technology infrastructure against damage from business continuity events that could have a significant disruptive effect on our operations. Our business continuity plan may not be successful in mitigating the effects of a disaster or other business continuity problem. We could potentially lose client data, experience a breach of security or confidential information, or experience material adverse interruptions to our operations or delivery of services to our clients in a disaster.

We will continue to regularly assess and take steps to improve upon our business continuity plans. However, a disaster on a significant scale or affecting certain of our key operating areas within or across regions, or our inability to successfully recover should we experience a disaster or other business continuity problem, could materially interrupt our business operations and cause material financial loss, loss of human capital, breach of confidential information, regulatory actions, reputational harm, damaged client relationships and legal liability.



***If we fail to effectively upgrade our information technology systems, our business and operations could be disrupted.***

As part of our efforts to continue the improvement of our enterprise resource planning, we plan to upgrade our existing information technology systems in order to automate several controls that are currently performed manually. We may experience difficulties in transitioning to these upgraded systems, including loss of data and decreases in productivity as personnel work to become familiar with these new systems. In addition, our management information systems will require modification and refinement as we grow and as our business needs change, which could prolong difficulties we experience with systems transitions, and we may not always employ the most effective systems for our purposes. If we experience difficulties in implementing new or upgraded information systems or experience significant system failures, or if we are unable to successfully modify our management information systems or respond to changes in our business needs, we may not be able to effectively manage our business and we may fail to meet our reporting obligations.

***Our future success depends on our ability to recruit and retain qualified employees, including our executive officers and directors.***

Our success is substantially dependent upon the performance of our senior management, such as our chief executive officer. Our management and employees may terminate their employment at any time, and the loss of the services of any of our executive officers could materially adversely affect our business. Our success is also substantially dependent upon our ability to attract additional personnel for all areas of our organization. Competition for qualified personnel is intense, and we may not be successful in attracting and retaining such personnel on a timely basis, on competitive terms or at all. Additionally, it may be more difficult for us to attract and retain qualified individuals to serve on our board of directors or as our executive officers due to potential liability concerns related to serving on a public company. If we are unable to attract and retain the necessary personnel, our results of operations, financial condition, business and prospects would be materially adversely affected.

***Changes in credit card association or other network rules or standards set by Visa or MasterCard, or changes in card association and debit network fees or products or interchange rates, could materially adversely affect our results of operations, business and financial position.***

We, and the banks that issue our prepaid debit cards, are subject to Visa and MasterCard association rules that could subject us to a variety of fines or penalties that may be levied by the card associations or networks for acts or omissions by us or businesses that work with us, including card processors, such as Alegeus. The termination of the card association registrations held by us or any of the banks that issue our cards, or any changes in card association or other debit network rules or standards, including interpretation and implementation of existing rules, participants deciding to use PIN networks, standards or guidance that increase the cost of doing business or limit our ability to provide our products and services, or limit our ability to receive interchange, could have a material adverse effect on our results of operations, financial condition, business and prospects. In addition, from time-to-time, card associations increase the organization or processing fees that they charge, which could increase our operating expenses, reduce our profit margin and materially adversely affect our results of operations, financial condition, business and prospects.

***We have entered into outsourcing and other agreements with third parties related to certain of our business operations, and any difficulties experienced in these arrangements could result in additional expense, loss of revenue or an interruption of our services.***

We have entered into outsourcing agreements with third parties to provide certain customer service and related support functions to our employer clients and their employee participants. As a result, we rely on third parties over which we have limited control. If these third parties are unable to perform to our requirements or to provide the level of service required or expected by our employer clients, including ensuring the privacy and integrity of individually identifiable health information that they may be privy to as a result of the services they perform for our employer clients and their employee participants, our operating results, financial condition, business, prospects and reputation may be materially harmed. In addition, we may be forced to pursue alternative strategies to provide these services, which could result in delays, interruptions, additional expenses and loss of clients and related revenues.

***If our intellectual property and technology are not adequately protected to prevent use or appropriation by our competitors, our business and competitive position could be materially adversely affected.***

We rely on a combination of copyright, trademark and trade secret laws, as well as confidentiality procedures and contractual provisions, to establish and protect our intellectual property rights in the United States.

The efforts we have taken to protect our intellectual property may not be sufficient or effective, and our trademarks and copyrights may be held invalid or unenforceable. We may not be effective in policing unauthorized use of our intellectual property, and even if we do detect violations, litigation may be necessary to enforce our intellectual property rights. Any enforcement efforts we undertake, including litigation, could be time consuming and expensive, could divert our management's attention and may result in a court determining that our intellectual property rights are unenforceable. If we are not successful in cost-effectively protecting our intellectual property rights, our results of operations, financial condition, business and prospects could be materially adversely affected.

***Our ability to use net operating loss carryforwards to offset future taxable income may be limited.***

As of December 31, 2015, we had \$10.9 million of federal and \$30.9 million of state net operating loss carryforwards available to offset future regular and alternative minimum taxable income. The state net operating loss carryforward has been prepared on a post-apportionment basis. These net operating loss carryforwards will expire in the year 2033 for U.S. federal income tax purposes and in years 2016 through 2033 for state income tax purposes, if not fully utilized. In addition, we have federal and state research and development credit carryforwards of approximately \$5.5 million and \$3.1 million, respectively. The federal research credit carryforwards expire beginning in 2022 through 2035, if not fully utilized. The state research credit carries forward indefinitely for the state of California and twenty years for the state of Texas. Our ability to utilize net operating loss and tax credit carryforwards are subject to restrictions, including limitations in the event of past or future ownership changes as defined in Section 382 of the Internal Revenue Code, or IRC, of 1986, as amended, and similar state tax laws. In general, an ownership change occurs if the aggregate stock ownership of certain stockholders increases by more than 50 percentage points over such stockholders' lowest percentage ownership during the testing period (generally three years). We have considered Section 382 of the IRC and concluded that any ownership change would not diminish our utilization of our net operating loss carryforwards or our research and development credits during the carryover periods.

***If one or more jurisdictions successfully assert that we should have collected or in the future should collect additional sales and use taxes on our fees, we could be subject to additional liability with respect to past or future sales and the results of our operations could be adversely affected.***

Sales and use tax laws and rates vary by jurisdiction and such laws are subject to interpretation. In those jurisdictions where we believe sales taxes are applicable, we collect and file timely sales tax returns. Currently, such taxes are minimal. Jurisdictions in which we do not collect sales and use taxes may assert that such taxes are applicable, which could result in the assessment of such taxes, interest and penalties, and we could be required to collect such taxes in the future. This additional sales and use tax liability could adversely affect our results of operations.

***Third parties may assert intellectual property infringement claims against us, or our services may infringe the intellectual property rights of third parties, which may subject us to legal liability and materially adversely affect our reputation.***

Assertion of intellectual property infringement claims against us could result in litigation. We might not prevail in any such litigation or be able to obtain a license for the use of any infringed intellectual property from a third party on commercially reasonable terms, or at all. Even if obtained, we may be unable to protect such licenses from infringement or misuse, or prevent infringement claims against us in connection with our licensing efforts. Any such claims, regardless of their merit or ultimate outcome, could result in substantial cost to us, divert management's attention and our resources away from our operations and otherwise adversely affect our reputation. Our process for controlling our own employees' use of third-party proprietary information may not be sufficient to prevent assertions of intellectual property infringement claims against us.

***We rely on insurance to mitigate some risks of our business and, to the extent the cost of insurance increases or we maintain insufficient coverage, our results of operations, business and financial condition may be materially adversely affected.***

We contract for insurance to cover a portion of our potential business risks and liabilities. In the current environment, insurance companies are increasingly specific about what they will and will not insure. It is possible that we may not be able to obtain sufficient insurance to meet our needs, may have to pay very high prices for the coverage we do obtain or may not acquire any insurance for certain types of business risk. This could leave us exposed, and to the extent we incur liabilities and expenses for which we are not adequately insured, our results of operations, business and financial condition could be materially adversely affected. Also, to the extent the cost of maintaining insurance increases, our operating expenses will rise, which could materially adversely affect our results of operations, financial condition, business and prospects.

***In the past significant deficiencies in our internal control over financial reporting have been identified. If our internal controls are not effective, there may be errors in our financial information that could require a restatement or delay our SEC filings, and investors may lose confidence in our reported financial information, which could lead to a decline in our stock price.***

We have, in the past, experienced issues with our internal control over financial reporting and it is possible that we may discover significant deficiencies or material weaknesses in our internal control over financial reporting in the future. Any failure to maintain or implement required new or improved controls, or any difficulties we encounter in their implementation, could cause us to fail to meet our periodic reporting obligations, or result in material misstatements in our financial information. Any such delays or restatements could cause investors to lose confidence in our reported financial information and lead to a decline in our stock price.

***Substantial sales of our common stock by our stockholders could depress the market price of our common stock regardless of our operating results.***

Sales of substantial amounts of our common stock in the public market, or the perception that these sales could occur, could adversely affect the market price of our common stock and impair our ability to raise capital through offerings of our common stock. As of December 31, 2015, we had 36,054,771 shares of our common stock outstanding. In addition, as of December 31, 2015, there were outstanding options to purchase 3,037,602 shares of our common stock and 763,028 restricted stock units. Substantially all of our outstanding common stock is eligible for sale, subject to Rule 144 volume limitations for holders affected by such limitations, as are common stock issuable under vested and exercisable options. Rule 144 allows public resale of restricted and control securities if certain conditions are met. If our existing stockholders sell a large number of common stock or the public market perceives that existing stockholders might sell our common stock, the market price of our common stock could decline significantly. These sales might also make it more difficult for us to sell equity securities at a time and price that we deem appropriate.

***Our stock price has fluctuated and may continue to do so and may even decline regardless of our financial performance.***

The market price of our common stock has fluctuated and may continue to fluctuate significantly in response to numerous factors, many of which are beyond our control, including:

- actual or anticipated fluctuations in our financial results;
- changes in the financial projections we provide to the public or our failure to meet these projections;
- failure of securities analysts to initiate or maintain coverage of our company, changes in financial estimates by any securities analysts who follow our company, or our failure to meet these estimates or the expectations of investors;
- ratings changes by any securities analysts who follow our company;
- announcements by us or our competitors of significant technical innovations, acquisitions, portfolio purchases, channel partnerships or capital commitments;
- changes in operating performance and stock market valuations of other newly public companies generally, or those in our industry in particular;
- changes brought about by health care reform and the emergence of federal, state and private exchanges;
- price and volume fluctuations in the overall stock market, including as a result of trends in the global economy;
- any major change in our board of directors or management;
- lawsuits threatened or filed against us; and
- other events or factors, including those resulting from a data security breach, war, incidents of terrorism or responses to these events.

In addition, in the past, following periods of volatility in the overall market and the market price of a particular company's securities, securities class action litigation has often been instituted against such a company. If securities class action litigation is instituted against us, it could result in substantial costs and a diversion of our management's attention and resources and could materially adversely affect our operating results.

***Anti-takeover provisions contained in our amended and restated certificate of incorporation and amended and restated bylaws, as well as provisions of Delaware law, could impair a takeover attempt.***

Our amended and restated certificate of incorporation, amended and restated bylaws and Delaware law contain provisions that could have the effect of delaying, preventing or rendering more difficult an acquisition of us if such acquisition is deemed undesirable by our board of directors. Our corporate governance documents include provisions that:

- create a classified board of directors whose members serve staggered three-year terms;
- authorize "blank check" preferred stock, which could be issued by the board of directors without stockholder approval and may contain voting, liquidation, dividend and other rights superior to our common stock;
- limit the ability of our stockholders to call and bring business before special meetings;
- require advance notice of stockholder proposals for business to be conducted at meetings of our stockholders and for nominations of candidates for election to our board of directors;
- control the procedures for the conduct and scheduling of board of directors and stockholder meetings; and
- provide the board of directors with the express power to postpone previously scheduled annual meetings and to cancel previously scheduled special meetings.

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These provisions, alone or together, could delay or prevent unsolicited takeovers and changes in control or changes in our management.

As a Delaware corporation, we are also subject to provisions of Delaware law, including Section 203 of the Delaware General Corporation Law, which prevents some stockholders holding more than 15% of our outstanding common stock from engaging in certain business combinations without approval of the holders of substantially all of our outstanding common stock.

Any provision of our amended and restated certificate of incorporation or amended and restated bylaws or Delaware law that has the effect of delaying or deterring a change in control could limit the opportunity for our stockholders to receive a premium for their shares of our common stock and could also affect the price that some investors are willing to pay for our common stock.

*We do not expect to declare any dividends in the foreseeable future.*

We do not anticipate declaring any cash dividends to holders of our common stock in the foreseeable future. Any future financing agreements may prohibit us from paying any type of dividends. Consequently, investors may need to rely on sales of their common stock after price appreciation, which may never occur, as the only way to realize any future gains on their investment. Investors seeking cash dividends should not purchase our common stock.

#### **Item 1B. Unresolved Staff Comments**

None.

#### **Item 2. Properties**

##### **Facilities**

We do not currently own any of our facilities. Our corporate headquarters are located in San Mateo, California where we occupy approximately 37,937 square feet of space under a lease that expires in May 2022. We have additional facilities in Arizona, California, Florida, Massachusetts, New York, Rhode Island, Texas, Vermont and Wisconsin under various leases that will expire between March 2016 and April 2023. We believe that our facilities are adequate for our current needs and that suitable additional or substitute space will be available as needed to accommodate planned expansion of our operations.

#### **Item 3. Legal Proceedings**

From time-to-time, we may be subject to various legal proceedings and claims that arise in the normal course of our business activities. As of the filing of this Annual Report on Form 10-K, we are not a party to any litigation whereby the outcome of such litigation, if determined adversely to us, would individually or in the aggregate be reasonably expected to have a material adverse effect on our results of operations, prospects, cash flows, financial position or brand.

#### **Item 4. Mine Safety Disclosures**

Not applicable.

## **PART II**

### **Item 5. Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities**

#### **Market Information**

Our common stock has traded on the New York Stock Exchange, or the NYSE, under the symbol "WAGE" since May 2012. The following table sets forth the range of high and low sales prices on the NYSE of our common stock for the periods indicated, as reported by the NYSE.

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Price Range

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	High	Low
Fiscal 2014:		
First Quarter (January 1, 2014 - March 31, 2014)	\$ 68.31	\$ 52.90
Second Quarter (April 1, 2014 - June 30, 2014)	\$ 58.36	\$ 33.04
Third Quarter (July 1, 2014 - September 30, 2014)	\$ 49.95	\$ 39.31
Fourth Quarter (October 1, 2014 - December 31, 2014)	\$ 64.99	\$ 43.44

	Price Range	
	High	Low
Fiscal 2015:		
First Quarter (January 1, 2015 - March 31, 2015)	\$ 65.56	\$ 52.35
Second Quarter (April 1, 2015 - June 30, 2015)	\$ 54.69	\$ 38.19
Third Quarter (July 1, 2015 - September 30, 2015)	\$ 51.43	\$ 38.21
Fourth Quarter (October 1, 2015 - December 31, 2015)	\$ 50.89	\$ 40.97

### Stockholders

As of February 19, 2016, according to the records of our transfer agent, there were 29 holders of record of our common stock. The number of beneficial stockholders is substantially greater than the number of holders of record because a large portion of our common stock is held through brokerage firms.

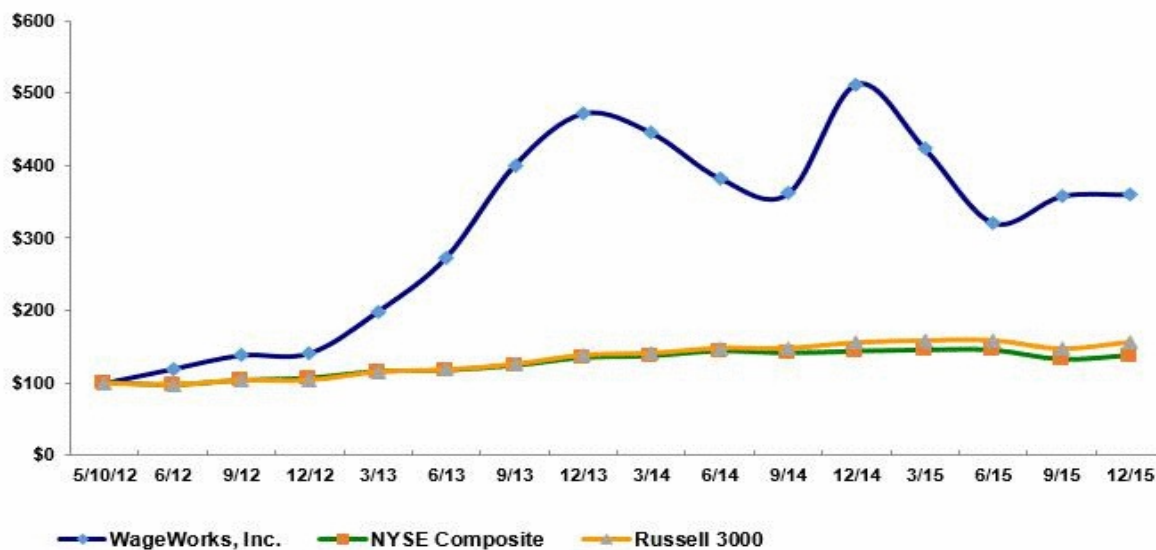
### Dividends

We have never declared nor paid any cash dividend on our common stock. We currently intend to retain any future earnings and do not currently plan to pay any dividends in the immediate future. The payment of future dividends on the common stock and the rate of such dividends, if any and when not restricted, will be determined by our board of directors in light of our results of operations, financial condition, capital requirements, and any other relevant factors.

### Stock Performance Graph

This performance graph shall not be deemed “filed” for purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities under that Section, and shall not be deemed to be incorporated by reference into any of our filings under the Securities Act or the Exchange Act, except as shall be expressly set forth by specific reference in such filing.

The following graph compares the cumulative total return of our common stock with the total return for the New York Stock Exchange Composite Index (the “NYSE Composite”) and the Russell 3000 Index (the “Russell 3000”) from May 10, 2012 (the date our common stock commenced trading on the NYSE) through December 31, 2015. The chart assumes \$100 was invested on May 10, 2012, in the common stock of WageWorks, Inc., the NYSE Composite and the Russell 3000, and assumes reinvestment of any dividends. The stock price performance on the following graph is not necessarily indicative of future stock price performance.



### Share Repurchase Program

On August 6, 2015, our Board of Directors authorized a \$100 million stock repurchase program which commenced immediately and does not have an expiration date. Repurchases made under this program may be made in the open market as the Company deems appropriate and market conditions allow. In 2015, we repurchased 118,772 shares of common stock for a total cost of \$5.0 million, or an average price of \$42.13 per share. As of December 31, 2015, we had \$95.0 million available for future share repurchases under the program.

The following table provides the repurchases of common stock shares during the three months ended December 31, 2015:

	Total Number of Shares Repurchased	Average Price Paid per Share	Total Number of Shares Purchased as Part of Publicly Announced Plans or Programs	Approximate Dollar Value of Shares that May Yet be Purchased Under the Plan or Program (in thousands)
October 1, 2015 to October 31, 2015	—	\$ —	—	\$ —
November 1, 2015 to November 30, 2015	49,913	42.36	49,913	97,886
December 1, 2015 to December 31, 2015	68,859	41.96	68,859	94,997
	<u>118,772</u>	\$ 42.13	<u>118,772</u>	\$ 94,997

### Item 6. Selected Financial Data

The following selected consolidated financial data (presented in thousands, except per share amounts) is derived from our consolidated financial statements. As our operating results are not necessarily indicative of future operating results, this data should be read in conjunction with the consolidated financial statements and notes thereto in Item 8 of Part II, “Financial Statements and Supplementary Data”, and with Item 7 of Part II, “Management’s Discussion and Analysis of Financial Condition and Results of Operations”.

	<b>Years Ended December 31,</b>				
	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>
	<b>(in thousands, except per share data)</b>				
<b>Consolidated Statements of Income Data:</b>					
Revenues	\$ 135,637	\$ 177,282	\$ 219,278	\$ 267,832	\$ 334,316
Operating expenses:					
Cost of revenues (excluding amortization of internal use software)	55,651	64,647	81,918	100,226	117,170
Technology and development, sales and marketing, general and administrative, and employee termination charges	55,099	78,029	93,772	115,565	149,587
Amortization and change in contingent consideration	11,327	15,674	11,612	20,992	27,618
Total operating expenses	122,077	158,350	187,302	236,783	294,375
Income from operations	13,560	18,932	31,976	31,049	39,941
Other income (expense):					
Interest income	36	36	17	5	153
Interest expense	(494)	(1,772)	(1,339)	(1,612)	(1,925)
Other, net	351	429	248	743	(182)
Income before income taxes	13,453	17,625	30,902	30,185	37,987
Income tax (provision) benefit	19,868	(7,126)	(9,203)	(11,943)	(15,037)
Net income	33,321	10,499	21,699	18,242	22,950
Accretion of redemption premium expense	(6,209)	(2,301)	—	—	—
Net income	\$ 27,112	\$ 8,198	\$ 21,699	\$ 18,242	\$ 22,950
Net income per share:					
Basic	\$ 17.65	\$ 0.45	\$ 0.65	\$ 0.52	\$ 0.64
Diluted	\$ 1.43	\$ 0.33	\$ 0.62	\$ 0.50	\$ 0.63
Shares used in computing net income per share:					
Basic	1,536	18,138	33,626	35,145	35,784
Diluted	20,086	24,414	35,277	36,330	36,595
	<b>As of December 31,</b>				
	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>
<b>Consolidated Balance Sheets Data:</b>					
Cash and cash equivalents	\$ 154,621	\$ 305,793	\$ 359,958	\$ 413,301	\$ 500,918
Working capital	(35,816)	46,362	68,843	61,467	121,781
Total assets	278,696	519,970	599,655	794,715	888,739
Total liabilities	218,584	363,559	371,523	515,291	551,770
Total redeemable convertible preferred stock	82,169	—	—	—	—
Total stockholders' equity (deficit)	(22,057)	156,411	228,132	279,424	336,969

In fiscal 2012, the revenue growth and associated increase to cost of revenues and other operating expenses were driven by post-purchase revenue from our acquisitions of Choice Strategies and TransitChek which were acquired in January 2012 and February 2012, respectively. The revenue growth and associated increases to cost of revenues and other operating expenses in fiscal 2013, was driven by post-purchase revenue from the acquisitions of Benefit Concepts and Crosby Benefit Systems, which were acquired in December 2012 and May 2013, respectively. The revenue growth and associated increase in cost of revenues and other operating expenses in fiscal 2014 and 2015, was driven by post-purchase revenue from the acquisition of CONEXIS, which was acquired in August 2014. In addition, changes in the estimated fair value of contingent consideration related to our acquisitions are included within the amortization and change in contingent consideration line item in the consolidated statement of income. The nature of these changes are disclosed within Note 1 to our consolidated financial statements under “Fair Value of Financial Instruments” and within our Management’s Discussion and Analysis of this Form 10-K.



## **Item 7. Management’s Discussion and Analysis of Financial Condition and Results of Operations**

*The following discussion and analysis of our financial condition and results of operations should be read in conjunction with our consolidated financial statements and related notes appearing elsewhere in this Annual Report on Form 10-K. The following discussion and analysis contains forward-looking statements that involve risks and uncertainties, as well as assumptions that, if they never materialize or prove incorrect, could cause our results to differ materially from those expressed or implied by such forward-looking statements. Statements that are not purely historical are forward-looking statements within the meaning of Section 27A of the Securities Act, and Section 21E of the Securities Exchange Act of 1934, as amended. Forward-looking statements are often identified by the use of words such as, but not limited to, “anticipate,” “believe,” “can,” “continue,” “could,” “estimate,” “expect,” “intend,” “may,” “plan,” “project,” “seek,” “should,” “target,” “will,” “would” and similar expressions or variations intended to identify forward-looking statements. Such statements include, but are not limited to, statements concerning market opportunity, our future financial and operating results, investment strategy, sales and marketing strategy, management’s plans, beliefs and objectives for future operations, technology and development, economic and industry trends or trend analysis, expectations about seasonality, opportunity for portfolio purchases, use of non-GAAP financial measures, operating expenses, anticipated income tax rates, capital expenditures, cash flows and liquidity. These statements are based on the beliefs and assumptions of our management based on information currently available to us. Such forward-looking statements are subject to risks, uncertainties and other important factors that could cause actual results and the timing of certain events to differ materially from future results expressed or implied by such forward-looking statements. Factors that could cause or contribute to such differences include, but are not limited to, those identified below, and those discussed in the section titled “Risk Factors” included under Part I, Item 1A above. Furthermore, such forward-looking statements speak only as of the date of this report. Except as required by law, we undertake no obligation to update any forward-looking statements to reflect events or circumstances after the date of such events.*

### **Overview**

#### **Our Business**

We are a leader in administering CDBs which empower employees to save money on taxes while also providing corporate tax advantages for employers. We are solely dedicated to administering CDBs, including pre-tax spending accounts such as HSAs, health and dependent care FSAs, HRAs, as well as Commuter Benefit Services, including transit and parking programs, wellness programs, COBRA and other employee benefits in the United States.

#### **Critical Accounting Policies and Significant Management Estimates**

Our consolidated financial statements are prepared in accordance with U.S. generally accepted accounting principles, or GAAP. The preparation of these consolidated financial statements requires us to make estimates and assumptions that affect the reported amounts of assets, liabilities, revenues, costs and expenses and related disclosures. We base our estimates on historical experience and on various other assumptions that we believe to be reasonable under the circumstances. In many instances, we could have reasonably used different accounting estimates, and in other instances, changes in the accounting estimates are reasonably likely to occur from period-to-period. Accordingly, actual results could differ significantly from the estimates made by our management. To the extent that there are material differences between these estimates and actual results, our future financial statement presentation, financial condition, results of operations and cash flows will be affected.

In many cases, the accounting treatment of a particular transaction is specifically dictated by GAAP and does not require management’s judgment in its application, while in other cases, management’s judgment is required in selecting among available alternative accounting standards that allow different accounting treatment for similar transactions. We believe that there are several accounting policies that are critical to understanding our business and prospects for future performance, as these policies affect the reported amounts of revenues and other significant areas that involve management’s judgment and estimates. These significant policies and our procedures related to these policies are described in detail below. In addition, please refer to Note 1, “Summary of Business and Significant Accounting Policies,” in the Notes to Consolidated Financial Statements of this Form 10-K included in Item 8, “Financial Statements and Supplementary Data,” of this report for further discussion of our accounting policies.

#### **Revenue Recognition**

We report revenue for the following product offerings: healthcare, commuter, COBRA and other services. Our revenues are primarily attributable to fees for services we provide to employer clients.

Healthcare and commuter programs generate revenues from the monthly services we provide in connection with their employees' participation in CDB accounts. COBRA revenue is generated from the administration of continuation of coverage services for participants who are no longer eligible for the employer's health benefits. Other revenue includes services related to enrollment and eligibility, non-healthcare, employee account administration (i.e., tuition and health club reimbursements) and project-related professional fees. Fees associated with services are recognized in the period services are rendered and earned in accordance with service arrangements with clients where fees are fixed or determinable and collectability is reasonably assured. Fees received for the initial setup of new clients and annual renewal fees are deferred and recognized ratably over the service period.

There are also revenues generated from fees collected on debit cards used by employee participants, known as interchange, that represent a percentage of the amounts transacted on each card. These cards are offered through our healthcare and commuter solutions. We recognize the fee revenues based on contractual fee rates with third parties when transactions on these cards are completed.

We also receive commissions from transit passes that we purchase from various transit agencies on behalf of employee participants. Due to our significant volume, we receive commissions on these passes which we recognize as vendor commission revenue. In addition, we recognize revenue on our estimate of passes that will expire unused over the estimated useful life of the passes, as the amounts paid for these passes are nonrefundable to both the employer client and the employee participant.

#### ***Valuation of Long-Lived Assets and Goodwill***

We review our long-lived assets for indicators of impairment whenever events or changes in circumstances indicate that the carrying amount of such assets may not be recoverable. Long-lived assets consist primarily of software and software development costs, acquired intangible assets, computers and equipment, leasehold improvements, and furniture and fixtures.

We perform an annual goodwill impairment test as of December 31<sup>st</sup> and more frequently if events and circumstances indicate that the asset might be impaired. When reviewing goodwill for impairment, we assess whether goodwill should be allocated to operating levels lower than our single operating segment for which discrete financial information is available and reviewed for decision-making purposes. These lower levels are referred to as reporting units. Currently, our one reporting unit was determined to be our single reportable segment. The identification of relevant events and circumstances and how these may impact a reporting unit's fair value or carrying amount involve significant judgments and assumptions. The judgment and assumptions include the identification of macroeconomic conditions, industry and market considerations, overall financial performance, our specific events and share price trends and making the assessment on whether each relevant factor will impact the impairment test positively or negatively and the magnitude of any such impact. As of December 31, 2015, we completed our annual goodwill impairment assessment and management concluded that no indicators of impairment were determined to be present.

To date, we have not made any impairment adjustments to goodwill, as the fair value of our reporting unit in all prior years has always exceeded our carrying value by a significant amount.

#### ***Income Taxes***

We are subject to income taxes in the United States. Significant judgments are required in evaluating our uncertain tax positions and determining our provision for income taxes.

We use the asset and liability method to account for income taxes. Deferred tax assets and liabilities are recognized for the future tax consequences attributable to differences between the financial statement carrying amounts of existing assets and liabilities and their respective tax bases and net operating loss carryforwards. Deferred tax assets and liabilities are measured using enacted tax rates expected to apply to taxable income in the years in which those temporary differences are expected to be recovered or settled. The effect on deferred tax assets and liabilities of a change in tax rates is recognized in income in the period that includes the enactment date. Valuation allowances are established, when necessary, to reduce deferred tax assets to an amount whose realization is more likely than not.

During the ordinary course of business, there are many transactions and calculations for which the ultimate tax determination is uncertain. As a result, we recognize tax liabilities based on estimates of whether additional taxes and interest will be due. These tax liabilities are recognized when, despite the belief that our tax return positions are supportable, we believe that certain positions may not be more likely than not of being sustained upon review by tax authorities. As of December 31, 2015, our unrecognized tax benefits approximated \$4.4 million, and we have no uncertain tax positions that would be reduced as a result of a lapse of the applicable statute of limitations. We believe that our accruals for tax liabilities are adequate for all open audit years based on our assessment of many factors, including past experience and interpretations of tax law. This assessment relies on estimates and assumptions and may involve a series of complex judgments about future events. We do not anticipate any adjustments would result in a material change to our financial position. To the extent that the final tax outcome of these matters is different than the amounts recorded, such differences will impact income tax expense in the period in which such determination is made. We recognize accrued interest and penalties related to unrecognized tax benefits as a component of income tax expense.

Management periodically evaluates if it is more likely than not that some or all of the deferred tax assets will be realized. In making such determination, we consider all available positive and negative evidence, including scheduled reversals of deferred tax liabilities, projected future taxable income, tax planning strategies and recent financial performance. In order to support a conclusion that a valuation allowance is not needed, positive evidence of sufficient quantity and quality (objective compared to subjective) is necessary to overcome negative evidence.

In the future, if there is a significant negative change in our operating results or the other factors that were considered in making this determination, we could be required to record a valuation allowance against our deferred tax assets. Any subsequent increases in the valuation allowance will be recognized as an increase in deferred tax expense. Any decreases in the valuation allowance will be recorded either as a reduction of the income tax provision or as a credit to paid-in capital if the associated deferred tax asset relates to windfall stock option deductions on the exercise of stock options.

### ***Stock-based Compensation***

Stock-based compensation for stock awards is estimated at the grant date based on the award's fair value as calculated by the Black-Scholes or Monte Carlo option pricing model and is recognized as an expense over the requisite service period, which is generally the vesting period. The determination of the fair value of stock-based awards on the date of grant using an option pricing model is affected by our stock price as well as assumptions regarding a number of complex and subjective variables. These variables include our expected stock price and the related volatility over the expected term of the awards, actual and projected employee stock option exercise behaviors, risk-free interest rates, estimated forfeitures, expected dividends and expectations of revenue target achievement.

We estimate expected volatility based on the historical volatility of comparable companies from a representative peer-group as well as our own historical volatility. We estimate expected term based on historical experience, giving consideration to the contractual terms of the stock-based awards, vesting schedules and expectations of future employee behavior such as exercises and forfeitures. We based the risk-free interest rate on zero-coupon yields implied from U.S. Treasury issues with remaining terms similar to the expected term on the options. We do not anticipate paying any cash dividends in the foreseeable future, and therefore, used an expected dividend yield of zero in the option pricing model. We are required to estimate forfeitures at the time of grant and revise those estimates in subsequent periods if actual forfeitures differ from those estimates. The estimated attainment of performance-based awards and related expense is based on the expectations of revenue target achievement. If we use different assumptions for estimating stock-based compensation expense in future periods, or if actual forfeitures differ materially from our estimated forfeitures, future stock-based compensation expense may differ significantly from what we have recorded in the current period and could materially affect our income from operations, net income and net income per share.

## **Results of Operations**

### ***Revenues***

	Year Ended December 31,			Change from prior year	
	2013	2014	2015	2014	2015
	(in thousands)				
Revenues:					
Healthcare	\$ 135,140	\$ 155,989	\$ 176,573	15%	13%
Commuter	59,579	61,776	63,895	4%	3%
COBRA	15,047	31,996	51,299	113%	60%
Other	9,512	18,071	42,549	90%	135%
Total revenues	\$ 219,278	\$ 267,832	\$ 334,316	22%	25%

### ***Healthcare Revenue***

We derive our healthcare revenue from the service fees paid by our employer clients for the administration services we provide in connection with their employee participants' FSAs, HRAs and HSAs. We also earn interchange revenue paid by financial institutions related to transaction fees on debit cards used by employee participants in connection with all of our healthcare programs and through our wholesale card program, and revenue from self-service plan kits called Premium Only Plan kits, or POP revenue.

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The \$20.6 million increase in healthcare revenue from 2014 to 2015 was primarily driven by a \$15.6 million increase in FSA, HRA and HSA revenues, of which \$8.4 million was from the contribution of a full year of CONEXIS operations in 2015, which was acquired in August 2014, and \$7.2 million was driven by the addition of new clients and growth in new employee participation in these programs. Healthcare revenue was further increased by a \$5.0 million increase in interchange fee revenue, due to increase in debit card usage and an increase in number of debit cards issued.

The \$20.8 million increase in healthcare revenue from 2013 to 2014 was primarily due to an \$18.7 million increase in FSA and HRA revenue. The FSA and HRA revenue increase was primarily driven by growth in new employee participation in our programs of \$9.2 million, post-purchase revenues of \$5.7 million for CONEXIS, and an interchange fee revenue increase of \$2.9 million due to increased debit card usage as well as an increase in the number of debit cards issued. FSA and HRA also increased by \$0.9 million in POP revenue, during 2014 compared to 2013. The growth in healthcare revenue was further driven by a \$2.1 million increase in HSA revenue primarily due to growth in participation of our HSA programs.

*Commuter Revenue*

We derive our commuter revenue from monthly service fees paid by our employer clients, interchange revenue paid by financial institutions related to transaction fees on debit cards used by employee participants in connection with our commuter solutions and commissions from the sale of transit passes used in our commuter solutions which we purchase from various transit agencies on behalf of employee participants.

The \$2.1 million increase in commuter revenue from 2014 to 2015 was primarily driven a \$1.9 million increase due to growth in the number of employee participation in our commuter programs and a \$0.2 million increases in interchange revenue.

The \$2.2 million increase in commuter revenue from 2013 to 2014 was primarily driven by a \$0.9 million increase in our commuter benefit programs, due to growth in the number of employee participants in these programs. The remainder of the commuter revenue growth was primarily driven by increased interchange revenue of \$0.8 million as a result of increased debit card usage and a full year of revenue from CBS of \$0.3 million.

*COBRA Revenue*

COBRA revenue is derived from administration services we provide to employer clients for continuation of coverage for participants who are no longer eligible for the employer's health benefits, such as medical, dental and vision, and for the continued administration of the employee participants' HRAs and certain healthcare FSAs.

The \$19.3 million increase in COBRA revenue from 2014 to 2015 was primarily driven by an increase of \$18.3 million related to a full year of CONEXIS operations in 2015, as well as \$1.0 million from the addition of new clients and growth in new employee participation in our COBRA programs.

The \$16.9 million increase in COBRA revenue from 2013 to 2014 was primarily driven by \$15.9 million in post-purchase revenues for CONEXIS. The remainder of the COBRA revenue growth was primarily driven by increased participation by employer clients in our COBRA administration services.

*Other Revenue*

Other revenue includes enrollment and eligibility services, employee account administration (i.e., tuition and health club reimbursements) and project-related professional fees. We also derive other revenue from administrative services we provide to a customer to operate their health insurance exchange business which includes enrollment, billing, customer service and payment processing services. In September 2015 the aforementioned customer and we mutually agreed to transition the relationship. As a result, revenues related to development and administrative services provided to this individual customer are not expected to continue to be a significant portion of Other Revenue beyond 2015.

The \$24.5 million increase in other revenue from 2014 to 2015 was primarily driven by an increase of \$22.6 million related to a full year of CONEXIS operations in 2015, of which \$20.3 million was related to increased development and administrative services rendered to the customer to operate their health insurance exchange business and \$2.3 million related to direct bill services. The remainder \$1.9 million increase in other revenue was due primarily to a \$0.8 million increase related to development and administrative services we provide to our customers and a \$0.5 million increase due to an increase in administration of direct bill services to employee participants.

The \$8.6 million increase in other revenue from 2013 to 2014 was primarily driven by \$8.2 million in post-purchase revenues for CONEXIS, of which \$6.6 million was related to development and administrative services rendered to the customer to operate their health insurance exchange business and \$1.6 million related to direct bill services. The remainder \$0.4 million increase was due to increases in our gym and tuition reimbursement programs.

**Cost of Revenues**

	Year Ended December 31,			Change from prior year	
	2013	2014	2015	2014	2015
	(in thousands)				
Cost of revenues (excluding amortization of internal use software)	\$ 81,918	\$ 100,226	\$ 117,170	22%	17%
Percent of revenue	37%	37%	35%		

The primary component of cost of revenues is expenses related to our claims processing, product support and customer service personnel. Cost of revenues also includes outsourced and temporary labor costs, check/ACH payment processing services, debit card processing services, shipping and handling costs for cards and passes and employee participant communications costs.

The \$16.9 million increase in cost of revenues from 2014 to 2015 was due primarily to an increase of \$15.7 million related to a full year of CONEXIS operations in 2015, an increase of \$1.6 million in stock-based compensation expense due to new grants of performance-based restricted stock units as well as stock options granted in the first quarter of 2015. The increase in cost of revenues was offset by decrease in temporary help and contractors mainly in product support functions.

The \$18.3 million increase in cost of revenues from 2013 to 2014 was due primarily to the inclusion of post-purchase expense of \$10.3 million for CONEXIS, as well as increases in outsourced services costs of \$4.0 million due to processing and supporting an increased number of employee participants. Cost of revenues was further driven by an increase in salaries and personnel-related costs of \$1.5 million due to an increase in headcount to support employee participant growth and an increase in stock-based compensation expense of \$1.2 million due to new grants of stock options and performance-based restricted stock units. Cost of revenues was also driven by an increase in travel and entertainment of \$0.4 million to support our sales efforts and acquisition related travel as well as an increase in postage and printing costs of \$0.3 million as we transitioned certain COBRA printing costs to an outside vendor. The remainder of the increase in cost of revenues is primarily due to platform losses during 2014 as well favorable platform loss adjustments in 2013.

As we continue to scale our operations, we expect our cost of revenues to increase in dollar amount to support increased employer client and employee participant levels. Cost of revenues will continue to be affected by our portfolio purchases, acquisitions and channel partner arrangements. Prior to migrating to our proprietary technology platforms, these new portfolios often operate with higher service delivery costs that result in increased cost of revenues until we are able to complete the migration process, which typically occurs over the 12- to 24-month period following closing of the portfolio purchase or acquisition.

**Technology and Development**

	Year Ended December 31,			Change from prior year	
	2013	2014	2015	2014	2015
	(in thousands)				
Technology and development	\$ 21,459	\$ 27,741	\$ 43,041	29%	55%
Percent of revenue	10%	10%	13%		

Technology and development expenses include personnel and related expenses for our technology operations and development personnel as well as outsourced programming services, the costs of operating our on-demand technology infrastructure, depreciation of equipment and software licensing expenses. During the planning and post-implementation phases of development, we expense, as incurred, all internal use software and website development expenses associated with our proprietary scalable delivery model. Expenses associated with the platform content or the repair or maintenance of the existing platforms are expensed as incurred.

The \$15.3 million increase in technology and development expenses from 2014 to 2015 was primarily due an increase of \$13.7 million related to a full year of CONEXIS operations in 2015. The remainder of the increase was primarily due to the loss on disposal of assets no longer in use and continued investment in product development to improve features and customer satisfaction in our proprietary platform.

The \$6.3 million increase in technology and development expenses from 2013 to 2014 was primarily due to the inclusion of post-purchase expense of \$6.2 million for CONEXIS as well as a \$0.4 million increase in stock-based compensation expense due to new grants of stock options. These increases were partially offset by higher capitalization of internally developed software projects which reduced the amount of expense recognized year over year, as we had a greater number of software projects in 2014 as compared to 2013, partly driven by new software projects related to our acquisition of CONEXIS.

We intend to continue enhancing the functionality of our software platform as part of our continuous effort to improve our employer client and employee participant experience and to maintain and enhance our control and compliance environment. The timing of development and enhancement projects, including the nature of expenditures as well as the phase of the project that could require capitalization or expense treatment, will significantly affect our technology and development expense both in dollar amount and as a percentage of revenues.

### **Sales and Marketing**

	Year Ended December 31,			Change from prior year	
	2013	2014	2015	2014	2015
	(in thousands)				
Sales and marketing	\$ 34,676	\$ 44,940	\$ 50,540	30%	12%
Percent of revenue	16%	17%	15%		

Sales and marketing expenses consist primarily of personnel and related expenses for our sales, client services and marketing staff, including sales commissions for our direct sales force and external agent/broker commission expense, as well as communication, promotional, public relations and other marketing expenses.

The \$5.6 million increase in sales and marketing expense from 2014 to 2015 was primarily due to an increase of \$5.4 million related to a full year of CONEXIS operations in 2015, as well as stock-based compensation expense of \$0.2 million due to new grants of restricted stock units and stock options. The remaining increase in sales and marketing expense was primarily driven by outside sales commissions to support the increase in our client base through our broker relationships and ongoing promotional marketing initiatives.

The \$10.3 million increase in sales and marketing expense from 2013 to 2014 was primarily due to the inclusion of post-purchase expense of \$5.3 million for CONEXIS as well as an increase in salaries and personnel-related costs of \$2.4 million due to hiring sales and marketing personnel to implement various new sales and marketing programs and to a lesser extent a full year of costs related to the CBS portfolio purchase, which was acquired in May 2013. Sales and marketing expenses were further driven by an increase in stock-based compensation expense of \$1.4 million due to new grants of stock options and performance-based restricted stock units. Sales and marketing expense was also driven by an increase of \$0.5 million in ongoing promotional marketing initiatives. Outside sales commissions driven by increased sales volumes through our broker relationships and travel and entertainment increased sales and marketing expense by \$0.4 million.

We continue to invest in sales, client services and marketing by hiring additional personnel and continuing to build our broker and channel relationships. We also promote our brand through a variety of marketing and public relations activities. As a result, we expect our sales and marketing expenses to increase in dollar amounts in future periods.

### **General and Administrative**

	Year Ended December 31,			Change from prior year	
	2013	2014	2015	2014	2015
	(in thousands)				
General and administrative	\$ 37,637	\$ 42,884	\$ 54,093	14%	26%
Percent of revenue	17%	16%	16%		

General and administrative expenses include personnel and related expenses and professional fees incurred by our executive, finance, legal, human resources and facilities departments.

The \$11.2 million increase in general and administrative expenses from 2014 to 2015 was primarily due to an increase of \$3.7 million related to a full year of CONEXIS operations in 2015 and \$4.2 million in stock-based compensation expense, primarily due to new grants of restricted stock units, performance-based restricted stock units and stock options. The remainder of the increase was primarily due to an increase in rent expense associated with new lease agreements at our San Mateo corporate office and our Arizona facility and increase in salaries and personnel-related compensation expense attributable to increase in headcount.

The \$5.2 million increase in general and administrative expenses from 2013 to 2014 was primarily driven by the inclusion of post-purchase expense of \$2.8 million for CONEXIS and \$2.3 million in stock-based compensation expense, primarily due to new grants of stock options, restricted stock units and performance-based restricted stock units.

As we continue to grow, we expect our general and administrative expenses to increase in absolute dollars as we expand general and administrative headcount to support our continued growth.

***Amortization and Change in Contingent Consideration***

	Year Ended December 31,			Change from prior year	
	2013	2014	2015	2014	2015
	(in thousands)				
Amortization and change in contingent consideration	\$ 11,612	\$ 20,992	\$ 27,618	81%	32%

Our amortization and change in contingent consideration consists of three components: amortization of internal use software, amortization of acquired intangible assets and change in contingent consideration. We capitalize our software development costs related to the development and enhancement of our business solution. When the technology is available for its intended use, the capitalized costs are amortized over the technology's estimated useful life, which is generally four years. Acquisition-related intangible assets are also amortized over their estimated useful lives.

The \$6.6 million increase in amortization and change in contingent consideration from 2014 to 2015 was driven by an increase of \$5.4 million in amortization of acquisition-related intangible assets as a result of the CONEXIS acquisition and increases from amortization of additions to internally developed software offset by a decrease in amortization of intangible assets that were fully amortized in 2015.

The \$9.4 million increase in the amortization and change in contingent consideration line item from 2013 to 2014 was driven by a re-measurement of the contingent consideration related to BCI, which took place in the third quarter of 2013, as the timing of anticipated partnerships and employer clients were deferred until later in 2014 and into 2015, which reduced the forecasted BCI revenues used in the determination of the contingent consideration. Due to the re-measurement, a \$6.0 million gain was recognized in 2013 while no such gains were recognized during 2014. The remaining increase is due primarily to additional amortization expense from acquisition-related intangible assets related to the CONEXIS acquisition and additional amortization of capitalized software development costs.

***Employee Termination and Other Charges***

	Year Ended December 31,			Change from prior year	
	2013	2014	2015	2014	2015
	(in thousands)				
Employee termination and other charges	\$ —	\$ —	\$ 1,913	0%	100%

In the second quarter of 2015, we executed an organizational efficiency plan which reduced our headcount. We recognized charges of \$1.9 million in 2015, primarily for severance costs.

***Other Income (Expense)***

	Year Ended December 31,		
	2013	2014	2015
	(in thousands)		
Interest income	\$ 17	\$ 5	\$ 153
Interest expense	(1,339)	(1,612)	(1,925)
Other income (expense)	248	743	(182)

The \$0.3 million increase in interest expense was due to increase in borrowing under the revolving credit facility with MUFG Union Bank, N.A. related to the acquisition of CONEXIS. Increase in other income (expense) as compared to 2014 was due primarily to expense in insurance claims reserve offset by gain related to the second and final payment from the settlement of a dispute in 2014.

The increase in the other income line item from 2013 to 2014 is due to a gain related to the settlement of a dispute with a third party.

***Income Taxes***

	Year Ended December 31,		
	2013	2014	2015
	(in thousands)		
Income taxes provision	\$ (9,203)	\$ (11,943)	\$ (15,037)



The \$3.1 million increase in the provision for income taxes from 2014 to 2015 was due primarily to an increase in federal income taxes as result of higher income before income taxes in 2015 compared to 2014.

The \$2.7 million increase in the provision for income taxes from 2013 to 2014 was primarily the result of an increase in federal income taxes driven by an increase in the overall tax rate for 2014 compared to 2013. The increase in the overall tax rate in 2014 was due to a reduction in permanent tax items related to non-deductible changes in the fair value of our contingent consideration.

### **Liquidity and Capital Resources**

At December 31, 2015, our principal sources of liquidity were cash and cash equivalents totaling \$500.9 million comprised primarily of funding by clients of amounts to be paid on behalf of employee participants as well as other cash flows from operating activities. For the year ended December 31, 2015, our cash flow from operating activities provided \$114.3 million and at December 31, 2015, we had \$67.7 million of borrowing capacity available under our revolving credit facility.

We believe that our existing cash and cash equivalents and expected cash flow from operations will be sufficient to meet our working capital, debt, capital expenditures and stock repurchase needs, as well as anticipated cash requirements for potential future portfolio purchases, over at least the next 12 months. We have historically been able to fulfill our obligations as incurred and expect to continue to fulfill our obligations in the future. Our expectation is based on our current and anticipated client retention rates and our continuing funding model in which the vast majority of our enterprise clients provide us with prefunds as more fully described below under “—*Prefunds*.” To the extent these current and anticipated future sources of liquidity are insufficient to fund our future business activities and requirements, including any potential portfolio purchases; we may need to raise additional funds through public or private equity or debt financing. We cannot provide assurance that we will be able to raise additional funds on favorable terms, if at all.

#### ***Prefunds***

Under our contracts with the vast majority of our employer clients, we receive prefunds that have been and are expected to continue to be a significant source of cash flows from operating activities. Our client contracts do not contain restrictions on our use of client prefunds and, as a result, each prefund is reflected in cash and cash equivalents on our consolidated balance sheet with an equivalent customer obligation recorded as a liability as the prefund is received. Changes in these prefunds and the corresponding customer obligations are reflected in our cash flows from operating activities. The timing of when employer clients make their prefunds as well as the timing of when we make payments on behalf of employee participants can significantly affect our cash flows.

The operation of these prefunds for our employer clients throughout the year typically is as follows: at the beginning of a plan year, these employer clients provide us with prefunds for their FSA and HRA programs based on a percentage of projected spending by the employee participants for the plan year and other factors. In the case of our commuter program, at the beginning of each month we receive prefunds based on the employee participants’ monthly elections. These prefunds are typically replenished on a weekly basis by our FSA and HRA employer clients and on a monthly basis by our commuter employer clients, in each case, after we have advanced the funds necessary to process employee participants’ FSA and HRA claims as they are submitted to us and to pay vendors relating to our commuter programs. As a result, our cash balances can vary significantly depending upon the timing of invoicing, the date payment is received from our employer clients of reimbursement for payments we have made on behalf of employee participants. This prefunding activity covers our estimate of approximately one week of spending on behalf of the employer client’s employee participants. We do not require a prefund to administer any of our HSA programs because employee participants in these programs only have access to funds they have previously contributed.

#### ***MUFG Union Bank, N.A. Revolving Credit Facility***

In the second quarter of 2015, the Company entered into an Amended and Restated Credit Agreement with certain lenders, including MUFG Union Bank, N.A. The amendment extended the term of the credit facility from July 21, 2017 to June 5, 2020 and reduced the margin added to LIBOR. The margin added to LIBOR rate is now in a range from 125 to 175 basis points, down from a range of 175 to 225 basis points. The interest rate applicable on the revolving credit facility as of December 31, 2015 is 1.54%. The amendment also provides for a \$150.0 million revolving credit facility, with a \$15.0 million subfacility for the issuance of letters of credit, an increase from the previous amount the Company could borrow in the aggregate of \$125.0 million. The amendment also contains an increase option permitting the Company to arrange with existing lenders and/or new lenders to provide up to an aggregate of \$100.0 million in additional commitments. In addition, the credit facility provides for stock repurchases from employees of up to an aggregate of \$1.0 million in any fiscal year. As of December 31, 2015, the Company had \$79.6 million outstanding under the credit facility.

Amounts borrowed, outstanding letters of credit and amounts available to borrow, were as follows (dollars in thousands):

	December 31, 2014	December 31, 2015
Amounts borrowed	\$ 79,600	\$ 79,600
Outstanding letters of credit	3,182	2,700
Amounts available to borrow <sup>(1)</sup>	42,218	67,700

(1) Excluding \$100 million increase option

As collateral for the revolving credit facility, we granted MUFG Union Bank, N.A. a security interest in substantially all of our assets. All of our material existing and future subsidiaries are required to guaranty our obligations under the revolving credit facility. Such guarantees by existing and future material subsidiaries are and will be secured by substantially all of the property of such material subsidiaries.

The revolving credit facility contains customary affirmative and negative covenants and also has financial covenants relating to a consolidated leverage ratio and an interest coverage ratio. We are obligated to pay customary commitment fees and letter of credit fees for a facility of this size and type. We are currently in compliance with all financial and non-financial covenants under the revolving credit facility.

The revolving credit facility contains customary events of default, including, among others, payment defaults, covenant defaults, inaccuracy of representations and warranties, cross-defaults to other material indebtedness, judgment defaults, a change of control default and bankruptcy and insolvency defaults. Under certain circumstances, a default interest rate will apply on all obligations during the existence of an event of default under the loan agreement at a per annum rate of interest equal to 2.00% above the applicable interest rate. Upon an event of default, the lenders may terminate the commitments, declare the outstanding obligations payable by us to be immediately due and payable and exercise other rights and remedies provided for under the revolving credit facility.

### **Cash Flows**

The following table presents information regarding our financial position including cash and cash equivalents:

	December 31,	
	2014	2015
	(in thousands)	
Cash and cash equivalents	\$ 413,301	\$ 500,918

The following table presents information regarding our cash:

	Year Ended December 31,		
	2013	2014	2015
	(in thousands)		
Net cash provided by operating activities	\$ 61,705	\$ 54,423	\$ 114,260
Net cash used in investing activities	(27,555)	(65,535)	(37,968)
Net cash provided by financing activities	20,015	64,455	11,325
Net increase in cash and cash equivalents	\$ 54,165	\$ 53,343	\$ 87,617

### **Cash Flows from Operating Activities**

Net cash provided by operating activities increased in 2015 compared to 2014 by \$59.5 million, primarily due to a \$4.7 million increase in profits and a \$36.7 million increase in cash provided by our working capital. Cash from operating activities in 2015 resulted primarily from our net income of \$23.0 million being adjusted for the following non-cash items: \$6.7 million for depreciation, \$27.6 million for amortization and change in contingent consideration and \$20.6 million for stock-based compensation expense. Cash from operating activities in 2015 compared to 2014 was further increased by changes in our working capital due primarily to an \$18.9 million increase in customer obligation as well as a \$2.4 million increase in accounts payable and accrued expenses due to the increase in prefunts and timing of payments to transit agencies.

Net cash provided by operating activities decreased in 2014 compared to 2013 by \$7.3 million, primarily due to an increase in accounts receivable in 2014 compared to 2013, primarily from the timing and receipt of billing for funds owed by employer clients as well as the timing of our billing and employer client payments of prefunds in our customer obligations account compared to a year ago.

***Cash Flows from Investing Activities***

Net cash used in investing activities decreased in 2015 compared to 2014 by \$27.6 million, primarily due to a decrease in cash consideration for business acquisitions of \$34.9 million, in which \$44.3 million was paid for the acquisition of CONEXIS in 2014 and \$9.4 million was paid in 2015 for the amount held back to cover for any indemnification losses incurred by us, which we are entitled to recover. This decrease was offset by increased expenditures of \$6.9 million for internal use software and project costs for the new CONEXIS office.

Net cash used in investing activities increased in 2014 compared to 2013 by \$38.0 million, primarily due to cash used in the acquisition of CONEXIS of \$44.3 million, net of cash received, during the third quarter of 2014, partially offset by a payment of \$15.0 million during the third quarter of 2013, in connection with an advanced payment made to Ceridian for the employer clients that are expected to transition to us, while no such payment was made during 2014. Cash used in investing activities was further increased by capitalized internal use software for various new software projects when compared to 2013, as well as an increase in purchased equipment.

***Cash Flows from Financing Activities***

Net cash provided by financing activities decreased in 2015 compared to 2014 by \$53.1 million, primarily due a decrease in proceeds from long-term debt of \$49.7 million related to borrowings under our revolving credit facility to partially fund the acquisition of CONEXIS in 2014. There were no borrowings under the revolving credit facility in 2015. Cash provided by financing activities was further decreased by payments of \$5.0 million for share repurchase activities in 2015.

Net cash provided by financing activities increased in 2014 compared to 2013 by \$44.4 million, primarily due to proceeds of long-term debt of \$49.7 million in 2014 related to borrowings under our revolving credit facility with MUFG Union Bank, N.A. to partially fund the acquisition of CONEXIS and repayments of long-term debt of \$15.0 million in 2013 which did not recur in 2014. These increases were partially offset by cash received from our follow-on offering in 2013 of \$11.6 million, which did not recur in 2014, as well as a decrease of \$9.2 million in proceeds received from the exercise of common stock options in 2014 compared to 2013.

**Contractual Obligations**

The following table describes our contractual obligations as of December 31, 2015:

	Total	Less than 1 year	1-3 years	3-5 years	More than 5 years
	(in thousands)				
Long-term debt obligations (1)	\$ 79,600	\$ —	\$ —	\$ 79,600	\$ —
Interest on long-term debt obligations (2)	5,420	1,204	2,409	1,807	—
Operating lease obligations (3)	46,149	6,821	14,006	13,776	11,546
Acquisition payments (4)	950	950	—	—	—
<b>Total</b>	<b>\$ 132,119</b>	<b>\$ 8,975</b>	<b>\$ 16,415</b>	<b>\$ 95,183</b>	<b>\$ 11,546</b>

- (1) As of December 31, 2015, maximum borrowings under the revolving credit facility are \$150.0 million with a base rate determined in accordance with the credit agreement or, at our option, LIBOR plus a spread of 1.25% to 1.75% per annum, and a maturity date of June 5, 2020. At December 31, 2015, we had \$79.6 million of outstanding principal which is recorded net of debt issuance costs on our consolidated balance sheets. The debt issuance costs are not included in the table above.
- (2) Estimated interest payments assume the interest rate applicable as of December 31, 2015 of 1.54% per annum on a \$79.6 million principal amount.
- (3) We lease facilities under non-cancelable operating leases expiring at various dates through 2023.
- (4) Estimated undiscounted contingent consideration and contractual obligations for companies acquired in 2012.

### **Off-Balance Sheet Arrangements**

Other than outstanding letters of credit issued under our revolving credit facility, we do not have any off-balance sheet arrangements. The majority of the standby letters of credit mature in one year. However, in the ordinary course of business, we will continue to renew or modify the terms of the letters of credit to support business requirements. The letters of credit are contingent liabilities, supported by our revolving credit facility, and are not reflected on our consolidated balance sheets.

### **Item 7A. Quantitative and Qualitative Disclosures About Market Risk**

Market risk represents the risk of loss that may affect our financial position due to adverse changes in financial market prices and rates. We are exposed to market risks related to changes in interest rates.

As of December 31, 2015, we had cash and cash equivalents of \$500.9 million. These amounts consist of cash on deposit with banks and money market funds. The cash and cash equivalents are held for working capital purposes. We do not enter into investments for trading or speculative purposes. Due to the short-term nature of these investments, we do not believe that changes in interest rates would have a material impact on our financial position and results of operations. However, declines in interest rates and cash balances will reduce future investment income.

The primary objective of our investment activities is to preserve principal while maximizing yields without significantly increasing risk. This objective is accomplished by making diversified investments, consisting only of investment grade securities. The decrease in interest income from the effect of a hypothetical decrease in short-term interest rates of 10% would not have a material impact on our net income and cash flows.

Our exposure to market risk also relates to the increase or decrease in the amount of interest expense we must pay on our outstanding debt instruments. As of December 31, 2015, we had outstanding principal of \$79.6 million under our credit facility. Each loan under the credit facility bears interest at a base rate determined in accordance with the credit agreement, or at our option, a LIBOR rate determined in accordance with the credit agreement, plus a spread of 1.25% to 1.75%, as of December 31, 2015. The increase in interest expense from the effect of a hypothetical change in interest rates of 1% would not have a material impact on our net income and cash flows.

**Item 8. Financial Statements and Supplementary Data**

**WageWorks, Inc. and Subsidiaries  
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**Report of Independent Registered Public Accounting Firm**

The Board of Directors and Stockholders  
WageWorks, Inc.:

We have audited the accompanying consolidated balance sheets of WageWorks, Inc. and subsidiaries (the Company) as of December 31, 2015 and 2014, and the related consolidated statements of income, stockholders' equity, and cash flows for each of the years in the three-year period ended December 31, 2015. These consolidated financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these consolidated financial statements based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the financial position of WageWorks, Inc. and subsidiaries as of December 31, 2015 and 2014, and the results of their operations and their cash flows for each of the years in the three-year period ended December 31, 2015, in conformity with U.S. generally accepted accounting principles.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), WageWorks, Inc.'s internal control over financial reporting as of December 31, 2015, based on criteria established in Internal Control – Integrated Framework (2013) issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO), and our report dated February 25, 2016 expressed an unqualified opinion on the effectiveness of the Company's internal control over financial reporting.

/s/ KPMG LLP

San Francisco, California  
February 25, 2016

## Report of Independent Registered Public Accounting Firm

The Board of Directors and Stockholders  
WageWorks Inc.:

We have audited WageWorks, Inc.'s (the Company's) internal control over financial reporting as of December 31, 2015, based on criteria established in Internal Control – Integrated Framework (2013) issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). WageWorks, Inc.'s management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting, included in the accompanying Management's Report on Internal Control over Financial Reporting. Our responsibility is to express an opinion on the Company's internal control over financial reporting based on our audit.

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, assessing the risk that a material weakness exists, and testing and evaluating the design and operating effectiveness of internal control based on the assessed risk. Our audit also included performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the Company are being made only in accordance with authorizations of management and directors of the Company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the Company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

In our opinion, WageWorks, Inc. maintained, in all material respects, effective internal control over financial reporting as of December 31, 2015, based on criteria established in Internal Control – Integrated Framework (2013) issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the consolidated balance sheets of WageWorks, Inc. and subsidiaries as of December 31, 2015 and 2014, and the related consolidated statements of income, stockholders' equity, and cash flows for each of the years in the three-year period ended December 31, 2015, and our report dated February 25, 2016 expressed an unqualified opinion on those consolidated financial statements.

/s/ KPMG LLP

San Francisco, California  
February 25, 2016



**WAGeworks, INC.**  
**Consolidated Balance Sheets**  
**(In thousands, except per share amounts)**

	<u>December 31, 2014</u>	<u>December 31, 2015</u>
<b>Assets</b>		
Current assets:		
Cash and cash equivalents	\$ 413,301	\$ 500,918
Restricted cash	332	332
Accounts receivable, net	54,453	72,271
Deferred tax assets - current	11,006	—
Prepaid expenses and other current assets	14,215	13,254
Total current assets	493,307	586,775
Property and equipment, net	39,137	47,955
Goodwill	157,109	157,109
Acquired intangible assets, net	94,776	82,616
Deferred tax assets	699	9,837
Other assets	9,687	4,447
<b>Total assets</b>	<b>\$ 794,715</b>	<b>\$ 888,739</b>
<b>Liabilities and Stockholders' Equity</b>		
Current liabilities:		
Accounts payable and accrued expenses	\$ 54,285	\$ 60,541
Customer obligations	362,451	400,821
Short-term contingent consideration	3,180	739
Other current liabilities	11,924	2,893
Total current liabilities	431,840	464,994
Long-term debt	79,219	78,996
Long-term contingent payment, net of current portion	695	—
Other non-current liabilities	3,537	7,780
Total liabilities	515,291	551,770
Stockholders' Equity:		
Common stock, \$0.001 par value (authorized 1,000,000 shares; 35,479 shares issued and outstanding at December 31, 2014; 36,055 shares issued and 35,936 shares outstanding at December 31, 2015)	36	36
Additional paid-in capital	303,568	343,166
Treasury stock at cost (119 shares at December 31, 2015)	—	(5,003)
Accumulated deficit	(24,180)	(1,230)
Total stockholders' equity	279,424	336,969
<b>Total liabilities and stockholders' equity</b>	<b>\$ 794,715</b>	<b>\$ 888,739</b>

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

**WAGeworks, INC.**  
**Consolidated Statements of Income**  
(In thousands, except per share amounts)

	Year Ended December 31,		
	2013	2014	2015
<b>Revenues:</b>			
Healthcare	\$ 135,140	\$ 155,989	\$ 176,573
Commuter	59,579	61,776	63,895
COBRA	15,047	31,996	51,299
Other	9,512	18,071	42,549
Total revenues	<u>219,278</u>	<u>267,832</u>	<u>334,316</u>
<b>Operating expenses:</b>			
Cost of revenues (excluding amortization of internal use software)	81,918	100,226	117,170
Technology and development	21,459	27,741	43,041
Sales and marketing	34,676	44,940	50,540
General and administrative	37,637	42,884	54,093
Amortization and change in contingent consideration	11,612	20,992	27,618
Employee termination and other charges	—	—	1,913
Total operating expenses	<u>187,302</u>	<u>236,783</u>	<u>294,375</u>
Income from operations	31,976	31,049	39,941
<b>Other income (expense):</b>			
Interest income	17	5	153
Interest expense	(1,339)	(1,612)	(1,925)
Other income (expense)	248	743	(182)
Income before income taxes	<u>30,902</u>	<u>30,185</u>	<u>37,987</u>
Income tax provision	(9,203)	(11,943)	(15,037)
<b>Net income</b>	<b><u>\$ 21,699</u></b>	<b><u>\$ 18,242</u></b>	<b><u>\$ 22,950</u></b>
Net income per share:			
Basic	\$ 0.65	\$ 0.52	\$ 0.64
Diluted	\$ 0.62	\$ 0.50	\$ 0.63
Shares used in computing net income per share:			
Basic	33,626	35,145	35,784
Diluted	35,277	36,330	36,595

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

**WAGEWORKS, INC.**  
**Consolidated Statements of Stockholders' Equity**  
(In thousands, except per share amounts)

	Common stock		Treasury stock		Additional paid-in capital	Accumulated deficit	Total Stockholders' Equity
	Shares	Amount	Shares	Amount			
Balance at December 31, 2012	31,571	\$ 32	-	\$ -	\$ 220,500	\$ (64,121)	\$ 156,411
Issuance of common stock in March 2013 follow-on offering at \$24.00 per share, net of issuance costs of \$829	500	1			10,721	-	10,722
Exercise of stock options	2,118	2			15,979	-	15,981
Exercise of Investor Warrant	351	-			-	-	-
Exercise of Lender Warrant	117	-			-	-	-
Issuance of common stock under Employee Stock Purchase Plan	89	-			1,817	-	1,817
Tax benefit from the exercise of stock options	-	-			12,296	-	12,296
Stock-based compensation	-	-			9,206	-	9,206
Net income	-	-			-	21,699	21,699
Balance at December 31, 2013	34,746	\$ 35	-	\$ -	\$ 270,519	\$ (42,422)	\$ 228,132
Exercise of stock options	648	1			6,743	-	6,744
Issuance of common stock under Employee Stock Purchase Plan	60	-			2,100	-	2,100
Issuance of restricted stock units, net of shares withheld for employee taxes	25	-			(785)	-	(785)
Tax benefit from the exercise of stock options	-	-			10,433	-	10,433
Stock-based compensation	-	-			14,558	-	14,558
Net income	-	-			-	18,242	18,242
Balance at December 31, 2014	35,479	\$ 36	-	\$ -	\$ 303,568	\$ (24,180)	\$ 279,424
Exercise of stock options	465	-			6,598	-	6,598
Issuance of common stock under Employee Stock Purchase Plan	54	-			2,145	-	2,145
Issuance of restricted stock units, net of shares withheld for employee taxes	57	-			(949)	-	(949)
Tax benefit from the exercise of stock options	-	-			11,198	-	11,198
Treasury stock acquired	-	-	(119)	(5,003)	-	-	(5,003)
Stock-based compensation	-	-			20,606	-	20,606
Net income	-	-			-	22,950	22,950
Balance at December 31, 2015	36,055	\$ 36	(119)	\$ (5,003)	\$ 343,166	\$ (1,230)	\$ 336,969

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

**WAGEWORKS, INC.**  
**Consolidated Statements of Cash Flows**  
(In thousands)

	Year Ended December 31,		
	2013	2014	2015
<b>Cash flows from operating activities:</b>			
Net income	\$ 21,699	\$ 18,242	\$ 22,950
Adjustments to reconcile net income to net cash provided by operating activities:			
Depreciation	3,421	4,386	6,671
Amortization and change in contingent consideration	11,612	20,992	27,618
Stock-based compensation	9,206	14,558	20,606
Loss on disposal of fixed assets	128	98	1,096
Payment of contingent consideration in excess of initial measurement	(643)	—	—
Provision for doubtful accounts	180	(367)	396
Deferred taxes	9,049	10,582	13,066
Excess tax benefit from the exercise of stock options	(12,296)	(10,433)	(11,198)
Changes in operating assets and liabilities:			
Accounts receivable	(8,457)	(20,969)	(18,214)
Prepaid expenses and other current assets	(3,954)	(2,743)	961
Other assets	(179)	(2,877)	2,084
Accounts payable and accrued expenses	7,840	2,684	5,062
Customer obligations	26,339	19,480	38,370
Other liabilities	(2,240)	790	4,792
Net cash provided by operating activities	<u>61,705</u>	<u>54,423</u>	<u>114,260</u>
<b>Cash flows from investing activities:</b>			
Purchases of property and equipment	(13,832)	(21,200)	(28,141)
Cash consideration for business acquisitions, net of cash acquired	(752)	(44,334)	(9,445)
Cash paid for acquisition of client contracts	(1,573)	—	(382)
Advance payment for acquisition of client contracts	(14,646)	—	—
Change in restricted cash	3,248	(1)	—
Net cash used in investing activities	<u>(27,555)</u>	<u>(65,535)</u>	<u>(37,968)</u>
<b>Cash flows from financing activities:</b>			
Proceeds from long-term debt, net of issuance cost	—	49,663	(366)
Repayment of long-term debt	(15,000)	—	—
Proceeds from follow-on offering net of underwriters commissions and discounts	11,550	—	—
Proceeds from exercise of common stock options	15,981	6,744	6,598
Proceeds from issuance of common stock under Employee Stock Purchase Plan	1,817	2,100	2,145
Payment of contingent consideration	(6,629)	(4,485)	(3,247)
Payment for treasury stock acquired	—	—	(5,003)
Excess tax benefit from the exercise of stock options	12,296	10,433	11,198
Net cash provided by financing activities	<u>20,015</u>	<u>64,455</u>	<u>11,325</u>
Net increase in cash and cash equivalents	54,165	53,343	87,617
Cash and cash equivalents at beginning of the year	305,793	359,958	413,301
<b>Cash and cash equivalents at end of the year</b>	<b><u>\$ 359,958</u></b>	<b><u>\$ 413,301</u></b>	<b><u>\$ 500,918</u></b>
<b>Supplemental cash flow disclosure:</b>			
Cash paid during the year for:			
Interest	\$ 1,533	\$ 866	\$ 2,542
Taxes	714	836	455
<b>Noncash financing and investing activities:</b>			
Accrued capital expenditures	421	556	800

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

**WAGEWORKS, INC.**  
**Notes to Consolidated Financial Statements**

**(1) Summary of Business and Significant Accounting Policies**

***Business***

WageWorks, Inc., (together with its subsidiaries, “WageWorks” or the “Company”) was incorporated in the state of Delaware in 2000. The Company is a leader in administering Consumer-Directed Benefits (“CDBs”), which empower employees to save money on taxes while also providing corporate tax advantages for employers. The Company operates as a single reportable segment on an entity level basis.

***Principles of Consolidation***

The consolidated financial statements include the accounts of the Company and its wholly owned subsidiaries. All significant intercompany accounts and transactions have been eliminated in consolidation.

***Reclassification***

Prior period amounts related to revenue from continuation services to employer clients under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”) within the Company’s consolidated income statements have been reclassified to conform to the current period presentation.

***Use of Estimates***

The preparation of financial statements in conformity with United States (“U.S.”) generally accepted accounting principles (“GAAP”) requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenue and expenses during the reporting period. Significant estimates in these consolidated financial statements include allowances for doubtful accounts, estimates of future cash flows associated with assets, useful lives for depreciation and amortization, loss contingencies, expired and unredeemed products, deferred tax assets, reserve for income tax uncertainties, the assumptions used for stock-based compensation, the assumptions used for software and web site development cost classification, and valuation and impairments of goodwill and long-lived assets. Actual results could differ from those estimates. In making its estimates, the Company considers the current economic and legislative environment in the estimates and has considered those factors when reviewing the assumptions and estimates.

***Cash, Cash Equivalents, and Restricted Cash***

The Company considers all highly liquid investments with an original maturity of 90 days or less to be cash equivalents. Cash and cash equivalents, which consist of cash on deposit with banks and money market funds, are stated at cost. To the extent the Company’s contracts do not provide for any restrictions on the Company’s use of cash that it receives from clients, the cash is recorded as cash and cash equivalents.

In all cases where we have collected cash from a customer but not fulfilled services, the Company recognizes a related liability to its customers, classified as customer obligations in the accompanying consolidated balance sheets.

Restricted cash represents cash used to collateralize standby letters of credit.

***Fair Value of Financial Instruments***

The Company’s financial assets and liabilities are recognized or disclosed at fair value in the financial statements on a recurring basis. The carrying amount of financial instruments approximates fair value because of their short maturity. The carrying amount of the Company’s variable rate debt approximates fair value.

The Company utilizes valuation techniques that maximize the use of observable inputs and minimize the use of unobservable inputs to the extent possible. The Company determines fair value based on assumptions that market participants would use in pricing an asset or liability in the principal or most advantageous market. When considering market participant assumptions in fair value measurements, the following fair value hierarchy distinguishes between observable and unobservable inputs, which are categorized in one of the following levels:

- Level 1 Inputs: Unadjusted quoted prices in active markets for identical assets or liabilities accessible to the reporting entity at the measurement date.

**WAGEWORKS, INC.**  
**Notes to Consolidated Financial Statements**

- Level 2 Inputs: Other than quoted prices included in Level 1 inputs that are observable for the asset or liability, either directly or indirectly, for substantially the full term of the asset or liability.
- Level 3 Inputs: Unobservable inputs for the asset or liability used to measure fair value to the extent that observable inputs are not available, thereby allowing for situations in which there is little, if any, market activity for the asset or liability at measurement date.

The contingent consideration payables related to the acquisitions of Benefit Concepts, Inc. (“BCI”) and Crosby Benefit Systems, Inc. (“CBS”) are recorded at fair value on the acquisition date and are adjusted quarterly to fair value. The increases or decreases in the fair value of contingent consideration payable can result from changes in anticipated revenue levels and changes in assumed discount periods and rates. As the fair value measure is based on significant inputs that are not observable in the market, they are categorized as Level 3.

Other financial instruments not measured at fair value on the Company’s consolidated balance sheet at December 31, 2015, but which require disclosure of their fair values include: cash and cash equivalents (including restricted cash), accounts receivable, accounts payable and accrued expenses and debt under the line of credit with certain lenders. The estimated fair value of such instruments at December 31, 2015 approximates their carrying value as reported on the consolidated balance sheets. The fair value of all of these instruments are categorized as Level 2 of the fair value hierarchy, with the exception of cash, which is categorized as Level 1 due to its short term nature.

The following table provides a reconciliation between the beginning and ending balances of items measured at fair value on a recurring basis that used significant unobservable inputs (Level 3) (in thousands):

	Contingent Consideration BCI	Contingent Consideration CBS
Balances at December 31, 2014	\$ 2,705	\$ 1,170
Gains or losses included in earnings:		
Losses on revaluation of contingent consideration	104	7
Payment of contingent consideration	(2,070)	(1,177)
Balances at December 31, 2015	\$ 739	\$ —

The Company measures contingent consideration elements each reporting period at fair value and recognizes changes in fair value in earnings each period in the amortization and change in contingent consideration line item on the consolidated statements of income, until the contingency is resolved. Losses on revaluation of contingent consideration result from accretion charges due to the passage of time and fair value adjustments due to changes in forecasted revenue levels.

The remaining contingent consideration for CBS was paid in the third quarter of 2015, while for BCI, the remaining balance will be paid in the first quarter of 2016.

The Company recorded a \$0.3 million and \$0.1 million charge related to the change in fair value of the contingent considerations for BCI and CBS during 2014 and 2015, respectively, as a result of accretion charges due to the passage of time.

*Quantitative Information about Level 3 Fair Value Measurements*

The significant unobservable inputs used in the fair value measurement of the Company’s contingent consideration designated as Level 3 are as follows:

	Fair Value at December 31, 2015 (in thousands)	Valuation Technique	Significant Unobservable Input
Contingent consideration – BCI	\$739	Discounted cash flow	Annualized revenue and probability of achievement

**WAGeworks, INC.**  
**Notes to Consolidated Financial Statements**

*Sensitivity to Changes in Significant Unobservable Inputs*

As presented in the table above, the significant unobservable inputs used in the fair value measurement of contingent consideration related to the acquisitions are annualized revenue forecasts developed by the Company's management and the probability of achievement of those revenue forecasts. Significant increases/decreases in these unobservable inputs in isolation would result in a significantly higher/lower fair value measurement.

***Accounts Receivable***

Accounts receivable represent both amounts receivable in relation to fees for the Company's services and unpaid amounts by customers for benefit services of participants provided by third-party vendors, such as transit agencies and healthcare providers. The Company provides for an allowance for doubtful accounts by reference to reserves for specific accounts. The Company reviews its allowance for doubtful accounts monthly. Account balances are written off against the allowance after all means of collection have been exhausted and the potential for recovery is considered remote. Write-offs for 2013, 2014 and 2015 were not significant.

***Property and Equipment***

Property and equipment are stated at cost less accumulated depreciation. Depreciation on computer and equipment and furniture and fixtures is calculated on a straight-line basis over the estimated useful lives of those assets, ranging from three to five years. Leasehold improvements are amortized on a straight-line basis over the shorter of their estimated useful life or the lease term. When events or circumstances suggest an asset's life is different than initially estimated, management reassesses the useful life of the asset and recognizes future depreciation prospectively over the revised life.

When assets are retired or otherwise disposed of, the cost and related accumulated depreciation are removed from their respective accounts, and any gain or loss on such sale or disposal is reflected in operating expenses.

Maintenance and repairs are expensed as incurred. Expenditures that substantially increase an asset's useful life are capitalized.

***Software and Web Site Development Costs***

Costs incurred to develop software are capitalized and recognized over the technology's estimated useful life, generally four years, as amortization in the accompanying consolidated statements of income. When events or circumstances suggest an asset's life is different than initially estimated, management reassesses the useful life of the asset and recognizes future amortization prospectively over the revised life. Costs incurred related to the planning and post implementation phases of development are expensed as incurred. Costs associated with the platform content or the repair or maintenance of the existing platforms is expensed as incurred.

The Company capitalizes interest on major construction or acquisition projects where the financial statement effect of capitalization versus current expense recognition is likely to be material. Capitalized interest related to software and development costs was immaterial for all years.

***Accounting for Impairment of Long-lived Assets***

The Company reviews long-lived assets for indicators of impairment whenever events or changes in circumstances indicate that the carrying amounts of such assets may not be recoverable. Long-lived assets consist primarily of software development costs, office equipment, leasehold improvements and definite-lived assets. An impairment of long-lived assets exists when the carrying amount of a long-lived asset, or asset group, exceeds its fair value. Impairment losses are recorded when the carrying amount of the impaired asset is not recoverable. Recoverability is determined by comparing the carrying amount of the asset or asset group to the undiscounted cash flows which are expected to be generated from its use. If the carrying amount of the asset or asset group exceeds its estimated future cash flows, an impairment charge is recognized by the amount by which the carrying amount of the asset or asset group exceeds its fair value. The Company did not record impairment losses related to long-lived assets in any of the years ended December 31, 2013, 2014 and 2015.

***Acquisitions and Goodwill***

The cost of acquisition is allocated to the assets acquired and liabilities assumed based on fair values at the date of acquisition. Goodwill represents the excess cost over the fair value of net assets acquired in the acquisition.

The Company performs a goodwill impairment test annually on December 31<sup>st</sup> and more frequently if events and circumstances indicate that the asset might be impaired. The following are examples of triggering events (none of which occurred in 2014 or 2015) that could indicate that the fair value of a reporting unit has fallen below the unit's carrying amount:



**WAGEWORKS, INC.**  
**Notes to Consolidated Financial Statements**

- A significant adverse change in legal factors or in the business climate
- An adverse action or assessment by a regulator
- Unanticipated competition
- A loss of key personnel
- A more-likely than-not expectation that a reporting unit or a significant portion of a reporting unit will be sold or otherwise disposed of

An impairment loss is recognized to the extent that the carrying amount exceeds the reporting unit's fair value. When reviewing goodwill for impairment, the Company assesses whether goodwill should be allocated to operating levels lower than the Company's single operating segment for which discrete financial information is available and reviewed for decision-making purposes. These lower levels are referred to as reporting units. The Company's chief operating decision maker, the Chief Executive Officer, does not allocate resources or assess performance at the individual healthcare, commuter, COBRA or other revenue stream level, but rather at the operating segment level. Discrete financial information is therefore not maintained at the revenue stream level. The Company's one reporting unit was determined to be the Company's one operating segment.

The goodwill impairment analysis is a two-step process: first, the reporting unit's estimated fair value is compared to its carrying value, including goodwill. If the Company determines that the estimated fair value of the reporting unit is less than its carrying value, the Company moves to the second step to determine the implied fair value of the reporting unit's goodwill. If the carrying amount of the reporting unit's goodwill exceeds its implied fair value, an impairment loss is recognized for any excess of the carrying amount of the reporting unit's goodwill over the implied fair value of the reporting unit in a manner similar to a purchase price allocation.

Whenever events or circumstances change, entities have the option to first make a qualitative evaluation about the likelihood of goodwill impairment. If impairment is deemed more likely than not, management would perform the currently prescribed two-step goodwill impairment test. Otherwise, the two-step goodwill impairment test is not required. In assessing the qualitative factors, the Company assesses relevant events and circumstances that may impact the fair value and the carrying amount of the reporting unit. The identification of relevant events and circumstances and how these may impact a reporting unit's fair value or carrying amount involve significant judgments and assumptions. The judgment and assumptions include the identification of macroeconomic conditions, industry and market considerations, overall financial performance, Company specific events and share price trends and making the assessment on whether each relevant factor will impact the impairment test positively or negatively and the magnitude of any such impact. At December 31, 2015, the Company completed its annual goodwill impairment assessment and management concluded that goodwill is not impaired and the two-step goodwill impairment test was not deemed necessary.

To date, the Company has not made any impairment adjustments to goodwill as the fair value of its reporting unit determined as the market capitalization of the Company on the testing date in all prior years has always exceeded its carrying value by a significant amount.

***Income Taxes***

The Company reports income taxes using an asset and liability approach. Deferred tax assets and liabilities arise from the differences between the tax basis of an asset or liability and its reported amount in the consolidated financial statements, as well as from net operating loss and tax credit carryforwards. Deferred tax amounts are determined by using the tax rates expected to be in effect when the taxes will actually be paid or refunds received, as provided under current enacted tax law. The effect on deferred tax assets and liabilities of a change in tax rates is recognized in income in the period that includes the enactment date. A valuation allowance reduces the deferred tax assets to the amount that is more likely than not to be realized.

The Company uses financial projections to support its net deferred tax assets, which contain significant assumptions and estimates of future operations. If such assumptions were to differ significantly, it may have a material impact on the Company's ability to realize its deferred tax assets. At the end of each period, the Company assesses the ability to realize the deferred tax benefits. If it is more likely than not that the Company would not realize the deferred tax benefits, then the Company would establish a valuation allowance for all or a portion of the deferred tax benefits.

The Company recognizes the effect of income tax positions only if those positions are more likely than not of being sustained on examination by the taxing authorities, based on the technical merits of the position. Recognized income tax positions are measured at the largest amount that is greater than 50% likely of being realized. Changes in recognition or measurement are reflected in the period in which the change in judgment occurs.

The Company records interest and penalties related to uncertain tax positions in income tax expense.

**WAGEWORKS, INC.**  
**Notes to Consolidated Financial Statements**

***Revenue Recognition***

The Company reports revenue based on the following product lines: Healthcare, Commuter, COBRA and Other revenue. Healthcare and Commuter include revenues generated from benefit service fees based on employee participant participation levels and interchange and other commission revenues. Interchange and other commission revenues are based on a percentage of total healthcare and commuter dollars transacted pursuant to written purchase agreements with certain vendors and banks. COBRA revenue is generated from the administration of continuation of coverage services for participants who are no longer eligible for their employer's health benefits, such as medical, dental, vision and for the continued administration of employee participants' Health Reimbursement Arrangements ("HRAs"), and certain healthcare Flexible Spending Accounts ("FSAs"). Other revenue includes services related to enrollment and eligibility, non-healthcare, and employee account administration (i.e., tuition and health club reimbursements) and project-related professional services.

The Company recognizes revenue when collectability is reasonably assured, service has been performed, persuasive evidence of an arrangement exists, and there is a fixed or determinable fee.

Benefit service fees are recognized on a monthly basis as services are rendered and earned under service arrangements where fees and commissions are fixed or determinable and collectability is reasonably assured. Benefit service fees are based on a fee for service model (e.g., monthly fee per participant) in which revenue is recognized on a monthly basis as services are rendered under price quotations or service agreements having stipulated terms and conditions, which do not require management to make any significant judgments or assumptions regarding any potential uncertainties. Fees received for initial setup of new clients and annual renewal fees are deferred and recognized on a monthly basis as services are rendered over the agreed benefit period. Contracts where initial setup fees are charged have an initial term of one year. The agreed benefit period means the length of the benefit plan year, which is one year. The initial setup fees are not considered separable from the ongoing services provided for which benefit service fees are earned.

Vendor and bank interchange revenues are attributed to revenue sharing arrangements the Company enters into with certain banks and card associations, whereby the Company shares a portion of the transaction fees earned by these financial institutions on debit cards the Company issues to its employee participants based on a percentage of total dollars transacted as reported on third-party reports. Commission revenue entails the Company purchasing passes on behalf of its employee participants from various transit agencies and due to the significant volume of purchases, the Company receives commissions on these passes which the Company records on a net basis. Commission revenue is recognized on a monthly basis as transactions are placed under written purchase agreements having stipulated terms and conditions, which do not require management to make any significant judgments or assumptions regarding any potential uncertainties. In addition, the Company recognizes revenue on its estimate of passes that will expire unused over the estimated useful life of the passes, as the amounts paid for these passes are nonrefundable to both the employer client and the employee participant.

Professional service fees are related to services provided to the Company's employer clients to accommodate their reporting or administrative requirements. These projects are discrete contracts and are not entered into contemporaneously with any other services the Company provides. The professional services revenues are recognized upon completion of services or projects in accordance with agreed upon terms and conditions, which do not require management to make any significant judgments or assumptions regarding any potential uncertainties and where fees are fixed or determinable and collectability is reasonably assured.

***Stock-Based Compensation***

The Company accounts for stock-based compensation cost related to restricted stock unit awards and stock options based on the estimated fair value of the award at the grant date. Stock-based compensation is recognized as expense over the employee's requisite service period (generally over the vesting period of the award) on a straight-line basis (see Note 11 – Employee Benefit Plans).

**WAGEWORKS, INC.**  
**Notes to Consolidated Financial Statements**

***Recently Issued Accounting Pronouncements***

In May 2014, the Financial Accounting Standards Board, or FASB, issued Accounting Standards Update No. 2014-09, *Revenue from Contracts with Customers*, or ASU 2014-09, which clarifies existing accounting literature relating to how and when a company recognizes revenue. Under ASU 2014-09, a company will recognize revenue when it transfers promised goods or services to customers in an amount that reflects the consideration to which the company expects to be entitled in exchange for those goods and services. Additionally, the guidance requires improved disclosures to help users of financial statements better understand the nature, amount, timing, and uncertainty of revenue and cash flows arising from contracts with customers. The new standard allows for either a full retrospective with or without practical expedients or a retrospective with a cumulative catch upon adoption transition method. In July 2015, the FASB deferred the effective date for annual reporting periods beginning after December 15, 2017 (including interim reporting periods within those periods) in ASU 2015-14. Early adoption is permitted to the original effective date of December 15, 2016 (including interim reporting periods within those periods). The Company is in the process of determining what impact, if any, the adoption of this ASU will have on its consolidated financial statements and related disclosures.

In April 2015, the FASB issued Accounting Standards Update 2015-03, *Simplifying the Presentation of Debt Issuance Costs*, “ASU 2015-03,” which changes the presentation of debt issuance costs in financial statements. ASU 2015-03 requires an entity to present such costs in the balance sheet as a direct deduction from the related debt liability rather than as an asset. Amortization of the costs will continue to be reported as interest expense. It is effective for annual reporting periods beginning after December 15, 2015. The Company early adopted this ASU and this adoption did not have a material impact on its consolidated financial statements.

In April 2015, the FASB issued Accounting Standards Update No. 2015-05, *Customer's Accounting for Fees Paid in a Cloud Computing Arrangement*, or ASU 2015-05. ASU 2015-05 provides guidance to customers about whether a cloud computing arrangement includes a software license. If a cloud computing arrangement includes a software license, then the customer should account for the software license element of the arrangement consistent with the acquisition of other software license. If a cloud computing arrangement does not include a software license, the customer should account for the arrangement as a service contract. The guidance will not change GAAP for a customer's accounting for service contracts. The Company is currently assessing what impact, if any, of adopting this ASU will have on its consolidated financial statements and related disclosures.

In September 2015, the FASB issued Accounting Standards Update No. 2015-16, *Simplifying the Accounting for Measurement-Period Adjustments*, or ASU 2015-16. ASU 2015-16 provides guidance that eliminates the requirement to restate prior period financial statements for measurement period adjustments following a business combination. The new guidance requires that the cumulative impact of a measurement period adjustment (including the impact on prior periods) be recognized in the reporting period in which the adjustment is identified. The prior period impact of the adjustment should be either presented separately on the face of the income statement or disclosed in the notes. The Company will adopt the ASU for all future business combination that have measurement period adjustments.

In November 2015, the FASB issued Accounting Standards Update No. 2015-17, *Balance Sheet Classification of Deferred Taxes*, or ASU 2015-17. ASU 2015-17 requires entities with a classified balance sheet to present all deferred tax assets and liabilities as noncurrent. The current requirement that deferred tax liabilities and assets of a tax-paying component of an entity be offset and presented as a single amount is not affected by the amendments in this Update. The Company elected to prospectively adopt the accounting standard in the beginning of our fourth quarter of fiscal 2015. Prior periods in the Company's consolidated financial statements were not retrospectively adjusted.

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**(2) Net Income per Share**

The following table sets forth the computation of basic and diluted net income per share:

	Year Ended December 31,		
	2013	2014	2015
Numerator for basic net income per share:			
Net income	\$ 21,699	\$ 18,242	\$ 22,950
Denominator for basic net income per share:			
Weighted-average common shares outstanding	33,626	35,145	35,784
Basic net income per share	\$ 0.65	\$ 0.52	\$ 0.64
Numerator for diluted net income per share:			
Net income	\$ 21,699	\$ 18,242	\$ 22,950
Denominator for diluted net income per share:			
Weighted-average common shares outstanding	33,626	35,145	35,784
Dilutive stock options and restricted stock units	1,651	1,185	811
Diluted weighted-average common shares outstanding	35,277	36,330	36,595
Diluted net income per share	\$ 0.62	\$ 0.50	\$ 0.63

Stock options and restricted stock units to purchase common stock are not included in the computation of diluted earnings per share if their effect would be anti-dilutive. There were 22 thousand, 1.09 million and 0.9 million anti-dilutive shares for 2013, 2014 and 2015.

**(3) Acquisitions and Channel Partner Arrangements***Crosby Benefit Systems, Inc. Acquisition*

On May 1, 2013, the Company acquired CBS, a third party administrator of CDBs, based in Newton, Massachusetts. This acquisition added new customers and participant relationships and further strengthened the Company's position in the CDBs market. The purchase price included a \$5.0 million cash payment that was paid on May 1, 2013 and a contingent consideration element that required the Company to pay the former owners of CBS additional amounts in 2014 and 2015 based upon revenue growth rates of CBS for 2014 and 2015, respectively. The remaining contingent consideration for CBS was paid in the third quarter of 2015.

*Ceridian Channel Partner Arrangement*

In July 2013, the Company entered into a channel partner arrangement with Ceridian Corporation, or Ceridian, a global product and services company. Pursuant to the arrangement, Ceridian's CDB account administration business for FSA and HRA was transitioned to the Company as of January 2015 with a final purchase price of \$13.5 million. In conjunction with the transition, the Company also entered into a separate reseller arrangement with Ceridian.

In September 2015, the Company entered into another agreement with Ceridian to transition their COBRA and direct bill portfolio to the Company. This relationship also allows Ceridian as a channel partner to resell the Company's COBRA and direct bill services to their new and existing clients in addition to the full suite of healthcare and commuter products they have been selling.

*CONEXIS Acquisition*

On August 1, 2014, the Company entered into an Asset Purchase Agreement with CONEXIS Benefits Administrators, LP ("CONEXIS"), a Texas limited partnership and Word & Brown Insurance Administrator, Inc., a California corporation, pursuant to which the Company acquired substantially all of the assets of CONEXIS. CONEXIS is a leader in employee benefits administration and serves approximately 16,000 organizations of all sizes. This acquisition added a new base of CDBs customers and participant relationships. The purchase price was \$118.0 million, adjusted for working capital adjustments, of which \$108.0 million was paid at closing with the remaining balance classified in the consolidated balance sheets in the other current liabilities line item. The holdback obligation of \$10.0 million was settled for \$9.4 million in the third quarter of 2015 after working capital adjustments. The results of operations for CONEXIS have been included in the Company's financial results since the acquisition.

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As part of the purchase price allocation, the Company determined that CONEXIS' separately identifiable intangible assets were its customer relationships, developed technology and trade name. The Company used the income approach to value the customer relationships and trade name. This approach calculates fair value by discounting the after-tax cash flows back to a present value. The Company used a replacement cost approach to estimate the fair value of developed technology in which estimates of development time and cost per man month are used to calculate total replacement cost.

Goodwill was calculated as the difference between the acquisition-date fair value of the consideration transferred and the values assigned to the assets acquired and liabilities assumed. Goodwill recognized from the transaction results from the acquired workforce, the opportunity to expand the Company's client base and achieve greater long-term growth opportunities than either company had operating alone. All of the recognized goodwill is expected to be deductible for tax purposes.

The following table summarizes the allocation of the purchase price at the date of acquisition (in millions):

	Amount	Weighted Average Useful Life (in years)
Net tangible assets acquired	\$ 4.7	
Customer relationships	48.1	10
Developed technology	3.9	5
Trade name	1.6	3
Non-compete agreement	0.2	7
Goodwill	59.5	
Total allocation of purchase price	<u>\$ 118.0</u>	

**(4) Goodwill and Intangible Assets**

The changes in the carrying amount of goodwill for the years ended December 31, 2014 and 2015 is as follows (in thousands):

Balance at December 31, 2013	\$ 97,636
Additions: CONEXIS acquisition (see Note 3)	59,473
Balance at December 31, 2014 and 2015	<u>\$ 157,109</u>

Acquired intangible assets at December 31, 2014 and December 31, 2015 were comprised of the following (in thousands):

	December 31, 2014			December 31, 2015		
	Gross carrying amount	Accumulated amortization	Net	Gross carrying amount	Accumulated amortization	Net
Amortizable intangible assets:						
Client contracts and broker relationships	\$ 120,723	\$ 33,885	\$ 86,838	\$ 124,261	\$ 47,013	\$ 77,248
Trade names	3,880	1,657	2,223	3,880	2,405	1,475
Technology	13,846	9,390	4,456	13,846	11,039	2,807
Noncompete agreements	2,232	1,798	434	2,232	1,870	362
Favorable lease	1,137	312	825	1,136	412	724
Total	<u>\$ 141,818</u>	<u>\$ 47,042</u>	<u>\$ 94,776</u>	<u>\$ 145,355</u>	<u>\$ 62,739</u>	<u>\$ 82,616</u>

Amortization expense of intangible assets totaled \$9.1 million, \$11.8 million and \$15.7 million in 2013, 2014 and 2015, respectively.

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The estimated expected amortization expense in future periods at December 31, 2015 is as follows (in thousands):

2016	\$	15,923
2017		15,369
2018		12,198
2019		11,638
2020		9,655
Thereafter		17,833
<b>Total</b>	<b>\$</b>	<b>82,616</b>

**(5) Accounts Receivable**

Accounts receivable at December 31, 2014 and 2015 was comprised of the following (in thousands):

	December 31, 2014	December 31, 2015
Trade receivables	\$ 35,762	\$ 37,999
Unpaid amounts for benefit services	19,458	35,343
	55,220	73,342
Less allowance for doubtful accounts	(767)	(1,071)
<b>Accounts receivable, net</b>	<b>\$ 54,453</b>	<b>\$ 72,271</b>

Allowance for doubtful accounts roll forward is comprised of the following (in thousands):

<b>Allowance for Doubtful Accounts:</b>	<b>Balance at Beginning of Fiscal Year</b>	<b>Charged to Operations</b>	<b>Recoveries (Deductions)</b>	<b>Balance at End of Fiscal Year</b>
Year ended December 31, 2015	\$ 767	\$ 475	\$ (171)	\$ 1,071
Year ended December 31, 2014	467	259	41	767
Year ended December 31, 2013	403	247	(183)	467

**(6) Property and Equipment**

Property and equipment at December 31, 2014 and 2015 was comprised of the following (in thousands):

	December 31, 2014	December 31, 2015
Computers and equipment	\$ 13,670	\$ 14,461
Software and software development costs	77,104	92,898
Furniture and fixtures	3,306	5,083
Leasehold improvements	8,285	13,594
	102,365	126,036
Less accumulated depreciation and amortization	(63,228)	(78,081)
<b>Property and equipment, net</b>	<b>\$ 39,137</b>	<b>\$ 47,955</b>

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During 2013, 2014 and 2015, the Company capitalized software development costs of \$15.3 million, \$16.5 million and \$15.7 million, respectively. Amortization expense related to capitalized software development costs was \$8.0 million, \$8.8 million and \$11.8 million for 2013, 2014, and 2015, respectively. These costs are included in amortization and change in contingent consideration in the accompanying consolidated statements of income. At December 31, 2015, the unamortized software development costs included in property and equipment in the accompanying consolidated balance sheets was \$27.4 million.

Total depreciation expense, including amortization of software and software development costs, for the years ended December 31, 2013, 2014 and 2015 was \$11.4 million, \$13.2 million and \$18.5 million, respectively.

**(7) Accounts Payable and Accrued Expenses**

Accounts payable and accrued expenses at December 31, 2014 and 2015 were comprised of the following (in thousands):

	December 31, 2014	December 31, 2015
Accounts payable	\$ 1,180	\$ 2,542
Payable to benefit providers and transit agencies	19,500	23,169
Accrued payables	11,099	11,198
Accrued compensation and related benefits	16,045	18,538
Other accrued expenses	3,156	2,891
Deferred revenue	3,305	2,203
Accounts payable and accrued expenses	<u>\$ 54,285</u>	<u>\$ 60,541</u>

**(8) Long-term Debt**

On June 5, 2015, the Company entered into an Amended and Restated Credit Agreement with certain lenders, including MUFG Union Bank, N.A., as administrative agent. With a \$15.0 million subfacility for the issuance of letters of credit, the amendment provides for a \$150.0 million revolving credit facility, an increase from the previous aggregate principal amount of \$125.0 million from which the Company could borrow. The amendment also contains an increase option permitting the Company to arrange with existing lenders and/or new lenders to provide up to an aggregate of \$100.0 million in additional commitments. The amendment extended the term of the credit facility from July 21, 2017 to June 5, 2020 and reduced the margin added to the London Interbank Offered Rate ("LIBOR"). The margin added to LIBOR rate is now in a range of 125 to 175 basis points, down from a range of 175 to 225 basis points. The interest rate applicable to the revolving credit facility as of December 31, 2015 is 1.54%. In connection with the Amended and Restated Credit Agreement, the Company incurred fees of approximately \$0.4 million, which are being amortized over the term of the amendment. The fees incurred are classified as a direct deduction from the long-term debt line item in the consolidated balance sheets. As of December 31, 2015, the Company had \$79.6 million outstanding under the credit facility.

Amounts borrowed, outstanding letters of credit and amounts available to borrow, were as follows (dollars in thousands):

	December 31, 2014	December 31, 2015
Amounts borrowed	\$ 79,600	\$ 79,600
Outstanding letters of credit	3,182	2,700
Amounts available to borrow <sup>(1)</sup>	42,218	67,700

(1) Excluding \$100 million increase option

As collateral, the Company's obligations are secured by substantially all of the Company's assets. All of the Company's material existing and future subsidiaries are required to guaranty the Company's obligations under the credit facility. Such guarantees by existing and future material subsidiaries are and will be secured by substantially all of the property of such material subsidiaries.

The credit facility contains customary affirmative and negative covenants and also has financial covenants relating to a liquidity ratio, a consolidated leverage ratio and an interest coverage ratio. The Company is obligated to pay customary commitment fees and letter of credit fees for a facility of this size and type. The Company is currently in compliance with all financial and non-financial covenants under the credit facility.



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The credit facility contains customary events of default, including, among others, payment defaults, covenant defaults, inaccuracy of representations and warranties, cross-defaults to other material indebtedness, judgment defaults, a change of control default and bankruptcy and insolvency defaults. Under certain circumstances, a default interest rate will apply on all obligations during the existence of an event of default under the loan agreement at a per annum rate of interest equal to 2.00% above the applicable interest rate. Upon an event of default, the lenders may terminate the commitments, declare the outstanding obligations payable by the Company to be immediately due and payable and exercise other rights and remedies provided for under the credit facility.

**(9) Organizational Efficiency Plan**

During the second quarter of 2015, the Company integrated operations and consolidated certain positions resulting in employee headcount reductions. The Company continually evaluates ways to improve business processes to ensure that operations align with its strategy and vision for the future. In 2015, the Company recognized charges in operating expenses of \$1.9 million, primarily for severance costs. The Company has recorded these severance costs within accrued compensation and related benefits in the accompanying consolidated balance sheet.

Changes in the Company's accrued liabilities for workforce reduction costs in 2015 were as follows (dollars in thousands):

	December 31, 2015
Beginning balance	\$ —
Employee termination and other charges	1,913
Cash paid	(1,730)
Ending balance	\$ 183

**(10) Common Stock**

***(a) Follow-on Public Offerings***

On March 18, 2013, the Company closed a follow-on public offering and sold 500,000 shares of common stock at a price of \$24.00 per share, which raised \$11.6 million, net of underwriters' discounts and commissions. Certain selling stockholders, including funds affiliated with VantagePoint Capital Partners ("VantagePoint"), sold 5,131,115 shares of common stock in the offering. In addition, the underwriters exercised their over allotment option to purchase 844,667 additional shares from the selling stockholders. The Company did not receive any proceeds from the sale of shares by the selling stockholders.

On August 19, 2013, the Company closed a follow-on public offering pursuant to which certain selling stockholders, including VantagePoint, sold 2,968,276 shares of common stock. In addition, the underwriters exercised their over allotment option to purchase 445,241 additional shares from the selling stockholders. The shares were purchased at a price of \$39.54 per share, net of underwriters' discounts and commissions. The Company did not receive any proceeds from the sale of shares by the selling stockholders.

***(b) Share Repurchase Program***

On August 6, 2015, the Company's Board of Directors authorized a \$100 million stock repurchase program which commenced immediately and does not have an expiration date. Repurchases made under this program may be made in the open market as the Company deems appropriate and market conditions allow. In 2015, the Company repurchased 118,772 shares of common stock for a total cost of \$5.0 million, or an average price of \$42.13 per share.

**(11) Employee Benefit Plans**

***(a) Employee Stock Option Plan***

On May 26, 2010, the company had adopted the 2010 Equity Incentive Plan ("2010 Plan"). Under the 2010 Plan, the Company can grant share-based awards to all employees, including executive officers, outside consultants and non-employee directors. As of December 31, 2015, the 2010 Plan has a total of 5.4 million common stock shares available for issuance.

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The Company's 2000 Stock Option/Stock Issuance Plan adopted in June 2000, as amended and restated, ("2000 Plan"), provides for the issuance of options and other stock-based awards. As of December 31, 2015, the 2000 Plan has a total of 0.7 million options outstanding. Any forfeitures or shares remaining under the plan are canceled and not available for reissue. No further grants will be made under the 2000 Plan.

Options under the 2000 Plan and the 2010 Plan ("the Plans") expires 10 years after the date of grant and generally vest over four years with 25% vesting after one year and the balance vesting monthly over the remaining period. The Company issues new shares upon the exercise of stock options.

Stock-based compensation is classified in the consolidated statements of income in the same expense line items as cash compensation. Amounts recorded as expense in the consolidated statements of income are as follows (in thousands):

	Year Ended December 31,		
	2013	2014	2015
Cost of revenue	\$ 978	\$ 2,227	\$ 3,836
Technology and development	818	1,209	1,190
Sales and marketing	1,079	2,466	2,724
General and administrative	6,331	8,656	12,856
<b>Total</b>	<b>\$ 9,206</b>	<b>\$ 14,558</b>	<b>\$ 20,606</b>

As of December 31, 2015, there was \$17.5 million of total unrecognized compensation cost related to unvested stock options that are expected to vest. The cost is expected to be recognized over a weighted-average period of approximately 2.71 years, as of December 31, 2015.

The following table summarizes the weighted-average fair value of stock options granted:

	Year Ended December 31,		
	2013	2014	2015
Stock options granted (in thousands)	576	1,026	501
Weighted-average fair value at date of grant	\$ 12.55	\$ 20.06	\$ 18.89

Stock option activity for the year ended December 31, 2015 is as follows (shares in thousands):

	Shares	Weighted-average exercise price	Remaining contractual term (years)	Aggregate intrinsic value (dollars in thousands)
Outstanding at December 31, 2014	3,206	\$ 20.90	6.75	\$ 140,029
Granted	501	48.71		
Exercised	(465)	14.19		
Forfeited	(205)	40.68		
Outstanding as of December 31, 2015	<u>3,037</u>	25.18	6.41	\$ 65,229
Vested and expected to vest at December 31, 2015	2,953	24.68	6.34	\$ 64,766
Exercisable at December 31, 2015	1,975	15.86	5.16	\$ 59,447

The total intrinsic value of options exercised during the years ended December 31, 2013, 2014 and 2015, was \$55.6 million, \$28.4 million and \$17.1 million, respectively. Cash received from option exercises under all share-based payment arrangements was \$16.0 million, \$6.7 million and \$6.6 million for the years ended December 31, 2013, 2014 and 2015, respectively. The Company elected to follow the tax law method of determining realization of excess tax benefits for stock-based compensation. There was approximately \$12.3 million, \$10.4 million and \$11.2 million of excess tax benefits related to stock-based compensation that was recorded to stockholders' equity during the years ended December 31, 2013, 2014 and 2015, respectively.

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**(b) Valuation Assumptions**

The Company calculated the fair value of each option award on the date of grant using the Black-Scholes option pricing model with the following weighted-average assumptions:

	Year Ended December 31,		
	2013	2014	2015
Expected volatility	51.43%	46.90%	43.48%
Risk-free interest rate	1.09%	1.87%	1.56%
Expected term (in years)	6.00	6.09	4.74
Dividend yield	—%	—%	—%

Stock-based compensation cost is measured at the grant date based on the fair value of the award. The determination of the fair value of stock-based awards on the date of grant using an option pricing model is affected by the Company's stock price as well as assumptions regarding a number of complex and subjective variables. Expected volatility is determined using weighted-average volatility of peer publicly traded companies as well as the Company's own historical volatility. The Company expects that it will increase weighting of its own historical data in future periods, as that history grows over time. The risk-free interest rate is determined by using published zero coupon rates on treasury notes for each grant date given the expected term on the options. The dividend yield of zero is based on the fact that the Company expects to invest cash in operations and has not paid cash dividends on its common stock. The Company estimates the expected term based on historical experience, giving consideration to the contractual terms of the stock-based awards, vesting schedules and expectations of future employee behavior such as exercises and forfeitures.

The fair value of each option grant for performance share options was estimated on the date of grant using the same option valuation model used for options granted under the employee share option plan and assumes that performance goals will be achieved.

Stock-based compensation expense is recognized in the consolidated statements of income based on awards ultimately expected to vest, and is reduced for estimated pre-vest forfeitures. Forfeitures are estimated at the time of grant and are revised, if necessary, in subsequent periods if actual forfeitures differ from those estimates. The Company calculates an adjustment of its compensation costs to the vested amounts on a quarterly basis. The estimate of pre-vesting of forfeitures is based on weighted average historical forfeiture rates. The Company will record additional expense if the actual forfeiture rate is lower than estimated, and will record a recovery of prior expense if the actual forfeiture rate is higher than estimated.

**(c) Restricted Stock Units**

The Company grants restricted stock units to certain employees, officers, and directors under the 2010 Plan. Restricted stock units vest upon either performance-based, market-based or service-based criteria.

Performance-based restricted stock units vest based on the satisfaction of specific performance criteria. At each vesting date, the holder of the award is issued shares of the Company's common stock. Compensation expense from these awards is equal to the fair market value of the Company's common stock on the date of grant and is recognized over the remaining service period based on the probable outcome of achievement of the financial metrics. Management's estimate of the number of shares expected to vest is based on the anticipated achievement of the specified performance criteria.

Market-based performance restricted stock units are granted such that they vest upon the achievement of certain per share price targets of the Company's common stock during a specified performance period. The fair market values of market-based performance restricted stock units are determined using the Monte Carlo simulation method. The Monte Carlo simulation method is subject to variability as several factors utilized must be estimated including the future daily stock price of the Company's common stock over the specified performance period, the Company's stock price volatility and risk-free interest rate. The amount of compensation expense is equal to the per share fair value calculated under the Monte Carlo simulation multiplied by the number of market-based performance restricted stock units granted, recognized over the specified performance period.

Generally, service-based restricted stock units vest over four years with 25% vesting after one year and the balance vesting monthly over the remaining period.

In the first quarter of 2014 and 2015, the Company granted a total of 106,500 and 140,000, respectively, of performance-based restricted stock units to certain executive officers. Performance-based restricted stock units are typically granted such that they vest upon the achievement of certain revenue growth rates, and other financial metrics, during a specified performance period for which participants have the ability to receive up to 150% of the target number of shares originally granted.

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The restricted stock units will be eligible to vest based on the Company’s achievement against an average annual earnings before interest, taxes, depreciation and amortization (“EBITDA”) margin target equal to or greater than 22% and compound revenue growth target for the specified performance period.

The following table describes the levels of revenue growth target for the specified performance period for the restricted stock units to vest:

Achievement of Revenue Growth Objective	Percentage of RSU Vesting
20% and Greater	150% will vest
Between 15% but less than 20%	Between 100% and 150% will vest
Between 10% but less than 15%	Between 50% and 100% will vest
Below 10%	None will vest

In the second quarter of 2014, the Company granted a total of 199,000 market-based performance restricted stock units to certain executive officers. The number of shares to be vested is subject to change based on certain market conditions. In the third quarter of 2014, one of the executives resigned and 33,000 market-based performance restricted stock units were forfeited and canceled.

The market-based performance restricted stock units will be eligible to vest based on the Company’s achievement of certain per share price of its common stock as reported on the New York Stock Exchange (“NYSE”), for any 20 consecutive trading day period during the specified performance period.

The following table describes the price per share targets that must be achieved for the specified performance period for the restricted stock units to vest:

WageWorks Per Share Price on NYSE	Payout Percentage
\$100	200%
\$90	100%
\$75	50%
Below \$75	0%

Stock-based compensation expense related to restricted stock units was \$2.7 million, \$6.0 million and \$13.0 million in 2013, 2014 and 2015, respectively. Total unrecorded stock-based compensation cost at December 31, 2015 associated with restricted stock units was \$19.5 million, which is expected to be recognized over a weighted-average period of 1.39 years.

The following table summarizes information about restricted stock units issued to officers, directors, and employees under the 2010 Plan:

	Shares <u>(in thousands)</u>	Weighted-average Grant Date Fair Value
Unvested at December 31, 2014	637	\$ 37.99
Granted	249	57.79
Vested	(74)	33.10
Forfeitures	(49)	40.36
Unvested at December 31, 2015	<u>763</u>	<u>\$ 44.83</u>

***(d) Employee Stock Purchase Plan***

In May 2012, the Company established the 2012 Employee Stock Purchase Plan (“ESPP”) which is intended to qualify under Section 423 of the Internal Revenue Code of 1986. The Company issued 54,357 common stock shares for which it received \$2.1 million from employee contributions during 2015. At December 31, 2015, a total of 1,228,060 shares of the Company’s common stock are available for sale under the ESPP. In addition, the ESPP provides for annual increases in the number of shares available for issuance under the ESPP on the first day of each fiscal year, equal to the least of:

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- 500,000 shares of common stock;
- 1% of the outstanding shares of the Company's common stock as of the last day of its immediately preceding fiscal year; or
- such other amount as may be determined by the board of directors.

Under the ESPP, employees are eligible to purchase common stock through payroll deductions of up to 25% of their eligible compensation, subject to any plan limitations. The ESPP has four consecutive offering periods of approximately three months in length during the year and the purchase price of the shares is 85% of the lower of the fair value of the Company's common stock on the first trading day of the offering period or on the last day of the offering period.

***(e) 401(k) Plan***

The Company participates in the WageWorks 401(k) Plan ("401(k) Plan"), a tax-deferred savings plan covering all of its employees working more than 1,000 hours per year. Employees become participants in the 401(k) Plan on the first day of any month following the first day of employment. Eligible employees may contribute up to 85% of their compensation to the 401(k) Plan, limited to the maximum allowed under the Internal Revenue Code. The Company, at its discretion, may match up to 25% of the first 6% of employees' contributions and may make additional contributions to the 401(k) Plan. The Company contributed approximately \$1.0 million for each of 2013 and 2014, and \$1.25 million for 2015.

**(12) Income Taxes**

The Company provides for income taxes using an asset and liability approach, under which deferred income taxes are provided based upon enacted tax laws and rates applicable to periods in which the taxes become payable. The Company is subject to income taxes in the U.S. federal and various state jurisdictions. Presently, the Company is under audit in New York State. There are no other income tax examinations on-going in the jurisdictions where the Company operates.

The components of the provision for income taxes are as follows (in thousands):

	<b>Year Ended December 31,</b>		
	<b>2013</b>	<b>2014</b>	<b>2015</b>
Current:			
Federal	\$ (10,748)	\$ (9,459)	\$ (9,873)
State	(1,702)	(1,539)	(3,296)
	<u>(12,450)</u>	<u>(10,998)</u>	<u>(13,169)</u>
Deferred:			
Federal	2,929	(828)	(2,902)
State	318	(117)	1,034
	<u>3,247</u>	<u>(945)</u>	<u>(1,868)</u>
Total provision for income taxes	<u>\$ (9,203)</u>	<u>\$ (11,943)</u>	<u>\$ (15,037)</u>

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Deferred tax assets (liabilities) consist of the following (in thousands):

	<b>December 31, 2014</b>	<b>December 31, 2015</b>
Deferred tax assets		
Current:		
Accruals and reserves	\$ 3,219	\$ —
Net operating loss carryforwards	7,787	—
Deferred tax assets-current	<u>11,006</u>	<u>—</u>
Noncurrent:		
Net operating loss carryforwards	34	1,725
Stock-based compensation	9,238	14,970
R&D and other credits	2,680	4,270
Property and equipment	579	—
Reserves-noncurrent	622	7,018
Deferred tax assets-noncurrent	<u>13,153</u>	<u>27,983</u>
Gross deferred tax assets	<u>24,159</u>	<u>27,983</u>
Deferred tax liabilities		
Noncurrent:		
Property and equipment	—	(4,123)
Intangible assets	(5,630)	(4,122)
Goodwill	<u>(6,824)</u>	<u>(9,901)</u>
Gross deferred tax liabilities	<u>(12,454)</u>	<u>(18,146)</u>
Net deferred tax assets and liabilities		
Net deferred tax assets-current	11,006	—
Net deferred tax assets (liabilities)-non-current	699	9,837
Total net deferred tax assets	<u>\$ 11,705</u>	<u>\$ 9,837</u>

Reconciliation of the statutory federal income tax rate to the Company's effective tax rate for the years ended December 31, 2013, 2014 and 2015:

	<b>Year Ended December 31,</b>		
	<b>2013</b>	<b>2014</b>	<b>2015</b>
Tax provision at U.S. statutory rate	35 %	35 %	35 %
State income taxes, net of federal benefit	5	5	5
Permanent items - adjustments to contingent consideration	(8)	—	—
Permanent items - other	1	1	1
R&D credits	(1)	—	(1)
Other	(2)	(1)	—
Provision (benefit) for tax	<u>30 %</u>	<u>40 %</u>	<u>40 %</u>

The Company's accounting for deferred taxes involves the evaluation of a number of factors concerning the realizability of the Company's deferred tax assets. Assessing the realizability of deferred tax assets is dependent upon several factors, including the likelihood and amount, if any, of future taxable income in relevant jurisdictions during the periods in which those temporary differences become deductible. The Company's management forecasts taxable income by considering all available positive and negative evidence including its history of operating income or losses and its financial plans and estimates which are used to manage the business. The Company has concluded there was sufficient positive evidence at the end of 2013, 2014 and 2015 to continue to support the position that the Company does not need to maintain a valuation allowance on deferred tax assets. These assumptions require significant judgment about future taxable income. The amount of deferred tax assets considered realizable is subject to adjustment in future periods if estimates of future taxable income are reduced.

**WAGEWORKS, INC.**  
**Notes to Consolidated Financial Statements**

At December 31, 2015, unrecognized tax benefits approximated \$4.4 million, which would impact income tax expense if recognized. Included in the balance at December 31, 2015 is \$0.3 million of current year tax positions, which would affect the Company's income tax expense if recognized. The Company does not anticipate that any adjustments would result in a material change to its financial position. For the years ended December 31, 2013, 2014 and 2015, the Company did not recognize any interest or penalties related to unrecognized tax benefits.

A reconciliation of the beginning and ending balances of the total amounts of gross unrecognized tax benefits is as follows (in thousands):

	Year Ended December 31,		
	2013	2014	2015
Balance, beginning of year	\$ 2,478	\$ 3,716	\$ 4,109
Increase in tax positions for prior years	515	—	134
Decrease in tax positions for prior years	—	(90)	—
Increase in tax positions for current year	723	483	319
Other decreases	—	—	(133)
Balance, end of year	\$ 3,716	\$ 4,109	\$ 4,429

The Company files income tax returns in the U.S. federal jurisdiction and various states jurisdictions. As a result of the Company's net operating loss carryforwards, the 2001 through 2015 tax years are open and may be subject to potential examination in one or more jurisdictions.

At December 31, 2015, the Company has federal and state operating loss carryforwards of approximately \$10.9 million and \$30.9 million, respectively, available to offset future regular and alternative minimum taxable income. The Company's state net operating loss carryforward is on a post-apportionment basis. The Company's federal net operating loss carryforwards expire in the year 2033, if not utilized. The state net operating loss carryforwards expire in the years 2016 through 2033. The federal and state net operating loss carryforwards include excess tax deductions related to stock options in the amount of \$10.1 million and \$5.2 million, respectively. When utilized, the related tax benefit will be booked to additional paid-in capital.

The Company also has tax deductible goodwill related to asset acquisitions.

In addition, the Company had federal and state research and development credit carryforwards of approximately \$5.5 million and \$3.1 million, respectively, available to offset future tax liabilities. The federal research credit carryforwards expire beginning in the years 2022 through 2035, if not fully utilized. The state research credit carries forward indefinitely for the state of California and 20 years for the state of Texas.

The Company's ability to utilize the net operating losses and tax credit carryforwards are subject to limitations in the event of an ownership change as defined in Section 382 of the Internal Revenue Code ("IRC") of 1986, as amended, and similar state tax law. In general, an ownership change occurs if the aggregate stock ownership of certain stockholders increases by more than 50 percentage points over such stockholders' lowest percentage ownership during the testing period (generally three years). The Company has considered Section 382 of the IRC and concluded that any ownership change would not diminish the Company's utilization of its net operating loss or its research and development credits during the carryover periods.

The Company elected to follow the tax law method of determining realization of excess tax benefits for stock-based compensation. During 2015, the Company recorded approximately \$11.2 million of excess tax benefits related to stock-based compensation that was credited to stockholders' equity during the year.



**WAGeworks, INC.**  
**Notes to Consolidated Financial Statements**

**(13) Commitments and Contingencies**

*(a) Operating Leases*

The Company leases office space and equipment under noncancelable operating leases with various expiration dates through 2023. Future minimum lease payments under noncancelable operating leases are as follows (in thousands):

	As of December 31, 2015
2016	\$ 6,821
2017	7,009
2018	6,997
2019	6,985
2020	6,791
Thereafter	11,546
Total future minimum lease payments	\$ 46,149

Rent expense was \$4.7 million for each of 2013 and 2014 and \$7.6 million in 2015. Future minimum lease payments under capital leases, not included in the table above, as of December 31, 2015 are \$0.3 million for 2016. The Company has no future minimum lease payments under capital leases extending beyond 2016.

*(b) Legal Matters*

The Company is involved from time to time in claims that arise in the normal course of its business. The Company is not presently subject to any material litigation nor, to management's knowledge, is any litigation threatened against the Company that collectively is expected to have a material adverse effect on the Company's cash flows, financial condition or results of operations.

**(14) Related Party**

The National Flex Trust ("the Trust"), established by a subsidiary of the Company, is to provide reimbursement of qualified expenses to plan participants under certain employer plans that have contracted with the Company to provide the plan services using a custodial account ("the Trust Account"). The client is responsible for maintaining the employer plan for their participants, including the establishment of eligibility and paying all eligible claim amounts owed to their participants. The Company is an independent contractor engaged to perform administration services. As an administrator, the Company does not have the power to direct the activities of the Trust that would most significantly impact the Trust's economic performance.

Under a Management Agreement for Services to the Trust, the Company provides services to the Trust, including accounting, treasury, tax, administration, and management. The Trust pays the Company monthly for the services provided based on plan participants and/or debit cards administered. For the past several years, the Trust's earnings have been insufficient to cover these costs and, consequently, the Company has not recognized these fees during this period. Trust expenses subsidized by the Company were \$80,000, \$100,000 and \$71,000 in 2013, 2014 and 2015, respectively.

The Company has a long-term receivable due from the Trust totaling \$1.0 million which the Trust holds with its banks, as a security deposit for the settlement of participant claims. The Company has recorded this receivable within other assets on its consolidated balance sheets.

**WAGEWORKS, INC.**  
**Notes to Consolidated Financial Statements**

**(15) Selected Quarterly Financial Data (unaudited)**

	Fiscal Quarter Ended							
	March 31, 2014	June 30, 2014	September 30, 2014	December 31, 2014	March 31, 2015	June 30, 2015	September 30, 2015	December 31, 2015
(in thousands, except per share amounts)								
Revenues:								
Healthcare	\$ 39,984	\$ 37,592	\$ 38,600	\$ 39,813	\$ 47,289	\$ 43,814	\$ 42,204	\$ 43,266
Commuter	16,043	15,050	15,078	15,605	15,897	16,028	16,003	15,967
COBRA	4,038	3,701	9,544	14,713	12,570	12,313	12,229	14,187
Other	2,555	2,414	4,776	8,326	9,540	10,602	12,724	9,683
Total revenues	62,620	58,757	67,998	78,457	85,296	82,757	83,160	83,103
Operating expenses:								
Cost of revenues (excluding amortization of internal use software)	22,797	21,157	24,951	31,321	32,071	29,775	26,364	28,960
Technology and development, sales and marketing, general and administrative, and employee termination charges	24,498	25,169	30,771	35,127	37,281	39,472	37,147	35,687
Amortization and change in contingent consideration	4,420	4,549	5,688	6,335	6,279	6,732	6,935	7,672
Total operating expenses	51,715	50,875	61,410	72,783	75,631	75,979	70,446	72,319
Income from operations	10,905	7,882	6,588	5,674	9,665	6,778	12,714	10,784
Other, net	(243)	(242)	215	(594)	(507)	(370)	(281)	(796)
Income before income taxes	10,662	7,640	6,803	5,080	9,158	6,408	12,433	9,988
Income tax provision	(4,218)	(3,053)	(2,690)	(1,982)	(3,519)	(2,890)	(4,835)	(3,793)
<b>Net income</b>	<b>\$ 6,444</b>	<b>\$ 4,587</b>	<b>\$ 4,113</b>	<b>\$ 3,098</b>	<b>\$ 5,639</b>	<b>\$ 3,518</b>	<b>\$ 7,598</b>	<b>\$ 6,195</b>
Net income per share:								
Basic	\$ 0.19	\$ 0.13	\$ 0.12	\$ 0.09	\$ 0.16	\$ 0.10	\$ 0.21	\$ 0.17
Diluted	\$ 0.18	\$ 0.13	\$ 0.11	\$ 0.08	\$ 0.15	\$ 0.10	\$ 0.21	\$ 0.17
Shares used in computing net income per share:								
Basic	34,831	35,117	35,234	35,393	35,555	35,761	35,880	35,936
Diluted	36,303	36,340	36,152	36,517	36,668	36,596	36,516	36,597

## **Item 9. Changes in and Disagreements With Accountants on Accounting and Financial Disclosure**

None.

### **Item 9A. Controls and Procedures**

#### **Evaluation of Disclosure Controls and Procedures**

We maintain “disclosure controls and procedures,” as such term is defined in Rule 13a-15(e) and 15d-15(e) under the Securities Exchange Act of 1934 (“Exchange Act”), that are designed to ensure that information required to be disclosed by us in reports that we file or submit under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in SEC rules and forms, and that such information is accumulated and communicated to our management, including our Chief Executive Officer and Chief Financial Officer, as appropriate to allow timely decisions regarding required disclosure. In designing and evaluating our disclosure controls and procedures, management recognizes that disclosure controls and procedures, no matter how well conceived and operated, can provide only reasonable, not absolute, assurance that the objectives of the disclosure controls and procedures are met.

Subject to the limitations noted above, based on their evaluation at the end of the period covered by this Annual Report on Form 10-K, our management, with the participation of our Chief Executive Officer and Chief Financial Officer, have evaluated the effectiveness of the Company’s disclosure controls and procedures and have concluded that our disclosure controls and procedures were effective at the reasonable assurance level.

#### **Management’s Report on Internal Control over Financial Reporting**

Our management is responsible for establishing and maintaining adequate internal control over financial reporting for the Company as defined in Rule 13a-15(f) and 15d-15(f) of the Exchange Act. The Company’s internal control over financial reporting is a process designed by, or under the supervision of, our Chief Executive Officer and Chief Financial Officer, and effected by our board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. Internal control over financial reporting includes those policies and procedures that: (i) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of our assets; (ii) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that our receipts and expenditures are being made only in accordance with authorizations of our management and directors; and (iii) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of our assets that could have a material effect on our financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

Our management has assessed the effectiveness of our internal control over financial reporting as of December 31, 2015. In making its assessment of internal control over financial reporting, management used the criteria set forth by the Committee of Sponsoring Organizations (COSO) of the Treadway Commission on Internal Control — Integrated Framework (2013). Based on this assessment, our CEO and CFO concluded that our internal control over financial reporting was effective as of December 31, 2015.

The effectiveness of our internal control over financial reporting as of December 31, 2015 has been audited by KPMG LLP, an independent registered public accounting firm, as stated in their report, which appears in Part II, Item 8 of this Form 10-K.

#### **Changes in Internal Control over Financial Reporting**

There was no change in our internal control over financial reporting identified in connection with the evaluation required by Rule 13a-15(d) or the Exchange Act that occurred during the period covered by this Annual Report on Form 10-K that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

### **Item 9B. Other Information**

None.

**PART III**

**Item 10. Directors, Executive Officers and Corporate Governance**

The information required by this Item 10 of Form 10-K that is found in our 2016 Proxy Statement to be filed with the SEC in connection with the solicitation of proxies for the Company's 2016 Annual Meeting of Stockholders is incorporated by reference to our 2016 Proxy Statement. The 2016 Proxy Statement will be filed with the SEC within 120 days after the end of the fiscal year to which this report relates.

**Item 11. Executive Compensation**

The information required by this Item 11 of Form 10-K is incorporated by reference to our 2016 Proxy Statement.

**Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters**

The information required by this Item 12 of Form 10-K is incorporated by reference to our 2016 Proxy Statement.

**Item 13. Certain Relationships and Related Transactions, and Director Independence**

The information required by this Item 13 of Form 10-K is incorporated by reference to our 2016 Proxy Statement.

**Item 14. Principal Accounting Fees and Services**

The information required by this Item 14 of Form 10-K is incorporated by reference to our 2016 Proxy Statement.

**PART IV**

**Item 15. Exhibits and Financial Statement Schedules**

Documents filed as part of this report are as follows:

1. Consolidated Financial Statements:

Our Consolidated Financial Statements are listed in the “Index to Consolidated Financial Statements” in Part II, Item 8 of this Annual Report on Form 10-K.

2. Exhibits:

The documents listed in the Exhibit Index of this Annual Report on Form 10-K are incorporated by reference or are filed with this report, in each case as indicated therein (numbered in accordance with Item 601 of Regulation S-K).

All other financial statement schedules have been omitted because they are either inapplicable or the information required is provided in the Company’s consolidated financial statements and accompanying footnotes of this Annual Report on Form 10-K.

### SIGNATURES

Pursuant to the requirement of Sections 13 or 15(d) of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

#### WAGeworks, INC.

Date: February 25, 2016

By: /s/ COLM M CALLAN  
Colm Callan  
Chief Financial Officer  
(Principal Financial Officer)  
/s/ COLM M CALLAN  
Colm Callan  
Chief Financial Officer  
(Principal Accounting Officer)

### POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints Joseph L. Jackson and Colm M. Callan, and each or any one of them, his or her lawful attorneys-in-fact and agents, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Annual Report on Form 10-K and to file the same, with all exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done in connection therewith, as fully to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them, or their or his substitutes, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

<u>SIGNATURE</u>	<u>TITLE</u>	<u>DATE</u>
<u>/ S / JOSEPH L JACKSON</u> <b>Joseph L. Jackson</b>	Chief Executive Officer and Director (Principal Executive Officer)	February 25, 2016
<u>/ S / COLM M CALLAN</u> <b>Colm Callan</b>	Chief Financial Officer (Principal Financial Officer)	February 25, 2016
<u>/ S / THOMAS A BEVILACQUA</u> <b>Thomas A. Bevilacqua</b>	Director	February 25, 2016
<u>/ S / BRUCE G BODAKEN</u> <b>Bruce G. Bodaken</b>	Director	February 25, 2016
<u>/ S / MARIANN BYERWALTER</u> <b>Mariann Byerwalter</b>	Director	February 25, 2016
<u>/ S / JEROME D GRAMAGLIA</u> <b>Jerome D. Gramaglia</b>	Director	February 25, 2016
<u>/ S / JOHN W LARSON</u> <b>John W. Larson</b>	Director	February 25, 2016
<u>/ S / EDWARD C NAFUS</u> <b>Edward C. Nafus</b>	Director	February 25, 2016
<u>/ S / ROBERT L METZGER</u> <b>Robert L Metzger</b>	Director	February 25, 2016

**Exhibit Index**

Exhibit Number	Exhibit Description	Form	Incorporated by Reference		Filing Date
			File No.	Exhibit	
3.1	Amended and Restated Certificate of Incorporation of Registrant	S-1	333-173709	3.2	07/19/2011
3.2	Amended and Restated Bylaws of Registrant	S-1	333-173709	3.4	07/19/2011
4.1	Specimen common stock certificate of Registrant	S-1	333-173709	4.1	07/19/2011
4.5	Stockholder Agreement by and among VantagePoint Venture Partners IV (Q), L.P., VantagePoint Venture Partners IV, L.P., VantagePoint Venture Partners IV Principals Fund, L.P. and Registrant	S-1	333-173709	4.5	07/19/2011
10.1*	Form of Indemnification Agreement entered into between Registrant, its affiliates and its directors and officers	S-1	333-173709	10.1	07/19/2011
10.2*	Amended and Restated 2010 Equity Incentive Plan	8-K	001-35232	10.1	04/17/2013
10.3*	Forms of Stock Option Agreements under the Amended and Restated 2010 Equity Incentive Plan	S-1	333-173709	10.3	07/19/2011
10.4*	2000 Stock Option/Stock Issuance Plan	S-1	333-173709	10.4	04/25/2011
10.5*	Form of Stock Option Agreement under the 2000 Stock Option/Stock Issuance Plan	S-1	333-173709	10.5	04/25/2011
10.6*	2012 Employee Stock Purchase Plan	10-K	001-35232	10.6	02/27/2013
10.6A	Registration statement for Amended and Restated 2010 Equity Incentive Plan and 2012 Employee Stock Purchase Plan	S-8	001-35232	10.6A	05/15/2015
10.7*	Form of Subscription Agreement under 2012 Employee Stock Purchase Plan	S-1	333-173709	10.7	03/07/2012
10.8*	Second Amended and Restated Employment Agreement, dated as of November 23, 2010, between Registrant and Joseph L. Jackson	S-1	333-173709	10.8	06/08/2011
10.9*	Form of Amended and Restated Executive Severance Benefit Agreement Purchase Plan	S-1	333-173709	10.9	04/25/2011
10.10	Commercial Credit Agreement, between Registrant and Union Bank, N.A., dated as of August 31, 2010	S-1	333-173709	10.10	04/25/2011
10.10A	First Loan Modification Agreement, by and among Registrant, Union Bank, N.A. and MHM Resources, LLC, dated as of November 16, 2011	S-1	333-173709	10.10A	03/07/2012
10.10B	Second Loan Modification Agreement, by and among Registrant, Union Bank, N.A. and MHM Resources, LLC, dated as of February 14, 2012	S-1	333-173709	10.10B	03/07/2012
10.10C	Third Loan Modification Agreement, by and among Registrant, Union Bank, N.A. and MHM Resources, LLC, dated as of September 20, 2012	8-K	001-35232	10.1	09/24/2012
10.10D	Credit Agreement, by and among Registrant, Union Bank, N.A. and MHM Resources, LLC, dated as of December 31, 2012	10-K	001-35232	10.10D	02/27/2013
10.10E	First Amendment to Credit Agreement, by and among Registrant, MUFG Union Bank, N.A. (formerly Union Bank, N.A.), MHM Resources, LLC and Benefit Concepts, Inc. of Rhode Island, dated July 21, 2014	10-K	001-35232	10.10E	02/26/2015



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10.10F	Second Amendment to Credit Agreement, by and among Registrant, MUFG Union Bank, N.A. (formerly Union Bank, N.A.), MHM Resources, LLC and Benefit Concepts, Inc. of Rhode Island, dated June 5, 2015				
10.11	Sublease Agreement between Oracle USA, Inc. and Registrant, dated as of September 13, 2006	S-1	333-173709	10.11	04/25/2011
10.12	First Amendment to Sublease between Oracle USA, Inc. and Registrant, dated as of October 30, 2006	S-1	333-173709	10.12	04/25/2011
10.13	Commercial Building Lease, by and between Applied Buildings, LLC and HCAP Strategies, Inc., dated as of December 17, 2004	S-1	333-173709	10.13	04/25/2011
10.14	Assignment and Assumption of Lease, between, HCAP Strategies, Inc. and Registrant, dated as of May 16, 2005	S-1	333-173709	10.14	04/25/2011
10.15	Amendment to Commercial Building Lease, between Applied Buildings, LLC and Registrant, dated as of September 8, 2005	S-1	333-173709	10.15	04/25/2011
10.16	Lease, by and between Phoenix Investors #25, L.L.C. and Registrant, dated as of July 23, 2007	S-1	333-173709	10.16	04/25/2011
10.17	First Amendment to Lease, by and between Phoenix Investors #25, L.L.C. and Registrant, dated as of May 24, 2010	S-1	333-173709	10.17	04/25/2011
10.18	Second Amendment to Lease, by and between Phoenix Investors #25, L.L.C. and Registrant, dated as of August 31, 2010	S-1	333-173709	10.18	04/25/2011
10.25	Second Amendment to Sublease between Oracle America, Inc. and Registrant, dated as of May 1, 2011	S-1	333-173709	10.25	06/08/2011
10.26	Lease Agreement by and between Liberty Property Limited Partnership and Registrant, dated as of March 26, 2014	10-K	001-35232	10.26	02/26/2015
10.27	Lease by and between Corporate Center Phase II Limited Partnership and CONEXIS Benefits Administrators, LP, dated as of August 26, 2004	10-K	001-35232	10.27	02/26/2015
10.27A	First Amendment to Lease by and between Corporate Center Phase II Limited Partnership and CONEXIS Benefit Administrators, LP, dated as of December 1, 2004	10-K	001-35232	10.27A	02/26/2015
10.27B	Second Amendment to Lease by and between Corporate Center Phase II Limited Partnership and CONEXIS Benefit Administrators, LP, dated as of October 20, 2005	10-K	001-35232	10.27B	02/26/2015

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10.27C	Third Amendment to Office Lease Agreement by and among NNN Las Colinas Highlands, LLC, NNN Las Colinas Highlands 1, LLC, NNN Las Colinas Highlands 2, LLC, NNN Las Colinas Highlands 3, LLC, NNN Las Colinas Highlands 4, LLC, NNN Las Colinas Highlands 5, LLC, NNN Las Colinas Highlands 6, LLC, NNN Las Colinas Highlands 7, LLC, NNN Las Colinas Highlands 8, LLC, NNN Las Colinas Highlands 9, LLC, NNN Las Colinas Highlands 10, LLC, NNN Las Colinas Highlands 11, LLC, NNN Las Colinas Highlands 12, LLC, NNN Las Colinas Highlands 13, LLC, NNN Las Colinas Highlands 14, LLC, NNN Las Colinas Highlands 15, LLC, NNN Las Colinas Highlands 16, LLC, NNN Las Colinas Highlands 17, LLC, NNN Las Colinas Highlands 18, LLC, NNN Las Colinas Highlands 19, LLC, NNN Las Colinas Highlands 20, LLC, NNN Las Colinas Highlands 21, LLC, NNN Las Colinas Highlands 22, LLC, NNN Las Colinas Highlands 23, LLC, NNN Las Colinas Highlands 24, LLC, NNN Las Colinas Highlands 25, LLC, NNN Las Colinas Highlands 26, LLC, NNN Las Colinas Highlands 27, LLC, NNN Las Colinas Highlands 28, LLC, NNN Las Colinas Highlands 29, LLC, NNN Las Colinas Highlands 30, LLC, NNN Las Colinas Highlands 31, LLC, Triple Net Properties Realty, Inc. and CONEXIS Benefit Administrators, LP, dated January 14, 2009	10-K	001-35232	10.27C	02/26/2015
10.27D	Assignment and Assumption of Lease by and among CONEXIS Benefits Administrators, LP, Word & Brown Insurance Administrators, Inc. and Registrant, dated as of July 31, 2014	10-K	001-35232	10.27D	02/26/2015
10.28	Lease Agreement by and between Park Place Realty Holding Company, Inc. and Registrant, dated April 10, 2014	10-Q	001-35232	10.28	05/05/2015
10.28A	Second Amendment to lease, by and between Potawatomi Properties, L.L.C. and Registrant, dated February 9, 2015	10-Q	001-35232	10.28A	05/05/2015
10.28B	Lease Agreement by and between Freeport 9 Office Center, L.P. and Registrant, dated March 25, 2015	10-Q	001-35232	10.28B	05/05/2015
10.29*	Executive Bonus Plan	8-K	001-35232	10.2	04/17/2013
21.1	List of subsidiaries of Registrant				
23.1	Consent of KPMG LLP, Independent Registered Public Accounting Firm				
24.1	Power of Attorney (contained in the signature page to this Annual Report)				
31.1	Certification of the Principal Executive Officer Pursuant to Exchange Act Rules 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002				
31.2	Certification of the Principal Financial Officer Pursuant to Exchange Act Rules 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002				
32.1**	Certification of the Principal Executive Officer and Principal Financial Officer Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002				
101.INS	XBRL Instance Document				

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101.SCH	XBRL Taxonomy Extension Schema
101.CAL	XBRL Taxonomy Extension Calculation Linkbase
101.DEF	XBRL Taxonomy Extension Definition Linkbase
101.LAB	XBRL Taxonomy Extension Label Linkbase
101.PRE	XBRL Taxonomy Extension Presentation Linkbase

\* Indicates a management contract or compensatory plan or arrangement.

\*\* The certifications attached as Exhibit 32.1 that accompany this Annual Report on Form 10-K, are not deemed filed with the Securities and Exchange Commission and are not to be incorporated by reference into any filing of WageWorks, Inc. under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, whether made before or after the date of this Form 10-K, irrespective of any general incorporation language contained in such filing.

**AMENDED AND RESTATED  
CREDIT AGREEMENT**

Dated as of June 5, 2015

among

**WAGeworks, INC.,**  
as Borrower,

**CERTAIN SUBSIDIARIES OF BORROWER,**  
as Guarantors

**MUFG UNION BANK, N.A.,**  
as Administrative Agent and L/C Issuer,

and

**THE OTHER LENDERS PARTY HERETO**

**MUFG UNION BANK, N.A.,**  
as Sole Lead Arranger and Sole Bookrunner

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## **SCHEDULES**

- 1.01 Existing Letters of Credit
- 2.01 Commitments and Applicable Percentages
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## **EXHIBITS**

- A Form of Loan Notice
- B Form of Revolving Loan Note
- C Form of Compliance Certificate
- D Form of Assignment And Assumption
- E Form of New Lender Addendum
- F Form of Guarantor Joinder
- G Form of Administrative Questionnaire
- H Form of Security Agreement
- I Form of Pledge Agreement
- J-1 U.S. Tax Compliance Certificate
- J-2 U.S. Tax Compliance Certificate
- J-3 U.S. Tax Compliance Certificate
- J-4 U.S. Tax Compliance Certificate
- K Form of Secured Party Designation Notice
- L Form of Closing Date Officer's Certificate

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**AMENDED AND RESTATED**  
**CREDIT AGREEMENT**

**CREDIT AGREEMENT** (this “**Agreement**”) is entered into as of June 5, 2015, among **WAGWORKS, INC.**, a Delaware corporation (“**Borrower**”), each Guarantor (as defined herein) from time to time party hereto, of Lender (as defined herein) from time to time party hereto, **MUFG UNION BANK, N.A.**, as Administrative Agent and L/C Issuer.

Borrower, MHM Resources, LLC, a Delaware limited liability company (“**MHM Resources**”), and Benefit Concepts Inc. of Rhode Island, a Rhode Island corporation (“**MCI**” and together with MHM Resources, the “**Existing Guarantors**” and each, an “**Existing Guarantor**”), as Guarantors, and Union Bank are parties to the Existing Credit Agreement, as defined below. Borrower and Union Bank wish to amend and restate, but without novation, the terms of the Existing Credit Agreement on the terms and conditions set forth herein, and Borrower has requested that the Lenders provide a revolving credit facility for the purposes set forth herein to Borrower, for itself and for the direct and indirect benefit of each Guarantor, and the Lenders are willing to do so on the terms and conditions set forth herein. In consideration of the mutual covenants and agreements herein contained, the parties hereto covenant and agree as follows:

**ARTICLE I**

**DEFINITIONS AND ACCOUNTING TERMS**

1.01 **Defined Terms.** As used in this Agreement, the following terms shall have the meanings set forth below:

“**Accounts**” means all accounts, whether or not defined in the UCC, now owned or hereafter acquired, including without limitation, (a) all accounts receivable, other receivables, book debts and other forms of obligations whether arising out of goods sold or services rendered or from any other transaction (including any such obligations that may be characterized as an account or contract under the UCC), (b) all purchase orders or receipts for goods or services, (c) all rights to any goods represented by any of the foregoing (including unpaid sellers’ rights or rescission, replevin, reclamation and stoppage in transit and rights to returned or repossessed goods), (d) all monies due or to become due under all purchase orders and contracts for the sale of goods or the performance of services or both or in connection with any other transaction (whether or not yet earned by performance) now or hereafter in existence, including the right to receive the proceeds of said purchase orders and contracts, and (e) all collateral security and guaranties of any kind, now or hereafter in existence, with respect to any of the foregoing.

“**Acquired Entity**” means (a) any Person that becomes a Subsidiary of Borrower as a result of an Acquisition or (b) any business entity or division of a Person, all or substantially all of the assets and business of which are acquired by Borrower or a Subsidiary of Borrower pursuant to an Acquisition.

“**Acquisition**” means any transaction or series of related transactions for the purpose of or resulting, directly or indirectly, in (a) the acquisition of all or substantially all of the assets of a

Person, or of any business or division of a Person (other than a Person that is a Subsidiary), (b) the acquisition of in excess of 50% of the capital stock, partnership interests, membership interests or equity of any Person (other than a Person that is a Subsidiary), or otherwise causing any Person to become a Subsidiary, or (c) a merger or consolidation or any other combination with another Person (other than a Person that is a Subsidiary).

“**Administrative Agent**” or “**Agent**” means MUFG Union Bank, N.A. in its capacity as administrative agent under any of the Loan Documents, or any successor administrative agent.

“**Administrative Agent’s Office**” means Administrative Agent’s address and, as appropriate, account as set forth on Schedule 11.02, or such other address or account as Administrative Agent may from time to time notify Borrower and Lenders.

“**Administrative Questionnaire**” means an Administrative Questionnaire in substantially the form attached hereto as **Exhibit G**, or another form as supplied by Administrative Agent.

“**Affiliate**” means, with respect to any specified Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified.

“**Aggregate Commitments**” means the Commitments of all Lenders. As of the Closing Date, the Aggregate Commitments shall be One Hundred Fifty Million Dollars (\$150,000,000).

“**Aggregate Consideration**” means, with respect to any Permitted Acquisition, the total aggregate cash and non-cash consideration paid or payable by Borrower and/or any of its Subsidiaries, including the sum (without duplication) of (a) the fair market value of the Equity Interests issued (or to be issued) as consideration in connection with such Permitted Acquisition, (b) the aggregate amount of all cash paid (or to be paid) by Borrower or any of its Subsidiaries as consideration in connection with such Permitted Acquisition and other Earn-Out obligations of Borrower and its Subsidiaries incurred in connection therewith, (c) the aggregate principal amount of all Indebtedness assumed, incurred and/or issued in connection with such Permitted Acquisition, and (d) the fair market value of all other consideration payable in connection with such Permitted Acquisition.

“**Agreement**” means this Credit Agreement.

“**Applicable Percentage**” means with respect to any Lender at any time, the percentage (carried out to the ninth decimal place) of the Aggregate Commitments represented by such Lender’s Commitment at such time, subject to adjustment as provided in Section 2.16. If the commitment of each Lender to make Loans and the obligation of the L/C Issuer to make L/C Credit Extensions have been terminated pursuant to Section 9.02 or if the Aggregate Commitments have expired, then the Applicable Percentage of each Lender shall be determined based on the Applicable Percentage of such Lender most recently in effect, giving effect to any subsequent assignments. The initial Applicable Percentage of each Lender is set forth opposite the name of such Lender on Schedule 2.01 or in the Assignment and Assumption pursuant to which such Lender becomes a party hereto, as applicable.

“**Applicable Rate**” means, from time to time: (a) from the Closing Date to the date on which Administrative Agent receives the financial statements and a Compliance Certificate pursuant to Sections 7.01 and 7.02 for the fiscal quarter ending June 30, 2015, the applicable percentages per annum specified for Pricing Level 2 in the pricing grid below, and (b) as of any date of determination thereafter, the applicable percentages per annum set forth in the pricing grid below determined by reference to the Consolidated Leverage Ratio, as set forth in the most recent financial statements and Compliance Certificate received by Administrative Agent pursuant to Sections 7.01 and 7.02:

Pricing Level	Consolidated Leverage Ratio	Applicable Rate for Base Rate Loans:	Applicable Rate for Eurodollar Rate Loans:	Applicable Rate for L/C Fees:
1	Less than 1.00:1.00	0.00%	1.25%	1.00%
2	Greater than or equal to 1.00 to 1.00, and less than 2.00 to 1.00	0.00%	1.50%	1.00%
3	Greater than or equal to 2.00 to 1.00	0.00%	1.75%	1.00%

Adjustments in the Applicable Rate shall be implemented quarterly beginning with the fiscal quarter ending as of June 30, 2015, on a prospective basis, as of the first (1st) day of the first calendar month following the delivery to Administrative Agent of the financial statements and accompanying Compliance Certificate delivered pursuant to Sections 7.01 and 7.02 evidencing the need for an adjustment; provided, that if the annual audited financial statements for any fiscal year and accompanying Compliance Certificate delivered to Administrative Agent result in a change in the Applicable Rate from the quarterly financial statements previously delivered by Borrower to Administrative Agent, then Administrative Agent shall make such change effective upon the first (1st) day of the calendar month following the delivery to Administrative Agent of such annual audited financial statements. Failure to timely deliver the quarterly or annual financial statements and accompanying Compliance Certificates shall, in addition to any other remedy provided for in this Agreement or the other Loan Documents, result in an increase in the Applicable Rate to the highest level set forth in the foregoing grid, from the date on which such Compliance Certificate was required to be delivered, until the first (1st) day of the calendar month following the delivery of those financial statements and accompanying Compliance Certificate demonstrating that such an increase is not required. If an Event of Default has occurred and is continuing at the time any reduction in the Applicable Rate is to be implemented, that reduction shall be deferred until the first (1st) day of the calendar month following the date on which such Event of Default is waived or cured.

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

“**Arranger**” means MUFG UNION BANK, N.A., in its capacity as sole lead arranger and sole bookrunner.

“**Assignee Group**” means two or more Eligible Assignees that are Affiliates of one another or two or more Approved Funds managed by the same investment advisor.

“**Assignment and Assumption**” means an assignment and assumption entered into by a Lender and an Eligible Assignee (with the consent of any party whose consent is required by Section 11.06(b)), and accepted by Administrative Agent, in substantially the form of **Exhibit D** or any other form (including electronic documentation generated by use of an electronic platform) approved by Administrative Agent.

“**Attributable Indebtedness**” means, with respect to any Person, on any date, (a) in respect of any Capital Lease of such Person, the capitalized amount thereof that would appear on a balance sheet of such Person prepared as of such date in accordance with GAAP, and (b) in respect of any Synthetic Lease Obligation, the capitalized amount of the remaining lease payments under the relevant lease that would appear on a balance sheet of such Person prepared as of such date in accordance with GAAP if such lease were accounted for as a Capital Lease and (c) in respect of any Securitization Transaction of any Person, the outstanding principal amount of such financing, after taking into account reserve accounts and making appropriate adjustments, determined by Administrative Agent in its reasonable judgment.

“**Audited Financial Statements**” means the audited consolidated balance sheet of Borrower and its Subsidiaries for the fiscal year ended December 31, 2014, and the related consolidated statements of income or operations, shareholders’ equity and cash flows for such fiscal year of Borrower and its Subsidiaries, including the notes thereto, audited by independent public accountants of recognized national standing and prepared in conformity with GAAP.

“**Availability Period**” means the period from and including the Closing Date to the earliest of (a) the Maturity Date, (b) the date of termination of the Aggregate Commitments pursuant to Section 2.06(a), and (c) the date of termination of the commitment of each Lender to make Loans and of the obligation of the L/C Issuer to make L/C Credit Extensions pursuant to Section 9.02.

“**Base Rate**” means for any day a fluctuating rate per annum equal to the highest of (a) the Federal Funds Rate plus 1/2 of 1%, (b) the rate of interest in effect for such day as publicly announced from time to time by MUFG Union Bank, N.A. as its “reference rate”, and (c) the Eurodollar Rate plus 1.00%; and if the Base Rate shall be less than zero, such rate shall be deemed zero for purposes of this Agreement. It is understood and agreed that the “MUFG Union Bank, N.A. Reference Rate” is one of Union Bank’s index rates and merely serves as a basis upon which effective rates of interest are calculated for loans making reference thereto and may not be the lowest or best rate at which Union Bank calculates interest or extends credit. The “MUFG Union Bank, N.A. reference The “Union Bank Reference Rate” is a rate set by MUFG Union Bank, N.A. based upon various factors including MUFG Union Bank, N.A.’s costs and desired return, general economic conditions and other factors, and is used as a reference point for pricing some loans, which may be priced at, above, or below such announced rate. Any change in such rate announced by MUFG Union Bank, N.A. shall take effect at the opening of business on the day specified in the public announcement of such change.

“**Base Rate Loan**” means a Loan that bears interest based on the Base Rate.

“**BCI**” has the meaning specified in the recitals hereto.

“**Borrower**” has the meaning specified in the introductory paragraph hereto.

“**Borrower Materials**” has the meaning specified in Section 11.02(c).

“**Borrowing**” means a borrowing consisting of simultaneous Loans of the same Type and, in the case of Eurodollar Rate Loans, having the same Interest Period made by each of the Lenders pursuant to Section 2.01.

“**Business Day**” means any day other than a Saturday, Sunday or other day on which commercial banks are authorized to close under the Laws of, or are in fact closed in, the state of California and, if such day relates to any Eurodollar Rate Loan, means any such day that is also a London Banking Day.

“**Capital Lease**” means, as applied to any Person, any lease of any property by that Person as lessee, which, in accordance with GAAP is required to be accounted for as a capital lease on the balance sheet of that Person.

“**Capital Lease Obligations**” means all monetary obligations of a Person under any leasing or similar arrangement which, in accordance with GAAP, is classified as a Capital Lease.

“**Cash**” means unrestricted cash and Cash Equivalents.

“**Cash Collateralize**” means to pledge and deposit with or deliver to Administrative Agent, for the benefit of one or more of the L/C Issuer or the Lenders, as collateral for L/C Obligations or obligations of Lenders to fund participations in respect of L/C Obligations, cash or deposit account balances or, if Administrative Agent and the L/C Issuer shall agree in their sole discretion, other credit support, in each case pursuant to documentation in form and substance satisfactory to Administrative Agent and the L/C Issuer (which documents are hereby consented to by Lenders). “**Cash Collateral**” shall have a meaning correlative to the foregoing and shall include the proceeds of such cash collateral and other credit support.

“**Cash Equivalents**” means, as at any date, (a) securities issued or directly and fully guaranteed or insured by the United States or any agency or instrumentality thereof (provided that the full faith and credit of the United States is pledged in support thereof) having maturities of not more than twelve months from the date of acquisition, (b) Dollar denominated time deposits and certificates of deposit of (i) any Lender, (ii) any domestic commercial bank of recognized standing having capital and surplus in excess of \$500,000,000 or (iii) any bank whose short-term commercial paper rating from S&P is at least A-1 or the equivalent thereof or from Moody’s is at least P-1 or the equivalent thereof (any such bank being an “**Approved Bank**”), in each case with maturities of not more than 270 days from the date of acquisition, (c) commercial paper and variable or fixed rate notes issued by any Approved Bank (or by the parent company thereof) or any variable rate notes issued by, or guaranteed by, any domestic corporation rated A-1 (or the equivalent thereof) or better by S&P or P-1 (or the equivalent thereof) or better by Moody’s and maturing within six months of the date of acquisition, (d) repurchase agreements entered into by any Person with a bank or trust company (including any of the Lenders) or recognized securities dealer having capital and surplus in excess of \$500,000,000 for direct

obligations issued by or fully guaranteed by the United States in which such Person shall have a perfected first priority security interest (subject to no other Liens) and having, on the date of purchase thereof, a fair market value of at least 100% of the amount of the repurchase obligations and (e) Investments, classified in accordance with GAAP as current assets, in money market investment programs registered under the Investment Company Act of 1940 which are administered by reputable financial institutions having capital of at least \$500,000,000 and the portfolios of which are limited to Investments of the character described in the foregoing subdivisions (a) through (d).

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

**“Cash Management Bank”** means any Person that, (a) at the time it enters into a Cash Management Agreement with a Loan Party, is a Lender or an Affiliate of a Lender, or (b) at the time it (or its Affiliate) becomes a Lender, is a party to a Cash Management Agreement with a Loan Party, in each case in its capacity as a party to such Cash Management Agreement; provided, however, that for any of the foregoing to be included as a “Secured Cash Management Agreement” on any date of determination by Administrative Agent, the applicable Cash Management Bank (other than Administrative Agent or an Affiliate of Administrative Agent) must have delivered a Secured Party Designation Notice to Administrative Agent prior to such date of determination.

**“Change in Law”** means the occurrence, after the Closing Date, of any of the following: (a) the adoption or taking effect of any law, rule, regulation or treaty, (b) any change in any law, rule, regulation or treaty or in the administration, interpretation, implementation or application thereof by any Governmental Authority or (c) the making or issuance of any request, rule, guideline or directive (whether or not having the force of law) by any Governmental Authority; provided that notwithstanding anything herein to the contrary, (x) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith and (y) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or the United States or foreign regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a “Change in Law”, regardless of the date enacted, adopted or issued.

**“Change of Control”** means any event or series of events by which:

(a) any “person” or “group” (as such terms are used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, but excluding any employee benefit plan of such person or its subsidiaries, and any person or entity acting in its capacity as trustee, agent or other fiduciary or administrator of any such plan), becomes the “beneficial owner” (as defined in Rules 13d 3 and 13d 5 under the Securities Exchange Act of 1934, except that a person or group shall be deemed to have “beneficial ownership” of all securities that such person or group has the right to acquire, whether such right is exercisable immediately or only after the passage of time (such right, an “option right”)), directly or indirectly, of 30% or more of the outstanding Voting Equity



Interests of Borrower on a fully-diluted basis (and taking into account all such securities that such person or group has the right to acquire pursuant to any option right); or

(b) during any period of 24 consecutive months, a majority of the members of the board of directors or other equivalent governing body of Borrower cease to be composed of individuals (i) who were members of that board or equivalent governing body on the first day of such period, (ii) whose election or nomination to that board or equivalent governing body was approved by individuals referred to in clause (i) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body or (iii) whose election or nomination to that board or other equivalent governing body was approved by individuals referred to in clauses (i) and (ii) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body.

“**Client Trust Accounts**” means deposit accounts maintained exclusively to hold Borrower’s and its Subsidiaries’ client deposits including prefunds and any other amounts provided by such clients relating to Borrower’s and its Subsidiaries’ administration of such clients’ benefits.

“**Closing Date**” means the first date all the conditions precedent in Section 5.01 are satisfied or waived in accordance with Section 11.01.

“**Code**” means the Internal Revenue Code of 1986, as amended.

“**Collateral**” means all of the “Collateral” referred to in the Collateral Documents and all of the other property that is or is intended under the terms of the Collateral Documents to be subject to Liens in favor of Administrative Agent for the benefit of the Secured Parties.

“**Collateral Documents**” means a collective reference to the Security Agreement (including any supplement or joinder thereto) and all other documents, instruments and agreements now or hereafter executed and delivered in connection with this Agreement pursuant to which Liens are granted or purported to be granted to Administrative Agent, for the benefit of the Secured Parties, each in form and substance satisfactory to Administrative Agent.

“**Commitment**” means, as to each Lender, its obligation to (a) make Loans to Borrower pursuant to Section 2.01, and (b) purchase participations in L/C Obligations, in an aggregate principal amount at any one time outstanding not to exceed the amount set forth opposite such Lender’s name on Schedule 2.01 or in the Assignment and Assumption pursuant to which such Lender becomes a party hereto, as applicable, as such amount may be adjusted from time to time in accordance with this Agreement (including but not limited to, and subject to the terms and conditions of, Section 2.06).

“**Commodity Exchange Act**” means the Commodity Exchange Act (7 U.S.C. § 1 et seq.), as amended from time to time, and any successor statute.

“**Compliance Certificate**” means a certificate substantially in the form of **Exhibit C** or such other form as may be acceptable to Administrative Agent, executed by Borrower’s chief financial officer or chief executive officer, certifying, among other things, that: (a) the financial statements delivered in connection therewith are true copies and fairly present the financial

condition of Borrower as of such date and the results of operations for the periods presented; (ii) the representations and warranties contained herein and in the other Loan Documents remain true and correct in all material respects as of such date (except for those representations and warranties, if any, expressly referring to a specific date which shall remain true, accurate and complete in all material respects as of such date); (iii) Borrower, and each of its Subsidiaries, have timely filed all required tax returns and reports, and Borrower and such Subsidiaries have timely paid all foreign, federal, state and local taxes, assessments, deposits and contributions owed, except as otherwise permitted pursuant to the terms of this Agreement; (iv) no Liens have been levied or claims made against Borrower or any of its Subsidiaries relating to unpaid employee payroll or benefits of which Borrower have not previously provided written notification to Administrative Agent; (v) Borrower is in compliance with all covenants set forth herein; and (vi) there exists no Event of Default nor any condition, act or event which with the giving of notice or the passage of time or both would constitute an Event of Default.

**“Connection Income Taxes”** means Other Connection Taxes that are imposed on or measured by net income (however denominated) or that are franchise Taxes or branch profits Taxes.

**“Consolidated Interest Expense”** means, with respect to any Person for any period, as of the last day of any fiscal period, the sum of (without duplication) (a) consolidated interest expense in respect of Indebtedness of such Person and its Subsidiaries, including all interest, premium payments, debt discount, fees, charges and related expenses (in each case as such expenses are calculated according to GAAP) paid or payable (without duplication) for that fiscal period by that Person and its Subsidiaries in connection with Indebtedness (including any obligations for fees, charges and related expenses payable to the issuer of any letter of credit) plus (b) the portion of rent paid or payable (without duplication) for that fiscal period by that Person under Capital Lease Obligations that should be treated as interest in accordance with GAAP, but, in each case, excluding (i) any amount not payable in Cash during the applicable period (including any such amounts attributable to original issue discount) and (ii) any one time financing fees.

**“Consolidated Leverage Ratio”** means, for any date of determination, for Borrower and its consolidated Subsidiaries, a ratio of (i) Indebtedness (including without limitation all obligations in respect of letters of credit, all Earn-Out Obligations and all other deferred Acquisition-related obligations and liabilities that constitute consideration for any Acquisition) as of such date, to (ii) EBITDA for the period of twelve (12) consecutive months (or four fiscal quarters) ending on such date. This ratio will be calculated at the end of each reporting period for which this Agreement requires Borrower to deliver financial statements (but no less frequently than quarterly), using the results of the twelve (12) consecutive month (or four fiscal quarter) period ending with that reporting period.

**“Consolidated Net Income (Loss)”** means, with respect to any fiscal period of a Person, the consolidated net income (loss) of such Person and its consolidated Subsidiaries for such period, after deduction of all expenses, taxes, and other proper charges, determined in accordance with GAAP, consistently applied but excluding, in any event:

(i) any gains or losses on the sale or other disposition of assets (other than sales of inventory in the ordinary course of business), including Investments, and any taxes on the excluded gains and any tax deductions or credits on account on any excluded losses;

(ii) net earnings of any Person in which such Person has an ownership interest, unless such net earnings shall have actually been received by such Person in the form of cash distributions; and

(iii) without duplication with (i) or (ii) above, any noncash gains or losses resulting from mark to market adjustments to warrants issued by such Person.

**“Consolidated Total Assets”** means, as of any date of determination, the total assets of Borrower and its Subsidiaries on a consolidated basis, determined in accordance with GAAP.

**“Contractual Obligation”** means, as to any Person, any provision of any security issued by such Person or of any agreement, instrument or other undertaking to which such Person is a party or by which it or any of its property is bound.

**“Control”** means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. **“Controlling”** and **“Controlled”** have meanings correlative thereto. Without limiting the generality of the foregoing, a Person shall be deemed to be Controlled by another Person if such other Person possesses, directly or indirectly, power to vote 10% or more of the securities having ordinary voting power for the election of directors, managing general partners or the equivalent.

**“Controlled Account”** means each deposit account and securities account that is subject to an account control agreement in form and substance satisfactory to Administrative Agent and the L/C Issuer.

**“Copyright License”** means any written agreement providing for the grant by or to a Loan Party or any Subsidiary of any right under any Copyright.

**“Copyrights”** means (a) all proprietary rights afforded Works pursuant to Title 17 of the United States Code, including, without limitation, all rights in mask works, copyrights and original designs and all proprietary rights afforded such Works by other countries for the full term thereof (and including all rights accruing by virtue of bilateral or international treaties and conventions thereto), whether registered or unregistered, including, but not limited to, all applications for registration, renewals, extensions, reversions or restorations thereof now or hereafter provided for by law and all rights to make applications for registrations and recordations, regardless of the medium of fixation or means of expression and (b) all copyright rights under the copyright laws of the United States and other countries for the full term thereof (and including all rights accruing by virtue of bilateral or international copyright treaties and conventions), whether registered or unregistered, including, but not limited to, all applications for registrations, renewals, extensions, reversions or restorations of copyrights now or hereafter provided for by law and all rights to make applications for copyright registrations and recordations, regardless of the medium of fixation or means of expression.

“**Credit Exposure**” means, as to any Lender at any time, the aggregate principal amount at such time of its outstanding Loans and such Lender’s participation in (i.e. its Applicable Percentage of) and all L/C Obligations at such time.

“**Credit Extension**” means each of the following: (a) a Borrowing and (b) an L/C Credit Extension.

“**Debtor Relief Laws**” means the Bankruptcy Code of the United States, and all other liquidation, conservatorship, bankruptcy, assignment for the benefit of creditors, moratorium, rearrangement, receivership, insolvency, reorganization, or similar debtor relief Laws of the United States or other applicable jurisdictions from time to time in effect and affecting the rights of creditors generally.

“**Default**” means any event or condition that constitutes an Event of Default or that, with the giving of any applicable notice, the passage of time, specified in Section 9.01, or both, would be an Event of Default.

“**Default Rate**” means (a) when used with respect to Obligations other than L/C Fees an interest rate equal to (i) the Base Rate plus (ii) the Applicable Rate, if any, applicable to Base Rate Loans plus (iii) 2% per annum; provided, however, that with respect to a Eurodollar Rate Loan, the Default Rate shall be an interest rate equal to the interest rate (including any Applicable Rate) otherwise applicable to such Loan plus 2% per annum, in each case to the fullest extent permitted by applicable Laws, and (b) when used with respect to L/C Fees, a rate equal to the Applicable Rate plus 2% per annum.

“**Defaulting Lender**” means, subject to Section 2.16(b), any Lender that (a) has failed to (i) fund all or any portion of its Loans within two Business Days of the date such Loans were required to be funded hereunder unless such Lender notifies Administrative Agent and Borrower in writing that such failure is the result of such Lender’s determination that one or more conditions precedent to funding (each of which conditions precedent, together with any applicable default, shall be specifically identified in such writing) has not been satisfied, or (ii) pay to Administrative Agent, the L/C Issuer or any Lender any other amount required to be paid by it hereunder (including in respect of its participation in Letters of Credit) within two Business Days of the date when due, (b) has notified Borrower, Administrative Agent or the L/C Issuer in writing that it does not intend to comply with its funding obligations hereunder, or has made a public statement to that effect (unless such writing or public statement relates to such Lender’s obligation to fund a Loan hereunder and states that such position is based on such Lender’s determination that a condition precedent to funding (which condition precedent, together with any applicable default, shall be specifically identified in such writing or public statement) cannot be satisfied), (c) has failed, within three Business Days after written request by Administrative Agent or Borrower, to confirm in writing to Administrative Agent and Borrower that it will comply with its prospective funding obligations hereunder (provided that such Lender shall cease to be a Defaulting Lender pursuant to this clause (c) upon receipt of such written confirmation by Administrative Agent and Borrower), or (d) has, or has a direct or indirect parent company that has, (i) become the subject of a proceeding under any Debtor Relief Law, or (ii) had appointed for it a receiver, custodian, conservator, trustee, administrator, assignee for the benefit of creditors or similar Person charged with reorganization or liquidation of its business or assets,

including the Federal Deposit Insurance Corporation or any other state or federal regulatory authority acting in such a capacity; provided that a Lender shall not be a Defaulting Lender solely by virtue of the ownership or acquisition of any Equity Interest in that Lender or any direct or indirect parent company thereof by a Governmental Authority so long as such ownership interest does not result in or provide such Lender with immunity from the jurisdiction of courts within the United States or from the enforcement of judgments or writs of attachment on its assets or permit such Lender (or such Governmental Authority) to reject, repudiate, disavow or disaffirm any contracts or agreements made with such Lender. Any determination by Administrative Agent that a Lender is a Defaulting Lender under any one or more of clauses (a) through (d) above, and of the effective date of such status, shall be conclusive and binding absent manifest error, and such Lender shall be deemed to be a Defaulting Lender (subject to Section 2.16(b)) as of the date established therefor by Administrative Agent in a written notice of such determination, which shall be delivered by Administrative Agent to Borrower, the L/C Issuer and each Lender promptly following such determination.

**“Designated Jurisdiction”** means any country or territory to the extent that such country or territory itself is the subject of any Sanction.

**“Disclosure Letter”** means the disclosure letter, dated as of the date hereof, delivered by Borrower to Administrative Agent and the Lenders.

**“Disposition”** or **“Dispose”** means the sale, transfer, license, lease or other disposition (including any sale and leaseback transaction) of any property by any Person, including any sale, assignment, transfer or other disposal, with or without recourse, of any notes or accounts receivable or any rights and claims associated therewith, but excluding any Involuntary Disposition.

**“Disqualified Stock”** means any Equity Interest of a Person that, by its terms (or by the terms of any security into which it is convertible or for which it is exchangeable), or upon the happening of any event, (a) matures (excluding any maturity as the result of an optional redemption by the issuer thereof) or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, or is redeemable or subject to repurchase at the option of the holder thereof, in whole or in part, or requires the payment of any cash dividend or any other scheduled payment, in each case constituting a return of capital, in each case at any time on or prior to the first anniversary of the Maturity Date or (b) is convertible into or exchangeable (unless at the sole option of the issuer thereof) for (i) Indebtedness or other debt securities or (ii) any Equity Interest referred to in clause (a) above, in each case at any time prior to the first anniversary of the Maturity Date.

**“Dollar”** and **“\$”** mean lawful money of the United States.

**“Domestic Subsidiary”** means any Subsidiary that is organized under the laws of any state or other political subdivision (including the District of Columbia) of the United States.

**“Earn-Out Obligations”** means, with respect to an Acquisition, all obligations of Borrower or any of its Subsidiaries to make earn out or other contingency payments, in each case, the terms of which are subject to or contingent upon the revenues, income, cash flow or

profits of any person or business acquired in connection with an Acquisition. Unless otherwise specified herein, the amount of any Earn-Out Obligations at the time of determination shall be the aggregate amount, if any, of such Earn-Out Obligations that are required at such time under GAAP to be recognized as liabilities on the consolidated balance sheet of Borrower.

“**EBITDA**” means, for any period of measurement, for Borrower and its Consolidated Subsidiaries an amount equal to its Consolidated Net Income (Loss) plus (a) the following to the extent deducted in the calculation thereof, the sum of: (i) Consolidated Interest Expense, plus (ii) the provision for federal, state, local and foreign income taxes payable by Borrower and its Subsidiaries, plus (iii) depreciation and amortization expense (including the impairment of goodwill or other intangible assets), plus (iv) non-cash charges required to be made pursuant to FAS 141R (including, non-cash changes in contingent consideration for Acquisitions), and other non-cash, items including, without limitation, non-cash expenses for stock based compensation), all as determined in accordance with GAAP as applicable, for such period, minus (b) the following to the extent included in calculating such Consolidated Net Income (Loss): (i) federal, state, local and foreign income tax credits of Borrower and its Subsidiaries for such period and (ii) all non-cash items increasing Consolidated Net Income (Loss) for such period.

Only for purposes of calculating EBITDA for the financial covenants set forth in Section 7.13 with respect to any reference period during which a Permitted Acquisition occurs: (i) such Permitted Acquisition and the following transactions in connection therewith shall be deemed to have occurred on the first day of the applicable reference period: (a) income statement items (whether positive or negative) attributable to the property or Acquired Entity subject to such Permitted Acquisition shall be included, (b) any retirement of Indebtedness, and (c) any Indebtedness incurred or assumed by Borrower or any of its Subsidiaries in connection therewith and if such Indebtedness has a floating or formula rate, shall have an implied rate of interest for the applicable period for purposes of this definition determined by utilizing the rate which is or would be in effect with respect to such Indebtedness as at the relevant date of determination, and (ii) the EBITDA of the Acquired Entity so acquired that is attributable to discontinued operations, as determined in accordance with GAAP, and operations or businesses disposed of prior to the end of such reference period, shall be excluded; provided, however, only the actual historical results of operations of the Acquired Entities, without adjustment for pro forma expense savings, synergies or revenue increases, shall be used for such calculation. Accordingly, as to any such reference period Consolidated Net Income (Loss), Consolidated Interest Expense, income tax expense and each other component contained in the definition of “EBITDA” shall be deemed to include the actual results of the Permitted Acquisition on a Pro Forma Basis with Borrower as if such Permitted Acquisition had occurred on the first day of such period.

“**Eligible Assignee**” means any Person that meets the requirements to be an assignee under Section 11.06(b)(iii) and (v) (subject to such consents, if any, as may be required under Section 11.06(b)(iii)).

“**Environmental Laws**” means any and all Federal, state, local, foreign and other applicable statutes, laws, regulations, ordinances, rules, judgments, orders, decrees, permits, concessions, grants, franchises, licenses, agreements or governmental restrictions relating to pollution and the protection of the environment or the release of any materials into the

environment, including those related to hazardous substances or wastes, air emissions and discharges to waste or public systems.

**“Environmental Liability”** means any liability, contingent or otherwise (including any liability for damages, costs of environmental remediation, fines, penalties or indemnities), of Borrower, any other Loan Party or any of their respective Subsidiaries directly or indirectly resulting from or based upon (a) violation of any Environmental Law, (b) the generation, use, handling, transportation, storage, treatment or disposal of any Hazardous Materials, (c) exposure to any Hazardous Materials, (d) the release or threatened release of any Hazardous Materials into the environment or (e) any contract, agreement or other consensual arrangement pursuant to which liability is assumed or imposed with respect to any of the foregoing.

**“Equipment”** means all equipment now owned or hereafter acquired, wherever located, including without limitation, all machinery, computers, machine tools, motors, equipment, furniture, furnishings, fixtures, vehicles (including motor vehicles and trailers), tools, parts, dies, jugs, goods (other than consumer goods, farm products or inventory), and all attachments, accessories, accessions, replacements, substitutions, additions, and improvements to any of the foregoing.

**“Equity Interests”** means, with respect to any Person, all of the shares of capital stock of (or other ownership or profit interests in) such Person, all of the warrants, options or other rights for the purchase or acquisition from such Person of shares of capital stock of (or other ownership or profit interests in) such Person, all of the securities convertible into or exchangeable for shares of capital stock of (or other ownership or profit interests in) such Person or warrants, rights or options for the purchase or acquisition from such Person of such shares (or such other interests), and all of the other ownership or profit interests in such Person (including partnership, member or trust interests therein), whether voting or nonvoting, and whether or not such shares, warrants, options, rights or other interests are outstanding on any date of determination.

**“ERISA”** means the Employee Retirement Income Security Act of 1974.

**“ERISA Affiliate”** means any member of a controlled group of corporations or any trade or business (whether or not incorporated) under common control with Borrower within the meaning of Section 414(b) or (c) of the Code (and any member of a group with Borrower under Sections 414(m) and (o) of the Code for purposes of provisions relating to Section 412 of the Code).

**“ERISA Event”** means (a) a Reportable Event with respect to a Pension Plan; (b) a withdrawal by Borrower or any ERISA Affiliate from a Pension Plan subject to Section 4063 of ERISA during a plan year in which it was a substantial employer (as defined in Section 4001(a)(2) of ERISA), or a cessation of operations by Borrower or any ERISA Affiliate that is treated as such a withdrawal under Section 4062(e) of ERISA; (c) a complete or partial withdrawal by Borrower or any ERISA Affiliate from a Multiemployer Plan or notification received by Borrower or any ERISA Affiliate that a Multiemployer Plan is in reorganization under Section 4241 of ERISA; (d) the filing of a notice of intent to terminate, a Pension Plan or Multiemployer Plan, or the treatment of an amendment of a Pension Plan or Multiemployer Plan as a termination, under Section 4041 or 4041A of ERISA, or the commencement of proceedings

by the PBGC to terminate a Pension Plan or Multiemployer Plan; (e) an event or condition which constitutes grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan or Multiemployer Plan; (f) the determination that any Pension Plan is considered an at-risk plan or a plan in endangered or critical status within the meaning of Sections 430, 431 and 432 of the Internal Revenue Code or Sections 303, 304 and 305 of ERISA; or (g) the imposition of any material liability under Title IV of ERISA, other than for PBGC premiums due but not delinquent under Section 4007 of ERISA, upon Borrower or any ERISA Affiliate.

“**Eurodollar Base Rate**” has the meaning specified in the definition of Eurodollar Rate.

“**Eurodollar Rate**” means for any Interest Period with respect to a Eurodollar Rate Loan (or a Base Rate Loan where interest is calculated with reference to the Eurodollar Rate), a rate per annum determined by Administrative Agent pursuant to the following formula:

$$\text{Eurodollar Rate} = \frac{\text{Eurodollar Base Rate}}{1.00 - \text{Eurodollar Reserve Percentage}}$$

Where,

“**Eurodollar Base Rate**” means,

(a) for any Interest Period with respect to a Eurodollar Rate Loan, the rate per annum equal to the London Interbank Offered Rate as administered by ICE Benchmark Administration (or any other Person that takes over the administration of such rate as reasonably determined by Administrative Agent) as displayed on the applicable Reuters screen page that displays such rate (or, in the event such rate does not appear on a Reuters page or screen, on any successor or substitute page on such screen that displays such rate, or on the appropriate page of such other information service or source that publishes such rate from time to time as selected by Administrative Agent in its reasonable discretion) (“**LIBOR**”), or a comparable or successor rate, which rate is approved by Administrative Agent (in consultation with Borrower so long as no Default exists), at approximately 11:00 a.m., London time, two (2) Business Days prior to the commencement of such Interest Period, for Dollar deposits (for delivery on the first day of such Interest Period) with a term equivalent to such Interest Period. If such rate is not available at such time for any reason, then the “Eurodollar Base Rate” for such Interest Period shall be the rate per annum determined by Administrative Agent to be the rate at which deposits in Dollars for delivery on the first day of such Interest Period in same day funds in the approximate amount of the Eurodollar Rate Loan being made, continued or converted by MUFG Union Bank, N.A. and with a term equivalent to such Interest Period would be offered to major banks in the London interbank eurodollar market at their request at approximately 11:00 a.m., London time, two (2) Business Days prior to the commencement of such Interest Period; and

(b) for any interest rate calculation with respect to a Base Rate Loan on any date, the rate per annum equal to (i) LIBOR or a comparable or successor rate, which rate is approved by Administrative Agent (in consultation with Borrower so long as no Default exists), at approximately 11:00 a.m., London time determined two (2) Business Days prior to such date for Dollar deposits for a term of one (1) month commencing that day or (ii) if such published rate is



not available at such time for any reason, the rate per annum determined by Administrative Agent to be the rate at which deposits in Dollars for delivery on the date of determination in same day funds in the approximate amount of the Base Rate Loan being made or maintained by MUFG Union Bank, N.A. and with a term equal to one (1) month would be offered to major banks in the London interbank Eurodollar market at their request at the date and time of determination.

Notwithstanding the foregoing, if for any reason, the Eurodollar Base Rate shall be less than zero, such rate shall be deemed zero for purposes of this Agreement. To the extent a comparable or successor rate is approved by Administrative Agent in connection herewith, the approved rate shall be applied in a manner consistent with market practice; provided, that to the extent such market practice is not administratively feasible for Administrative Agent, such approved rate shall be applied in a manner as otherwise reasonably determined by Administrative Agent.

**“Eurodollar Reserve Percentage”** means, for any day during any Interest Period, the reserve percentage (expressed as a decimal, carried out to five decimal places) in effect on such day, whether or not applicable to any Lender, under regulations issued from time to time by the FRB for determining the maximum reserve requirement (including any emergency, supplemental or other marginal reserve requirement) with respect to Eurocurrency funding (currently referred to as “Eurocurrency liabilities”). The Eurodollar Rate for each outstanding Eurodollar Rate Loan and each Base Rate Loan calculated with reference to the Eurodollar Rate, shall be adjusted automatically as of the effective date of any change in the Eurodollar Reserve Percentage.

**“Eurodollar Rate Loan”** means a Loan that bears interest at a rate based on clause (a) of the definition of the “Eurodollar Base Rate.”

**“Event of Default”** has the meaning specified in Section 9.01.

**“Excluded Swap Obligation”** means, with respect to any Guarantor, any Swap Obligation if, and only to the extent that, all or a portion of the Guarantor Obligation of such Guarantor of, or the grant by such Guarantor of a security interest to secure, such Swap Obligation (or any Guarantor Obligation thereof) is or becomes illegal under the Commodity Exchange Act or any rule, regulation or order of the Commodity Futures Trading Commission (or the application or official interpretation of any thereof) by virtue of such Guarantor’s failure for any reason to constitute an “eligible contract participant” as defined in the Commodity Exchange Act and the regulations thereunder at the time the Guarantee of such Guarantor or the grant of such security interest becomes effective with respect to such Swap Obligation. If a Swap Obligation arises under a master agreement governing more than one swap, such exclusion shall apply only to the portion of such Swap Obligation that is attributable to swaps for which such Guarantee or security interest is or becomes illegal.

**“Excluded Taxes”** means any of the following Taxes imposed on or with respect to a Recipient or required to be withheld or deducted from a payment to a Recipient, (a) Taxes imposed on or measured by net income (however denominated), franchise Taxes, and branch profits Taxes, in each case, (i) imposed as a result of such Recipient being organized under the laws of, or having its principal office or, in the case of any Lender, its Lending Office located in, the jurisdiction imposing such Tax (or any political subdivision thereof) or (ii) that otherwise are

Other Connection Taxes, (b) in the case of a Lender, U.S. federal withholding Taxes imposed on amounts payable to or for the account of such Lender with respect to an applicable interest in a Loan or Commitment pursuant to a law in effect on the date on which (i) such Lender acquires such interest in the Loan or Commitment (other than pursuant to an assignment request by Borrower under [Section 2.14](#)) or (ii) such Lender changes its Lending Office, except in each case to the extent that, pursuant to [Section 3.01](#), amounts with respect to such Taxes were payable either to such Lender's assignor immediately before such Lender became a party hereto or to such Lender immediately before it changed its Lending Office, (c) Taxes attributable to such Recipient's failure to comply with [Section 3.01\(e\)](#), and (d) any U.S. federal withholding Taxes imposed pursuant to FATCA.

**"Existing Credit Agreement"** means that certain Credit Agreement, dated as of December 31, 2012 by and among Borrower, MHM Resources, BCI, Administrative Agent and the Lenders party thereto, as amended, supplemented, extended or otherwise modified from time to time, including by that certain First Amendment to Credit Agreement dated as of July 21, 2014.

**"Existing Guarantors"** has the meaning specified in the recitals hereto.

**"Existing Letters of Credit"** means the Letters of Credit, if any, listed on [Schedule 1.01](#).

**"Facility Termination Date"** means the date as of which all of the following shall have occurred: (a) the Aggregate Commitments have terminated, (b) all Obligations (other than (i) contingent indemnification obligations as to which no claim has been asserted or is known to exist and (ii) obligations with respect to Cash Management Agreements) have been paid in full, (c) all Letters of Credit have terminated or expired (other than Letters of Credit as to which Cash Collateral or other arrangements with respect thereto satisfactory to Administrative Agent and the L/C Issuer shall have been made) and (d) all Secured Obligations with respect to Cash Management Agreements have been paid in full or cash collateral or other arrangements with respect thereto satisfactory to the applicable Cash Management Bank in its good faith judgment shall have been made.

**"FASB ASC"** means the Accounting Standards Codification of the Financial Accounting Standards Board.

**"FATCA"** means Sections 1471 through 1474 of the Code, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with), any current or future regulations or official interpretations thereof and any agreements entered into pursuant to Section 1471(b)(1) of the Code.

**"Federal Funds Rate"** means, for any day, the rate per annum (rounded upward, if necessary, to a whole multiple of 1/100 of 1%) equal to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers on such day, as published by the Federal Reserve Bank of New York on the Business Day next succeeding such day; provided that (a) if such day is not a Business Day, the Federal Funds Rate for such day shall be such rate on such transactions on the next preceding

Business Day as so published on the next succeeding Business Day, and (b) if no such rate is so published on such next succeeding Business Day, the Federal Funds Rate for such day shall be the average rate (rounded upward, if necessary, to a whole multiple of 1/100 of 1%) charged to MUFG Union Bank, N.A. on such day on such transactions as determined by Administrative Agent.

“**Fee Letter**” means the letter agreement dated May 5, 2015, among Borrower, Administrative Agent and the Arranger.

“**Foreign Lender**” means (a) if Borrower is a U.S. Person, a Lender that is not a U.S. Person, and (b) if Borrower is not a U.S. Person, a Lender that is resident or organized under the laws of a jurisdiction other than that in which Borrower is resident for tax purposes (including such a Lender when acting in the capacity of the L/C Issuer). For purposes of this definition, the United States, each State thereof and the District of Columbia shall be deemed to constitute a single jurisdiction.

“**Foreign Subsidiary**” means any Subsidiary other than a Domestic Subsidiary.

“**FRB**” means the Board of Governors of the Federal Reserve System of the United States.

“**Fronting Exposure**” means, at any time there is a Defaulting Lender, with respect to the L/C Issuer, such Defaulting Lender’s Applicable Percentage of the outstanding L/C Obligations with respect to Letters of Credit issued by the L/C Issuer other than L/C Obligations as to which such Defaulting Lender’s participation obligation has been reallocated to other Lenders or Cash Collateralized in accordance with the terms hereof.

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

“**Funded Indebtedness**” means, with respect to any Person, at a particular time, without duplication, all of the following, whether or not included as indebtedness or liabilities in accordance with GAAP:

- (a) all obligations for borrowed money, whether current or long-term (including the Obligations) and all obligations of such Person evidenced by bonds, debentures, notes, loan agreements or other similar instruments;
- (b) all purchase money Indebtedness;
- (c) the principal portion of all obligations under conditional sale or other title retention agreements relating to property purchased by Borrower or any Subsidiary (other than customary reservations or retentions of title under agreements with suppliers entered into in the ordinary course of business);

(d) all obligations arising under letters of credit (including standby and commercial), bankers' acceptances, bank guaranties, surety bonds and similar instruments;

(e) all obligations in respect of the deferred purchase price of property or services (other than trade accounts payable in the ordinary course of business and, in each case, not past due for more than 90 days after the date on which such trade account payable was created), including, without limitation, any Earn-Out Obligations recognized as a liability on the balance sheet of Borrower and its Subsidiaries in accordance with GAAP;

(f) the Attributable Indebtedness of Capital Leases, Securitization Transactions and Synthetic Leases;

(g) all mandatory obligations of such Person to purchase, redeem, retire, defease or otherwise make any payment in respect of any Equity Interests in such Person or any other Person prior to the Maturity Date, valued, in the case of a redeemable preferred interest, at the greater of its voluntary or involuntary liquidation preference plus accrued and unpaid dividends;

(h) all Funded Indebtedness of others secured by (or for which the holder of such Funded Indebtedness has an existing right, contingent or otherwise, to be secured by) any Lien on, or payable out of the proceeds of production from, property owned or acquired by such Person, whether or not the obligations secured thereby have been assumed;

(i) all Guarantees with respect to Funded Indebtedness of the types specified in clauses (a) through (h) above of another Person; and

(j) all Funded Indebtedness of the types referred to in clauses (a) through (i) above of any partnership or joint venture (other than a joint venture that is itself a corporation or limited liability company) in which such Person is a general partner or joint venturer, except to the extent that Funded Indebtedness is expressly made non-recourse to such Person.

For purposes hereof, the amount of any direct obligation arising under letters of credit (including standby and commercial), bankers' acceptances, bank guaranties, surety bonds and similar instruments shall be the maximum amount available to be drawn thereunder.

“GAAP” means generally accepted accounting principles in the United States set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or such other principles as may be approved by a significant segment of the accounting profession in the United States, that are applicable to the circumstances as of the date of determination, consistently applied and as in effect from time to time. The term “**consistently applied**,” as used in connection herewith, means that the accounting principles applied are consistent in all material respects with those applied at prior dates or for prior periods

**“Governmental Authority”** means the government of the United States or any other nation, or of any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government (including any supra-national bodies such as the European Union or the European Central Bank).

**“Guarantee”** means, as to any Person, (a) any obligation, contingent or otherwise, of such Person guaranteeing or having the economic effect of guaranteeing any Indebtedness or other obligation payable or performable by another Person (the “primary obligor”) in any manner, whether directly or indirectly, and including any obligation of such Person, direct or indirect, (i) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness or other obligation, (ii) to purchase or lease property, securities or services for the purpose of assuring the obligee in respect of such Indebtedness or other obligation of the payment or performance of such Indebtedness or other obligation, (iii) to maintain working capital, equity capital or any other financial statement condition or liquidity or level of income or cash flow of the primary obligor so as to enable the primary obligor to pay such Indebtedness or other obligation, or (iv) entered into for the purpose of assuring in any other manner the obligee in respect of such Indebtedness or other obligation of the payment or performance thereof or to protect such obligee against loss in respect thereof (in whole or in part), or (b) any Lien on any assets of such Person securing any Indebtedness or other obligation of any other Person, whether or not such Indebtedness or other obligation is assumed by such Person (or any right, contingent or otherwise, of any holder of such Indebtedness to obtain any such Lien). The amount of any Guarantee shall be deemed to be an amount equal to the stated or determinable amount of the related primary obligation, or portion thereof, in respect of which such Guarantee is made or, if not stated or determinable, the maximum reasonably anticipated liability in respect thereof as determined by the guaranteeing Person in good faith. The term “Guarantee” as a verb has a corresponding meaning.

**“Guarantor”** means, collectively, each Person which becomes a Guarantor in accordance with Section 7.14 hereof, together with their successors and assigns.

**“Guarantor Obligations”** with respect to any Guarantor, means all obligations and liabilities of such Guarantor which may arise under or in connection with this Agreement (including, without limitation, Article IV) or any other Loan Document to which such Guarantor is a party, in each case whether on account of guarantee obligations, reimbursement obligations, fees, indemnities, costs, expenses or otherwise (including, without limitation, all fees and disbursements of counsel to Administrative Agent or to Lenders that are required to be paid by such Guarantor pursuant to the terms of this Agreement or any other Loan Document), provided that Guarantor Obligations shall not include any Excluded Swap Obligation.

**“Guaranty”** means the Guaranty made by the Guarantors in favor of Administrative Agent, the Lenders and the other Secured Parties pursuant to Article IV (including any supplement or joinder thereto), as amended, modified, supplemented, extended or restated from time to time.

**“Hazardous Materials”** means all explosive or radioactive substances or wastes and all hazardous or toxic substances, wastes or other pollutants, including petroleum or petroleum distillates, asbestos or asbestos-containing materials, polychlorinated biphenyls, radon gas, infectious or medical wastes and all other substances or wastes of any nature regulated pursuant to any Environmental Law.

**“Hedge Bank”** means any Person that, (a) at the time it enters into an interest rate Swap Contract permitted by this Agreement, is a Lender or an Affiliate of a Lender, or (b) at the time it (or its Affiliate) becomes a Lender, is a party to an interest rate Swap Contract not prohibited by this Agreement, in each case, in its capacity as a party to such Swap Contract; provided that for any of the foregoing to be included as a “Secured Hedge Agreement” on any date of determination by t Administrative Agent, the applicable Hedge Bank (other than Administrative Agent or an Affiliate of Administrative Agent) must have delivered a Secured Party Designation Notice to Administrative Agent prior to such date of determination.

**“Honor Date”** has the meaning specified in Section 2.03(c)(i).

**“Indebtedness”** means, as to any Person at a particular time, without duplication, all of the following, whether or not included as indebtedness or liabilities in accordance with GAAP:

- (a) all Funded Indebtedness;
- (b) the Swap Termination Value of any Swap Contract;
- (c) all Guarantees with respect to outstanding Indebtedness of the types specified in clauses (a) and (b) above of any other Person; and
- (d) all Indebtedness of the types referred to in clauses (a) through (c) above of any partnership or joint venture (other than a joint venture that is itself a corporation or limited liability company) in which Borrower or a Subsidiary is a general partner or a joint venturer, unless such Indebtedness is expressly made non-recourse to Borrower or a Subsidiary.

**“Indemnified Taxes”** means (a) Taxes, other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any obligation of any Loan Party under any Loan Document and (b) to the extent not otherwise described in (a), Other Taxes.

**“Indemnitees”** has the meaning specified in Section 11.04(b).

**“Information”** has the meaning specified in Section 11.07.

**“Interest Coverage Ratio”** means, for any date of determination, the ratio of: (a) the sum of (i) EBITDA for the twelve (12) consecutive month (or four fiscal quarter) period ending on such date, plus (ii) to the extent deducted in the calculation of the EBITDA, operating lease payments made during such period, minus (iii) the sum of (A) Restricted Payments made during such period, plus (B) payments made during such period in respect of deferred Acquisition-related obligations that constitute consideration for such Acquisition and Earn-Out Obligations, to (b) the sum of (i) Consolidated Interest Expense for such period, plus (c) operating lease payments during such period.

**“Interest Payment Date”** means, (a) as to any Loan other than a Base Rate Loan, the last day of each Interest Period applicable to such Loan and the Maturity Date; provided, however, that if any Interest Period for a Eurodollar Rate Loan exceeds three (3) months, the respective dates that fall every three (3) months after the beginning of such Interest Period shall also be Interest Payment Dates; and (b) as to any Base Rate Loan, the last Business Day of each of March, June, September and December and the Maturity Date.

**“Interest Period”** means, as to each Eurodollar Rate Loan, the period commencing on the date such Eurodollar Rate Loan is disbursed or converted to or continued as a Eurodollar Rate Loan and ending on the date one (1), two (2), three (3) or six (6) months thereafter or, upon consent of all Lenders, such other period that is twelve (12) months or less (in each case subject to availability), as selected by Borrower in its Loan Notice; provided that:

(i) any Interest Period that would otherwise end on a day that is not a Business Day shall be extended to the next succeeding Business Day unless, in the case of a Eurodollar Rate Loan, such Business Day falls in another calendar month, in which case such Interest Period shall end on the next preceding Business Day;

(ii) any Interest Period pertaining to a Eurodollar Rate Loan that begins on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period) shall end on the last Business Day of the calendar month at the end of such Interest Period; and

(iii) no Interest Period shall extend beyond the Maturity Date.

**“Inventory”** means all inventory now owned or hereafter acquired, wherever located, including without limitation all goods, merchandise and other personal property held for sale or lease or which is furnished under any contract of service or is held as raw materials, works or goods in process, materials and supplies of every nature used or consumed or to be used or consumed in the ordinary course of its business, whether now owned or hereafter acquired and the proceeds of products thereof.

**“Investment”** means, as to any Person, any direct or indirect acquisition or investment by such Person, whether by means of (a) the purchase or other acquisition of capital stock or other Equity Interests of another Person, (b) a loan, advance or capital contribution to, or purchase or other acquisition of any equity participation or interest in, another Person, including any partnership or joint venture interest in such other Person, or (c) an Acquisition. For purposes of covenant compliance, the amount of any Investment shall be the amount actually invested, without adjustment for subsequent increases or decreases in the value of such Investment. For the avoidance of doubt, prefunded investments held subject to a fiduciary duty to be used for the sole purpose of administering clients’ benefits in the ordinary course of business shall not constitute Investments for purposes of this Agreement.

**“Involuntary Disposition”** means any loss of, damage to or destruction of, or any condemnation or other taking for public use of, any property of any Loan Party or any Subsidiary.

**“IP Rights”** means, collectively, with respect to any Person, all of such Person’s right, title, and interest in and to the following: (a) all Copyrights, all domain names, all websites, all Patents, all Proprietary Software, all Trademarks, all Trade Secrets and all Other Intellectual Property owned and/or used by any Loan Party or any Subsidiary; (b) all Copyright Licenses, all Patent Licenses and all Trademark Licenses; and (c) all claims for damages by way of past, present and future infringement of any of the rights included above, with the right, but not the obligation, to sue for and collect such damages for said use or infringement of the intellectual property rights identified above.

**“IRS”** means the United States Internal Revenue Service.

**“ISP”** means, with respect to any Letter of Credit, the “International Standby Practices 1998” published by the Institute of International Banking Law & Practice, Inc. (or such later version thereof as may be in effect at the time of issuance).

**“Issuer Documents”** means with respect to any Letter of Credit, the L/C Application, and any other document, agreement and instrument entered into by the L/C Issuer and Borrower (or any Subsidiary) or in favor of the L/C Issuer and relating to such Letter of Credit.

**“Joinder Agreement”** means a joinder agreement substantially in the form of **Exhibit F** executed and delivered by a Material Subsidiary in accordance with the provisions of Section 7.14.

**“Laws”** means, collectively, all international, foreign, Federal, state and local statutes, treaties, rules, guidelines, regulations, ordinances, codes and administrative or judicial precedents or authorities, including the interpretation or administration thereof by any Governmental Authority charged with the enforcement, interpretation or administration thereof, and all applicable administrative orders, directed duties, requests, licenses, authorizations and permits of, and agreements with, any Governmental Authority, in each case whether or not having the force of law.

**“L/C Advance”** means, with respect to each Lender, such Lender’s funding of its participation in any L/C Borrowing in accordance with its Applicable Percentage.

**“L/C Application”** means an application and agreement for the issuance or amendment of a Letter of Credit in the form from time to time in use by the L/C Issuer.

**“L/C Borrowing”** means an extension of credit resulting from a drawing under any Letter of Credit which has not been reimbursed on the date when made or refinanced as a Borrowing.

**“L/C Credit Extension”** means, with respect to any Letter of Credit, the issuance thereof or extension of the expiry date thereof, or the increase of the amount thereof.

**“L/C Disbursement”** means a payment or disbursement made by a L/C Issuer pursuant to a drawing under a Letter of Credit.



“**L/C Expiration Date**” means the day that is ninety (90) days prior to the Maturity Date then in effect (or, if such day is not a Business Day, the next preceding Business Day).

“**L/C Fee**” has the meaning specified in Section 2.03(i).

“**L/C Issuer**” means MUFG Union Bank, N.A. in its capacity as issuer of Letters of Credit hereunder, or any successor issuer of Letters of Credit hereunder, or such other Lender as Borrower may from time to time select as an L/C Issuer hereunder pursuant to Section 2.03; provided that such Lender has agreed to be an L/C Issuer.

“**L/C Obligations**” means, as at any date of determination, the aggregate amount available to be drawn under all outstanding Letters of Credit plus the aggregate of all Unreimbursed Amounts, including all L/C Borrowings. For purposes of computing the amount available to be drawn under any Letter of Credit, the amount of such Letter of Credit shall be determined in accordance with Section 1.06. For all purposes of this Agreement, if on any date of determination a Letter of Credit has expired by its terms but any amount may still be drawn thereunder by reason of the operation of Rule 3.14 of the ISP, such Letter of Credit shall be deemed to be “outstanding” in the amount so remaining available to be drawn.

“**L/C Sublimit**” means an amount equal to Fifteen Million Dollars (\$15,000,000). The L/C Sublimit is part of, and not in addition to, the Aggregate Commitments.

“**Lenders**” has the meaning specified in the introductory paragraph hereto and, includes the Persons listed on Schedule 2.01 and any other Person that shall have become party hereto pursuant to an Assignment and Assumption, other than any such Person that ceases to be a party hereto pursuant to an Assignment and Assumption.

“**Lending Office**” means, as to any Lender, the office or offices of such Lender as set forth on the such Lender’s signature page hereto, or such other office or offices as a Lender may from time to time notify Borrower and Administrative Agent.

“**Letter of Credit**” means any standby letter of credit issued hereunder providing for the payment of cash upon the honoring of a presentation thereunder and shall include the Existing Letters of Credit.

“**Lien**” means any mortgage, pledge, hypothecation, assignment for security, deposit arrangement, encumbrance, lien (statutory or other), charge, or preference, priority or other security interest or preferential arrangement in the nature of a security interest of any kind or nature whatsoever (including any conditional sale or other title retention agreement, any easement, right of way or other encumbrance on title to real property, and any financing lease having substantially the same economic effect as any of the foregoing).

“**Loan**” has the meaning specified in Section 2.01.

“**Loan Documents**” means this Agreement, each Note, each Issuer Document, each Joinder Agreement, any agreement creating or perfecting rights in Cash Collateral pursuant to the provisions of Section 2.15 of this Agreement, each Collateral Document, the Fee Letter, the Guaranty and each other document, instrument and agreement entered into in connection with

the transactions contemplated by this Agreement, together with all alterations, amendments, changes, extensions, modifications, refinancings, refundings, renewals, replacements, restatements, or supplements, of or to any of the foregoing.

“**Loan Notice**” means a notice of (a) a Borrowing, (b) a conversion of Loans from one Type to the other, or (c) a continuation of Eurodollar Rate Loans, pursuant to Section 2.02(a), which, if in writing, shall be substantially in the form of **Exhibit A**.

“**Loan Parties**” means, collectively, Borrower and each Guarantor.

“**London Banking Day**” means any day on which dealings in Dollar deposits are conducted by and between banks in the London interbank eurodollar market.

“**Material Adverse Effect**” means a material adverse change in or a material adverse effect on (i) the business, assets, operations, liabilities, or financial condition of Borrower and its Subsidiaries, taken as a whole, or (ii) the prospect of payment or performance by Borrowers or any Guarantor of its or their respective obligations under any of the Loan Documents, or (iii) the validity or enforceability of the Loan Documents, or (iv) the rights and remedies of Administrative Agent or any Secured Party under any of the Loan Documents, or (v) any Loan Party’s interest in, or the value, perfection or priority of Bank’s security interest in the Collateral.

“**Material IP Rights**” means all IP Rights that are material to the business of Borrower and its Subsidiaries taken as a whole; “**Material IP Right**” means any IP Right that is material to the business of Borrower and its Subsidiaries taken as a whole.

“**Material Subsidiary**” means,

(i) as of the last day of any fiscal quarter of Borrower, any Domestic Subsidiary that meets any of the following conditions at such time: (A) such Subsidiary’s consolidated total revenues for the period of the immediately preceding four fiscal quarters is equal to or greater than 5% of the consolidated total revenues of Borrower and its Subsidiaries for such period, determined in accordance with GAAP, in each case as reflected in the most recent annual or quarterly (as applicable) financial statements required to be delivered pursuant to this Agreement; (B) such Subsidiary’s total assets, determined in accordance with GAAP, as of the last day of the immediately preceding fiscal quarter, are equal to or greater than 5% of Consolidated Total Assets, in each case as reflected in the most recent annual or quarterly (as applicable) financial statements of Borrower required to be delivered pursuant to this Agreement; and

(ii) as of any other Material Subsidiary Assessment Date, any Domestic Subsidiary that has, on a Pro Forma Basis, based upon the then most recently delivered financial statements delivered pursuant to this Agreement, and after giving effect to the applicable acquisition, divestiture or creation, as though occurring on the first day of the four fiscal quarter period ending on the effective date of such delivered financial statements, (1) total revenues for the period of the immediately preceding four fiscal quarters is equal to or greater than 5% of the consolidated total revenues of Borrower and its Subsidiaries for such period, determined in accordance with GAAP, or (2) total assets,

determined in accordance with GAAP, equal to or greater than 5% of Consolidated Total Assets as of such date, determined in accordance with GAAP;

provided, however, that if at any time the Subsidiaries qualifying as Material Subsidiaries pursuant to clause (i) or (ii) above, in the aggregate and together with the total assets and total revenues of Borrower, do not represent at least 95% of Consolidated Total Assets and 95% of consolidated total revenues of Borrower and its Subsidiaries (the “**95% Threshold**”), Borrower shall promptly designate additional Subsidiaries as Material Subsidiaries until the 95% Threshold is satisfied collectively by all Material Subsidiaries. Once a Subsidiary qualifies, or is designated by Borrower, a Material Subsidiary, it shall continue to constitute a Material Subsidiary throughout the term of this Agreement.

“**Material Subsidiary Assessment Date**” means each of (a) the date on which Borrower delivers or is obligated to deliver to Bank financial statements pursuant to Section 7.01, (b) the date on which Borrower, directly or through one or more Subsidiaries, consummates any Acquisition, or acquires or creates any new or additional Subsidiary, and (c) the date on which Borrower, directly or through one or more Subsidiaries, sells, transfers, divests or otherwise disposes of any Subsidiary or all or substantially of the assets of any Subsidiary.

“**Maturity Date**” means June 5, 2020; provided, however, that if such date is not a Business Day, the Maturity Date shall be the preceding Business Day.

“**MHM Resources**” has the meaning specified in the recitals hereto.

“**Minimum Collateral Amount**” means, at any time, (i) with respect to Cash Collateral consisting of cash or deposit account balances provided to reduce or eliminate Fronting Exposure during the existence of a Defaulting Lender, an amount equal to 100% of the Fronting Exposure of the L/C Issuer with respect to Letters of Credit issued and outstanding at such time, (ii) with respect to Cash Collateral consisting of cash or deposit account balances provided in accordance with Section 2.15, an amount equal to 100% of the Outstanding Amount of all L/C Obligations, and (iii) otherwise, an amount determined by Administrative Agent and the L/C Issuer in their sole discretion.

“**Moody’s**” means Moody’s Investors Service, Inc. and any successor thereto.

“**Multiemployer Plan**” means any employee benefit plan of the type described in Section 4001(a)(3) of ERISA, to which Borrower or any ERISA Affiliate makes or is obligated to make contributions, or during the preceding five plan years, has made or been obligated to make contributions.

“**Multiple Employer Plan**” means a Plan which has two or more contributing sponsors (including Borrower or any ERISA Affiliate) at least two of whom are not under common control, as such a plan is described in Section 4064 of ERISA.

“**New Lender**” has the meaning specified in Section 2.06(b)(ii).

“**New Lender Addendum**” means a new lender addendum entered into by and between Borrower, Administrative Agent and New Lender, in substantially the form of **Exhibit E** or any other form approved by Administrative Agent.

“**Non-Consenting Lender**” means any Lender that does not consent to or approve any consent, waiver, amendment, release or modification that (i) requires the approval of all affected Lenders in accordance with the terms of Section 11.01 or the approval of one hundred percent (100%) of the Lenders and (ii) has been approved by the Required Lenders.

“**Non-Defaulting Lender**” means, at any time, each Lender that is not a Defaulting Lender at such time.

“**Note**” means a promissory note made by Borrower in favor of a Lender evidencing Loans made by such Lender, substantially in the form of **Exhibit B**.

“**Obligations**” means all advances to, and debts, liabilities, obligations, covenants and duties of every kind of, any Loan Party arising under any Loan Document or otherwise with respect to any Loan or Letter of Credit owed to Administrative Agent or the Lenders or any one or more of them, whether direct or indirect (including those acquired by assumption), absolute or contingent, liquidated or unliquidated, legal or equitable, due or to become due, now existing or hereafter arising, voluntary or involuntary and however arising, whether such Loan Party is liable individually or jointly or with others, whether incurred before, during or after any proceeding under any Debtor Relief Laws, and including interest and fees that accrue after the commencement by or against any Loan Party or any Affiliate thereof of any proceeding under any Debtor Relief Laws naming such Person as the debtor in such proceeding, regardless of whether such interest and fees are allowed claims in such proceeding. The foregoing shall also include (a) all obligations under any Swap Contract between any Loan Party and any Hedge Bank that is permitted to be incurred pursuant hereto and (b) all obligations under any Cash Management Agreement between any Loan Party and any Cash Management Bank.

“**OFAC**” means the Office of Foreign Assets Control of the United States Department of the Treasury.

“**Organization Documents**” means, (a) with respect to any corporation, the certificate or articles of incorporation and the bylaws (or equivalent or comparable constitutive documents with respect to any non-U.S. jurisdiction); (b) with respect to any limited liability company, the certificate or articles of formation or organization and operating agreement; and (c) with respect to any partnership, joint venture, trust or other form of business entity, the partnership, joint venture or other applicable agreement of formation or organization and any agreement, instrument, filing or notice with respect thereto filed in connection with its formation or organization with the applicable Governmental Authority in the jurisdiction of its formation or organization and, if applicable, any certificate or articles of formation or organization of such entity.

“**Other Connection Taxes**” means, with respect to any Recipient, Taxes imposed as a result of a present or former connection between such Recipient and the jurisdiction imposing such Tax (other than connections arising from such Recipient having executed, delivered,

become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Loan Document, or sold or assigned an interest in any Loan or Loan Document).

**“Other Intellectual Property”** means all worldwide intellectual property rights, proprietary rights and common-law rights, whether registered or unregistered, not otherwise included in Copyrights, Copyright Licenses, Patents, Patent Licenses, Trademarks, Trademark Licenses or Trade Secrets, including, without limitation, all rights to and under all new and useful inventions, discoveries, methods, processes, designs, technology, art, trade dress, algorithms, software, concepts, protocols, electronic or other databases and all improvements thereof and all know-how related thereto.

**“Other Taxes”** means all present or future stamp, court or documentary, intangible, recording, filing or similar Taxes that arise from any payment made under, from the execution, delivery, performance, enforcement or registration of, from the receipt or perfection of a security interest under, or otherwise with respect to, any Loan Document, except any such Taxes that are Other Connection Taxes imposed with respect to an assignment (other than an assignment made pursuant to [Section 3.06](#)).

**“Outstanding Amount”** means (a) with respect to Loans on any date, the aggregate outstanding principal amount thereof after giving effect to any borrowings and prepayments or repayments of Loans occurring on such date; and (b) with respect to any L/C Obligations on any date, the amount of such L/C Obligations on such date after giving effect to any L/C Credit Extension occurring on such date and any other changes in the aggregate amount of the L/C Obligations as of such date, including as a result of any reimbursements by Borrower of Unreimbursed Amounts.

**“Participant”** has the meaning specified in [Section 11.06\(d\)](#).

**“Participant Register”** has the meaning specified in [Section 11.06\(d\)](#).

**“Patent License”** means any written agreement providing for the grant by or to a Loan Party or any Subsidiary of any right under any Patent.

**“Patents”** means all patents, letters patent, patent applications and like protections in the United States and all other countries (and letters patent that issue therefrom) and all improvements divisions, continuations, renewals, reissues, reexaminations, extensions and continuations (including continuations-in-part and continuing prosecution applications) thereof, for the full term thereof.

**“Patriot Act”** means the Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism USA PATRIOT Act (Title III of Pub. L. 107 -56 (signed into law October 26, 2001)) and the USA PATRIOT Improvement and Reauthorization Act of 2005 (Pub. L. 109-177).

**“PBGC”** means the Pension Benefit Guaranty Corporation.

**“Pension Plan”** means any “employee pension benefit plan” (as such term is defined in Section 3(2) of ERISA), other than a Multiemployer Plan, that is subject to Title IV of ERISA and is sponsored or maintained by Borrower or any ERISA Affiliate or to which Borrower or any ERISA Affiliate contributes or has an obligation to contribute, or in the case of a Multiple Employer Plan described in Section 4064(a) of ERISA, has made contributions at any time during the immediately preceding five plan years.

**“Permitted Acquisition”** means any Acquisition by Borrower or a Subsidiary of Borrower, provided that:

(a) the Acquired Entity in the same line of business as Borrower or a business incidental or closely related thereto,

(b) Borrower (or Borrower and a Wholly Owned Subsidiary of Borrower), is the surviving and successor entity in such Acquisition (including any merger or consolidation),

(c) for any Acquisition where the Aggregate Consideration paid or payable by Borrower and its Subsidiaries in connection with such Acquisition exceeds Fifty Million Dollars (\$50,000,000) Borrower shall have delivered to Administrative Agent, at least five (5) days prior to the consummation of such Acquisition:

(i) historical financial information for the Acquired Entity, including, if available, audited financial statements, quality of earnings reports and year-to-date interim financial statements,

(ii) if requested by Administrative Agent, true, correct and complete copies of all of the documents, instruments and agreements relating to such acquisition, including all related annexes, schedules and exhibits,

(iii) such other financial information and other information regarding the Acquired Entity, as Administrative Agent may reasonably request, and

(iv) a Pro Forma Compliance Certificate, duly executed by a Responsible Officer, certifying and demonstrating, among other things compliance on an actual and Pro Forma Basis with all financial covenants;

(d) the assets acquired, or owned by the Acquired Entity, will not be subject to any Lien following the effective date of such Acquisition, other than any required Lien in favor of Administrative Agent, for the benefit of the Secured Parties, and Permitted Liens;

(e) no Event of Default shall have occurred and be continuing on the effective date thereof or shall result from the consummation of such Acquisition;

(f) such Acquisition does not result in a Change of Control; and

(g) to the extent applicable, such Acquisition shall have been approved by a requisite majority of the shareholders, and a disinterested majority of the board of directors (or an equivalent governing body) of, the Acquired Entity.

**“Permitted Investments”** means:

- (a) Investments existing on the Closing Date and listed on Schedule 8.02 to the Disclosure Letter;
- (b) Cash Equivalents or any Investments that are consistent with the investment policy approved by Borrower’s board of directors and approved by the Required Lenders, such approval not to be unreasonably withheld;
- (c) Investments consisting of the endorsement of negotiable instruments for deposit or collection or similar transactions in the ordinary course of business;
- (d) Investments by Borrower or a Guarantor in (i) Guarantors or Borrower, as the case may be, and (ii) Domestic Subsidiaries of Borrower for current operating expenses, not to exceed \$1,000,000 in any fiscal year during the term hereof, incurred in the ordinary course of the businesses currently engaged in by Borrower or reasonably related thereto;
- (e) Investments consisting of (i) travel advances and employee relocation loans and other employee loans and advances in the ordinary course of business, and (ii) loans to employees, officers or directors relating to the purchase of equity securities of Borrower pursuant to employee stock purchase plans or agreements approved by Borrower’s board of directors, not to exceed \$250,000 in the aggregate in any year `during the term hereof;
- (f) Investments (including debt obligations) received in connection with the bankruptcy or reorganization of customers or suppliers and in settlement of delinquent obligations of, and other disputes with, customers or suppliers arising in the ordinary course of business;
- (g) Investments consisting of notes receivable of, or prepaid royalties and other credit extensions, to customers and suppliers who are not Affiliates, in the ordinary course of business; provided that this paragraph (g) shall not apply to Investments of Borrower in any Subsidiary;
- (h) Investments consisting of deposit accounts, provided that if required pursuant to Section 7.06, such deposit accounts shall be subject to a prior perfected security interest in favor of Bank;
- (i) Investments accepted in connection with Dispositions permitted by Section 8.05;
- (j) Permitted Acquisitions, including the creation of Subsidiaries in connection with any such Permitted Acquisitions (provided that any Material Subsidiaries are co-Borrowers or Guarantors hereunder); and
- (k) Other Investments in an aggregate amount not to exceed the Threshold Amount in any fiscal year.

**“Permitted Liens”** means those Liens permitted by Section 8.01 hereof.

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

“**Plan**” means any “employee benefit plan” (as such term is defined in Section 3(3) of ERISA) that is sponsored or maintained by Borrower or any ERISA Affiliate other than (i) a Multiemployer Plan established by Borrower or (ii) with respect to any such plan that is subject to Section 412 of the Code or Title IV of ERISA, any ERISA Affiliate.

“**Platform**” has the meaning specified in Section 11.02(c).

“**Pledge Agreement**” means that certain Amended and Restated Pledge Agreement dated as of the Closing Date entered into among the Loan Parties and Administrative Agent, for the benefit of the Secured Parties, substantially in the form of **Exhibit I** attached hereto (including any supplement or joinders thereto) as amended, modified or restated from time to time.

“**Pro Forma Basis**” means, with respect to any transaction, that for purposes of calculating the financial covenants set forth in Section 7.13 (including any calculation of such financial covenants in accordance with any other Section of this Agreement), such transaction (including any Acquisition) shall be deemed to have occurred as of the first day of the most recent four fiscal quarter period preceding the date of such transaction for which Borrower was required to deliver financial statements pursuant to Section 7.01(a) or (b). In connection with the foregoing, (a) with respect to any Disposition or Involuntary Disposition, income statement and cash flow statement items (whether positive or negative) attributable to the property disposed of shall be excluded to the extent relating to any period occurring prior to the date of such transaction; (b) with respect to any Acquisition, (i) income statement and cash flow statement items attributable to the Person or property acquired shall be included to the extent relating to any period applicable in such calculations to the extent (A) such items are not otherwise included in such income statement and cash flow statement items for Borrower and its Subsidiaries in accordance with GAAP or in accordance with any defined terms set forth in Section 1.01 and (B) such items are supported by financial statements or other information satisfactory to Administrative Agent, (ii) any Indebtedness retired, incurred or assumed by any Loan Party or any Subsidiary (including the Person or property acquired) in connection with such transaction and any Indebtedness of the Person or property acquired which is not retired in connection with such transaction (A) shall be deemed to have been retired or incurred as of the first day of the applicable period and (B) if such Indebtedness has a floating or formula rate, shall have an implied rate of interest for the applicable period for purposes of this definition determined by utilizing the rate which is or would be in effect with respect to such Indebtedness as at the relevant date of determination; and (c) with respect to any Restricted Payment, any Indebtedness incurred or assumed by Borrower or any Subsidiary in connection with such transaction (A) shall be deemed to have been incurred as of the first day of the applicable period, and (B) if such Indebtedness has a floating or formula rate, shall have an implied rate of interest for the applicable period for purposes of this definition determined by utilizing the rate which is or would be in effect with respect to such Indebtedness as at the relevant date of determination.

“**Pro Forma Compliance Certificate**” means a certificate of a Responsible Officer of Borrower containing reasonably detailed calculations of the financial covenants set forth in Section 7.13 or Borrower’s unrestricted cash for purposes of Section 8.06, as of the most recent



fiscal quarter end for which Borrower was required to deliver financial statements pursuant to Section 7.01(a) or (b) after giving effect to the applicable transaction on a Pro Forma Basis. For the avoidance of doubt, such certificate shall contain detailed calculations and other information of the items specified in the definition of Pro Forma Basis, in form and substance reasonably acceptable to Administrative Agent.

**“Proprietary Software”** means any proprietary software owned, licensed or otherwise used by any Loan Party or any Subsidiary other than any software that is generally commercially available, including without limitation, the object code and source code forms of such software and all associated documentation.

**“Public Lender”** has the meaning specified in Section 11.02(c).

**“Qualified ECP Guarantor”** means, in respect of any Swap Obligation, each Guarantor that has total assets exceeding \$10,000,000 at the time such Swap Obligation is incurred or such other person as constitutes an “eligible contract participant” under the Commodity Exchange Act or any regulations promulgated thereunder and can cause another person to qualify as an “eligible contract participant” at such time by entering into a keepwell under Section 1a(18)(A)(v)(II) of the Commodity Exchange Act.

**“Qualified Stock”** of any Person means any Equity Interest of such Person that is not Disqualified Stock.

**“Rating Agency”** means Moody’s, S&P, Fitch Ratings Ltd. or any other nationally recognized rating agency or service.

**“Recipient”** means Administrative Agent, any Lender, the L/C Issuer, or any other recipient of any payment to be made by or on account of any obligation of any Loan Party hereunder.

**“Register”** has the meaning specified in Section 11.06(c).

**“Related Parties”** means, with respect to any Person, such Person’s Affiliates and the partners, directors, officers, employees, agents, trustees, administrators, managers, advisors and representatives of such Person and of such Person’s Affiliates.

**“Reportable Event”** means any of the events set forth in Section 4043(c) of ERISA, other than events for which the thirty (30) day notice period has been waived.

**“Request for Credit Extension”** means (a) with respect to a Borrowing, conversion or continuation of Loans, a Loan Notice, and (b) with respect to an L/C Credit Extension, an L/C Application.

**“Required Lenders”** means, at any time, Lenders having more than 50.0% of the Aggregate Commitments or, if the commitment of each Lender to make Loans and the obligation of the L/C Issuer to make L/C Credit Extensions have been terminated pursuant to Section 9.02, Lenders holding in the aggregate more than 50.0% of the Total Outstandings (with the aggregate amount of each Lender’s risk participation and funded participation in L/C Obligations being

deemed “held” by such Lender for purposes of this definition); provided that the Commitment of, and the portion of the Total Outstandings held or deemed held by, any Defaulting Lender shall be excluded for purposes of making a determination of Required Lenders; provided, further that, when the Aggregate Commitments and/or Total Outstandings, as applicable, as of any date of determination are held by (i) four (4) Lenders, Required Lenders shall mean not less than three (3) Lenders; (ii) three (3) Lenders, Required Lenders shall mean not less than two (2) Lenders; and (iii) two (2) Lenders, Required Lenders shall mean both Lenders; provided, further, that the amount of any participation in any Unreimbursed Amounts that such Defaulting Lender has failed to fund that have not been reallocated to and funded by another Lender shall be deemed to be held by the Lender that is the L/C Issuer, as the case may be, in making such determination.

“**Responsible Officer**” means the manager, chief executive officer, president, chief financial officer, treasurer or controller of a Loan Party, and solely for purposes of the delivery of incumbency certificates pursuant to Section 5.01, the secretary or any assistant secretary of a Loan Party and, solely for purposes of notices given pursuant to Article II, any other officer or employee of the applicable Loan Party so designated by any of the foregoing officers in a notice to Administrative Agent. Any document delivered hereunder that is signed by a Responsible Officer of a Loan Party shall be conclusively presumed to have been authorized by all necessary corporate, partnership and/or other action on the part of such Loan Party and such Responsible Officer shall be conclusively presumed to have acted on behalf of such Loan Party.

“**Restricted Agreement**” means any license or other agreement (other than over-the-counter software that is commercially available to the public) to which Borrower is a party or under which Borrower is bound (including licenses and agreements under which Borrower is the licensee), the failure, breach or termination of which could reasonably be expected to have a Material Adverse Effect.

“**Restricted Payment**” means any dividend or other distribution (whether in cash, securities or other property) with respect to any capital stock or other Equity Interest of Borrower or any other Person, or any payment (whether in cash, securities or other property), including any sinking fund or similar deposit, on account of the purchase, redemption, retirement, defeasance, acquisition, cancellation or termination of any such capital stock or other Equity Interest or on account of any return of capital to such Person’s stockholders, partners or members (or the equivalent Person thereof).

“**S&P**” means Standard & Poor’s Ratings Services, a division of The McGraw-Hill Companies, Inc. and any successor thereto.

“**Sanction(s)**” means any sanction administered or enforced by the United States Government (including without limitation, OFAC), the United Nations Security Council, the European Union, Her Majesty’s Treasury (“HMT”) or other relevant sanctions authority.

“**SEC**” means the Securities and Exchange Commission, or any Governmental Authority succeeding to any of its principal functions.

“**Secured Cash Management Agreement**” means any Cash Management Agreement that is entered into by and between any Loan Party and any Cash Management Bank.

“**Secured Hedge Agreement**” means any interest rate Swap Contract permitted under Article VII or VIII that is entered into by and between any Loan Party and any Hedge Bank.

“**Secured Obligations**” means all Obligations, all obligations of any Loan Party arising under Secured Cash Management Agreements and Secured Hedge Agreements and all costs and expenses incurred in connection with enforcement and collection of the foregoing by any Loan Party, including the fees, charges and disbursements of counsel, in each case whether direct or indirect (including those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising and including interest and fees that accrue after the commencement by or against any Loan Party or any Affiliate thereof of any proceeding under any Debtor Relief Laws naming such Person as the debtor in such proceeding, regardless of whether such interest and fees are allowed claims in such proceeding.

“**Secured Parties**” means, collectively, Administrative Agent, the Lenders, the L/C Issuer, the Hedge Banks, the Cash Management Banks, each co-agent or sub-agent appointed by Administrative Agent from time to time pursuant to Section 10.05, and the other Persons the Secured Obligations owing to which are or are purported to be secured by the Collateral under the terms of the Collateral Documents.

“**Secured Party Designation Notice**” shall mean a notice from any Lender or an Affiliate of a Lender substantially in the form of **Exhibit K**.

“**Securities Laws**” means the Securities Act of 1933, the Securities Exchange Act of 1934, Sarbanes-Oxley and the applicable accounting and auditing principles, rules, standards and practices promulgated, approved or incorporated by the SEC or the Public Company Accounting Oversight Board, as each of the foregoing may be amended and in effect on any applicable date hereunder.

“**Securitization Transaction**” means, with respect to any Person, any financing transaction or series of financing transactions (including factoring arrangements) pursuant to which such Person or any Subsidiary of such Person may sell, convey or otherwise transfer, or grant a security interest in, accounts, payments, receivables, rights to future lease payments or residuals or similar rights to payment to a special purpose subsidiary or affiliate of such Person.

“**Security Agreement(s)**” means, individually or collectively, (a) the Security Agreement of even date herewith executed by Borrower and the other Loan Parties in favor of Bank, (b) each other pledge or security agreement executed from time to time by a Loan Party in favor of Bank, all as amended, modified, supplemented or restated from time to time

“**Solvent**” means, as of any date of determination, and as to any Person, that on such date: (a) the fair valuation of the assets of such Person is greater than the fair valuation of such Person’s probable liability in respect of existing debts; (b) such Person does not intend to, and does not believe that it will, incur debts beyond such Person’s ability to pay as such debts mature; (c) such Person is not engaged in a business or transaction, and is not about to engage in a business or transaction, which would leave such Person with assets remaining which would

constitute unreasonably small capital after giving effect to the nature of the particular business or transaction; and (d) such Person is generally paying its debts as they become due. For the purpose of the foregoing (1) the “fair valuation” of any assets means the amount realizable within a reasonable time, either through collection or sale, of such assets at their regular market value, which is the amount obtainable by a capable and diligent businessman from an interested buyer willing to purchase such assets within a reasonable time under ordinary circumstances; and (2) the term “debts” includes any legal liability whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent.

“**Subject Lender**” has the meaning specified in Section 2.14.

“**Subordinated Debt**” is indebtedness incurred by a Loan Party subordinated to all of each Loan Party’s Obligations to Administrative Agent, the Lenders and the L/C Issuer on terms acceptable to Administrative Agent and the Required Lenders (pursuant to a subordination, intercreditor, or other similar agreement in form and substance satisfactory to Administrative Agent entered into between Administrative Agent and the other creditor).

“**Subsidiary**” of a Person means a corporation, partnership, joint venture, limited liability company or other business entity of which a majority of the shares of securities or other interests having ordinary voting power for the election of directors or other governing body (other than securities or interests having such power only by reason of the happening of a contingency) are at the time beneficially owned, or the management of which is otherwise controlled, directly, or indirectly through one or more intermediaries, or both, by such Person. Unless otherwise specified, all references herein to a “Subsidiary” or to “Subsidiaries” shall refer to a Subsidiary or Subsidiaries of Borrower.

“**Swap Contract**” means (a) any and all rate swap transactions, basis swaps, credit derivative transactions, forward rate transactions, commodity swaps, commodity options, forward commodity contracts, equity or equity index swaps or options, bond or bond price or bond index swaps or options or forward bond or forward bond price or forward bond index transactions, interest rate options, forward foreign exchange transactions, cap transactions, floor transactions, collar transactions, currency swap transactions, cross-currency rate swap transactions, currency options, spot contracts, or any other similar transactions or any combination of any of the foregoing (including any options to enter into any of the foregoing), whether or not any such transaction is governed by or subject to any master agreement, and (b) any and all transactions of any kind, and the related confirmations, which are subject to the terms and conditions of, or governed by, any form of master agreement published by the International Swaps and Derivatives Association, Inc., any International Foreign Exchange Master Agreement, or any other master agreement (any such master agreement, together with any related schedules, a “**Master Agreement**”), including any such obligations or liabilities under any Master Agreement; provided that, for the avoidance of doubt, the following shall not be deemed a “Swap Contract”: (i) no phantom stock or similar plan (including, any stock option plan) providing for payments only on account of services provided by current or former directors, officers, employees or consultants of Borrower or the Subsidiaries, (ii) any stock option or warrant agreement for the purchase of Equity Interests, (iii) the purchase of Equity Interests or Indebtedness (including securities convertible into Equity Interests) pursuant to

delayed delivery contracts, and (iv) any of the foregoing to the extent that it constitutes a derivative embedded in a convertible security.

**“Swap Counterparty”** means, with respect to any swap with a Lender, any person or entity that is or becomes a party to such swap.

**“Swap Obligation”** means, with respect to any Guarantor, any obligation to pay or perform under any agreement, contract or transaction that constitutes a “swap” within the meaning of section 1a(47) of the Commodity Exchange Act between any Lender and one or more Swap Counterparties.

**“Swap Termination Value”** means, in respect of any one or more Swap Contracts, after taking into account the effect of any legally enforceable netting agreement relating to such Swap Contracts, (a) for any date on or after the date such Swap Contracts have been closed out and termination value(s) determined in accordance therewith, such termination value(s), and (b) for any date prior to the date referenced in clause (a), the amount(s) determined as the mark-to-market value(s) for such Swap Contracts, as determined based upon one or more mid-market or other readily available quotations provided by any recognized dealer in such Swap Contracts (which may include a Lender or any Affiliate of a Lender).

**“Synthetic Lease”** means any synthetic lease, tax retention operating lease, off-balance sheet loan or similar off-balance sheet financing arrangement whereby the arrangement is considered borrowed money indebtedness for tax purposes but is classified as an operating lease or does not otherwise appear on a balance sheet under GAAP.

**“Synthetic Lease Obligation”** means the monetary obligation of a Person under (a) a so-called synthetic, off-balance sheet or tax retention lease, or (b) an agreement for the use or possession of property creating obligations that do not appear on the balance sheet of such Person but which, upon the insolvency or bankruptcy of such Person, would be characterized as the indebtedness of such Person (without regard to accounting treatment).

**“Taxes”** means all present or future taxes, levies, imposts, duties, deductions, withholdings (including backup withholding), assessments, fees or other charges imposed by any Governmental Authority, including any interest, additions to tax or penalties applicable thereto.

**“Threshold Amount”** means \$2,500,000.

**“Total Outstandings”** means the aggregate Outstanding Amount of all Loans and all L/C Obligations.

**“Trademark License”** means any written agreement, providing for the grant by or to a Loan Party or any Subsidiary of any right to use a Trademark.

**“Trademarks”** means all statutory and common law trademarks, trade names, corporate names, company names, business names, fictitious business names, trade styles, service marks, logos and other source or business identifiers, and the goodwill associated therewith, now existing or hereafter adopted or acquired, all registrations and recordings thereof, and all applications to register in connection therewith, under the laws of the United States, any state

thereof or any other country or any political subdivision thereof, or otherwise, for the full term and all renewals thereof.

“**Trade Secrets**” means any data or information of any Loan Party or any Subsidiary that is not commonly known by or available to the public and which (a) derives economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

“**Type**” means, with respect to a Loan, its character as a Base Rate Loan or a Eurodollar Rate Loan.

“**UCC**” means the Uniform Commercial Code as the same may, from time to time, be enacted and in effect in the State of California; provided, that in the event by reason of mandatory provisions of law, any or all of the attachment, perfection or priority of or remedies with respect to, Administrative Agent’s Lien, for the benefit of Administrative Agent and Lenders, on any Collateral is governed by the Uniform Commercial Code as enacted and in effect in a jurisdiction other than the State of California, the term “UCC” shall mean the Uniform Commercial Code as enacted and in effect in such other jurisdiction solely for purposes of the provisions hereof relating to such attachment, perfection, priority or remedies and for purposes of definitions related to such provisions; provided, further, that to the extent that the UCC is used to define any term herein or in any of the Loan Documents and such term is defined differently in different Articles or Divisions of the UCC, the definition of such term contained in Article or Division 9 shall govern.

“**Unfunded Pension Liability**” means the excess of a Pension Plan’s benefit liabilities under Section 4001(a)(16) of ERISA, over the current value of that Pension Plan’s assets, determined as of the date of the most recent actuarial valuation of such Pension Plan in accordance with the assumptions used for funding the Pension Plan pursuant to Section 412 of the Code for the applicable plan year.

“**Union Bank**” means MUFG Union Bank, N.A., and its successors.

“**United States**” and “**U.S.**” mean the United States of America.

“**Unreimbursed Amount**” has the meaning specified in Section 2.03(c)(i).

“**Unrelated Person**” means any Person other than (a) Borrower or any Wholly Owned Subsidiary, or (b) an employee stock ownership plan or other employee benefit plan covering the employees of any of the Loan Parties and their Subsidiaries.

“**U.S. Borrower**” means any Borrower that is a U.S. Person.

“**U.S. Person**” means any Person that is a “United States Person” as defined in Section 7701(a)(30) of the Code.

“**U.S. Tax Compliance Certificate**” has the meaning assigned to such term in Section 3.01(e).

“**Voting Equity Interests**” means, with respect to any Person, the Equity Interests entitled to vote for members of the board of directors or equivalent governing body of such Person.

“**Wholly Owned Subsidiary**” means any Person 100% of whose Equity Interests are at the time owned by Borrower directly or indirectly through other Persons 100% of whose Equity Interests are at the time owned, directly or indirectly, by Borrower (provided, however, that in determining the percentage ownership of any such Person, no ownership interest in the nature of “qualifying shares” or “directors shares” or other similar ownership requirements under applicable law shall be deemed to be outstanding).

“**Withholding Agent**” means Borrower and Administrative Agent.

“**Work**” means any work or subject matter that is subject to protection pursuant to Title 17 of the United States Code.

1.02 **Interpretive Provisions.** With reference to this Agreement and each other Loan Document, unless otherwise specified herein or in such other Loan Document:

(a) The definitions of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation.” The word “will” shall be construed to have the same meaning and effect as the word “shall.” Unless the context requires otherwise, (i) any definition of or reference to any agreement, instrument or other document (including the Loan Documents and any Organization Document) shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein or in any other Loan Document), (ii) any reference herein to any Person shall be construed to include such Person’s successors and assigns, (iii) the words “hereto,” “herein,” “hereof and “hereunder,” and words of similar import when used in any Loan Document, shall be construed to refer to such Loan Document in its entirety and not to any particular provision thereof, (iv) all references in a Loan Document to Articles, Sections, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Exhibits and Schedules to, the Loan Document in which such references appear, (v) any reference to any law shall include all statutory and regulatory provisions consolidating, amending, replacing or interpreting such law and any reference to any law or regulation shall, unless otherwise specified, refer to such law or regulation as amended, modified, extended, restated, replaced or supplemented from time to time, and (vi) the words “asset” and “property” shall be construed to have the same meaning and effect and to refer to any and all real and personal property and tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

(b) In the computation of periods of time from a specified date to a later specified date, the word “from” means “from and including;” the words “to” and “until” each mean “to but excluding;” and the word “through” means “to and including.”

(c) Section headings herein and in the other Loan Documents are included for convenience of reference only and shall not affect the interpretation of this Agreement or any other Loan Document.

(d) For purposes of Section 3.01, the term “Lender” includes the L/C Issuer and the term “applicable Law” includes FATCA.

1.03 **Accounting Terms.**

(a) **Generally.** Except as otherwise specifically prescribed herein, all accounting terms not specifically or completely defined herein shall be construed in conformity with, and all financial data (including financial ratios and other financial calculations) required to be submitted pursuant to this Agreement shall be prepared in conformity with, GAAP applied on a consistent basis, as in effect from time to time, applied in a manner consistent with that used in preparing the Audited Financial Statements, except as otherwise specifically prescribed herein; provided, however, that calculations of Attributable Indebtedness under any Synthetic Lease or the implied interest component of any Synthetic Lease shall be made by Borrower in accordance with accepted financial practice and consistent with the terms of such Synthetic Lease. Notwithstanding the foregoing, for purposes of determining compliance with any covenant (including the computation of any financial covenant) contained herein, Indebtedness of Borrower and its Subsidiaries shall be deemed to be carried at 100% of the outstanding principal amount thereof, and the effects of FASB ASC 825 and FASB ASC 470-20 on financial liabilities shall be disregarded.

(b) **Changes in GAAP.** If at any time any change in GAAP would affect the computation of any financial ratio or requirement set forth in any Loan Document, and either Borrower or the Required Lenders shall so request, Administrative Agent, Lenders and Borrower shall negotiate in good faith to amend such ratio or requirement to preserve the original intent thereof in light of such change in GAAP (subject to the approval of the Required Lenders); provided that, until so amended, (i) such ratio or requirement shall continue to be computed in accordance with GAAP in effect prior to such change therein and (ii) Borrower shall provide to Administrative Agent and Lenders financial statements and other documents required under this Agreement or as reasonably requested hereunder setting forth a reconciliation between calculations of such ratio or requirement made before and after giving effect to such change in GAAP. Without limiting the foregoing, leases shall continue to be classified and accounted for on a basis consistent with that reflected in the Audited Financial Statements for all purposes of this Agreement, notwithstanding any change in GAAP relating thereto, unless the parties hereto shall enter into a mutually acceptable amendment addressing such changes, as provided for above.

(c) **Consolidation of Variable Interest Entities.** All references herein to consolidated financial statements of Borrower and its Subsidiaries or to the determination of any amount for Borrower and its Subsidiaries on a consolidated basis or any similar reference shall, in each case, be deemed to include each variable interest entity that Borrower is required to consolidate pursuant to FASB ASC 810 as if such variable interest entity were a Subsidiary as defined herein..



1.04 **Rounding.** Any financial ratios required to be maintained by Borrower pursuant to this Agreement shall be calculated by dividing the appropriate component by the other component, carrying the result to one place more than the number of places by which such ratio is expressed herein and rounding the result up or down to the nearest number (with a rounding-up if there is no nearest number).

1.05 **Times of Day; Rates.** Unless otherwise specified, all references herein to times of day shall be references to Pacific time (daylight or standard, as applicable). Administrative Agent does not warrant, nor accept responsibility, nor shall Administrative Agent have any liability with respect to the administration, submission or any other matter related to the rates in the definition of "Eurodollar Rate" or with respect to any comparable or successor rate thereto.

1.06 **Letter of Credit Amounts.** Unless otherwise specified herein the amount of a Letter of Credit at any time shall be deemed to be the stated amount of such Letter of Credit in effect at such time; provided, however, that with respect to any Letter of Credit that, by its terms or the terms of any Issuer Document related thereto, provides for one or more automatic increases in the stated amount thereof, the amount of such Letter of Credit shall be deemed to be the maximum stated amount of such Letter of Credit after giving effect to all such increases, whether or not such maximum stated amount is in effect at such time.

## **ARTICLE II**

### **THE COMMITMENTS AND CREDIT EXTENSIONS**

2.01 **Loans.** Subject to the terms and conditions set forth herein, each Lender severally agrees to make loans (each such loan, a "**Loan**") to Borrower from time to time, on any Business Day during the Availability Period, in an aggregate amount not to exceed at any time outstanding the amount of such Lender's Commitment; provided, however, that after giving effect to any Borrowing, (i) the Total Outstandings shall not exceed the Aggregate Commitments, and (ii) the Credit Exposure of any Lender shall not exceed such Lender's Commitment. Within the limits of each Lender's Commitment, and subject to the other terms and conditions hereof, Borrower may borrow under this Section 2.01, prepay under Section 2.05, and reborrow under this Section 2.01. Loans may be Base Rate Loans or Eurodollar Rate Loans.

#### **2.02 Borrowings, Conversions and Continuations of Loans.**

(a) Each Borrowing, each conversion of Loans from one Type to the other, and each continuation of Eurodollar Rate Loans shall be made upon Borrower's irrevocable notice to Administrative Agent, which may be given by telephone. Each such notice must be received by Administrative Agent not later than 10:00 a.m. (i) three (3) Business Days prior to the requested date of any Borrowing of, conversion to or continuation of Eurodollar Rate Loans or of any conversion of Eurodollar Rate Loans to Base Rate Loans, and (ii) on the requested date of any Borrowing of Base Rate Loans. Each telephonic notice by Borrower pursuant to this Section 2.02(a) must be confirmed promptly by delivery to Administrative Agent of a written Loan Notice, appropriately completed and signed by a Responsible Officer of Borrower. Each Borrowing of, conversion to or continuation of Eurodollar Rate Loans shall be in a principal amount of Two Million Dollars (\$2,000,000) or a whole multiple of One Million

Dollars (\$1,000,000) in excess thereof. Except as provided in Section 2.03(c), each Borrowing of or conversion to Base Rate Loans shall be in a principal amount of One Million Dollars (\$1,000,000) or a whole multiple of Five Hundred Thousand Dollars (\$500,000) in excess thereof. Each Loan Notice (whether telephonic or written) shall specify (i) whether Borrower is requesting a Borrowing, a conversion of Loans from one Type to the other, or a continuation of Eurodollar Rate Loans, (ii) the requested date of the Borrowing, conversion or continuation, as the case may be (which shall be a Business Day), (iii) the principal amount of Loans to be borrowed, converted or continued, (iv) the Type of Loans to be borrowed or to which existing Loans are to be converted, and (v) if applicable, the duration of the Interest Period with respect thereto. If Borrower fails to specify a Type of Loan in a Loan Notice or if Borrower fails to give a timely notice requesting a conversion or continuation, then the applicable Loans shall be made as, or converted to, Base Rate Loans. Any such automatic conversion to Base Rate Loans shall be effective as of the last day of the Interest Period then in effect with respect to the applicable Eurodollar Rate Loans. If Borrower requests a Borrowing of, conversion to, or continuation of Eurodollar Rate Loans in any such Loan Notice, but fails to specify an Interest Period, it will be deemed to have specified an Interest Period of one month.

(b) Following receipt of a Loan Notice, Administrative Agent shall promptly notify each Lender of the amount of its Applicable Percentage of the applicable Loans, and if no timely notice of a conversion or continuation is provided by Borrower, Administrative Agent shall notify each Lender of the details of any automatic conversion to Base Rate Loans described in the preceding subsection. In the case of a Borrowing, each Lender shall make the amount of its Loan available to Administrative Agent in immediately available funds at Administrative Agent's Office not later than 1:00 p.m. on the Business Day specified in the applicable Loan Notice. Upon satisfaction of the applicable conditions set forth in Section 5.02 (and, if such Borrowing is the initial Credit Extension, Section 5.01), Administrative Agent shall make all funds so received available to Borrower in like funds as received by Administrative Agent either by (i) crediting the account of Borrower on the books of MUFG Union Bank, N.A. with the amount of such funds or (ii) wire transfer of such funds, in each case in accordance with instructions provided to (and reasonably acceptable to) Administrative Agent by Borrower; provided, however, that if, on the date the Loan Notice with respect to such Borrowing is given by Borrower, there are L/C Borrowings outstanding, then the proceeds of such Borrowing first, shall be applied, to the payment in full of any such L/C Borrowings, and second, shall be made available to Borrower as provided above.

(c) Except as otherwise provided herein, a Eurodollar Rate Loan may be continued or converted only on the last day of an Interest Period for such Eurodollar Rate Loan. During the existence of a Default, no Loans may be requested as, converted to or continued as Eurodollar Rate Loans without the consent of the Required Lenders, and the Required Lenders may demand that any or all of the then outstanding Eurodollar Rate Loans be converted immediately to Base Rate Loans and Borrower agrees to pay all amounts due under Section 3.05 in accordance with the terms thereof due to any such conversion.

(d) Administrative Agent shall promptly notify Borrower and Lenders of the interest rate applicable to any Interest Period for Eurodollar Rate Loans upon determination of such interest rate.

(e) After giving effect to all Borrowings, all conversions of Loans from one Type to the other, and all continuations of Loans as the same Type, there shall not be more than six (6) Interest Periods in effect with respect to Loans at any one time.

2.03 **Letters of Credit.**

(a) **The Letter of Credit Commitment.**

(i) Subject to the terms and conditions set forth herein, (A) the L/C Issuer agrees, in reliance upon the agreements of the other Lenders set forth in this Section 2.03, (1) from time to time on any Business Day during the period from the Closing Date until the L/C Expiration Date, to issue Letters of Credit for the account of Borrower, and to amend or extend Letters of Credit previously issued by it, in accordance with subsection (b) below, and (2) to honor drawings under the Letters of Credit; and (B) the Lenders severally agree to participate in Letters of Credit issued for the account of Borrower and any drawings thereunder; provided that after giving effect to any L/C Credit Extension with respect to any Letter of Credit, (x) the Total Outstandings shall not exceed the Aggregate Commitments, (y) the Credit Exposure of any Lender shall not exceed such Lender's Commitment, and (z) the Outstanding Amount of the L/C Obligations shall not exceed the L/C Sublimit. Each request by Borrower for the issuance or amendment of a Letter of Credit shall be deemed to be a representation by Borrower that the L/C Credit Extension so requested complies with the conditions set forth in the proviso to the preceding sentence. Within the foregoing limits, and subject to the terms and conditions hereof, Borrower's ability to obtain Letters of Credit shall be fully revolving, and accordingly Borrower may, during the foregoing period, obtain Letters of Credit to replace Letters of Credit that have expired or that have been drawn upon and reimbursed. All Existing Letters of Credit shall be deemed to have been issued pursuant hereto, and from and after the Closing Date shall be subject to and governed by the terms and conditions hereof.

(ii) The L/C Issuer shall not issue any Letter of Credit, if:

(A) subject to Section 2.03(b)(iii), the expiry date of such requested Letter of Credit would occur more than twelve (12) months after the date of issuance or last extension, unless the Required Lenders have approved such expiry date; or

(B) the expiry date of such requested Letter of Credit would occur after the L/C Expiration Date, unless all the Lenders have approved such expiry date.

(iii) The L/C Issuer shall be under no obligation to issue any Letter of Credit if:

(A) any order, judgment or decree of any Governmental Authority or arbitrator shall by its terms purport to enjoin or restrain the

L/C Issuer from issuing such Letter of Credit, or any Law applicable to the L/C Issuer or any request or directive (whether or not having the force of law) from any Governmental Authority with jurisdiction over the L/C Issuer shall prohibit, or request that the L/C Issuer refrain from, the issuance of letters of credit generally or such Letter of Credit in particular or shall impose upon the L/C Issuer with respect to such Letter of Credit any restriction, reserve or capital requirement (for which the L/C Issuer is not otherwise compensated hereunder) not in effect on the Closing Date, or shall impose upon the L/C Issuer any unreimbursed loss, cost or expense which was not applicable on the Closing Date and which the L/C Issuer in good faith deems material to it;

(B) the issuance of such Letter of Credit would violate one or more policies of the L/C Issuer applicable to letters of credit generally;

(C) except as otherwise agreed by Administrative Agent and the L/C Issuer, such Letter of Credit is in an initial stated amount less than Five Hundred Thousand Dollars (\$500,000);

(D) such Letter of Credit is to be denominated in a currency other than Dollars;

(E) a default of any Lender's obligations to fund under Section 2.03(c) exists or any Lender is at such time a Defaulting Lender hereunder, unless the L/C Issuer has entered into arrangements, including the delivery of Cash Collateral, satisfactory to the L/C Issuer (in its sole discretion) with Borrower or such Defaulting Lender to eliminate the L/C Issuer's risk with respect to such Lender; or

(F) such Letter of Credit contains any provisions for automatic reinstatement of the stated amount after any drawing thereunder.

(iv) The L/C Issuer shall not amend any Letter of Credit if the L/C Issuer would not be permitted at such time to issue such Letter of Credit in its amended form under the terms hereof.

(v) The L/C Issuer shall be under no obligation to amend any Letter of Credit if (A) the L/C Issuer would have no obligation at such time to issue such Letter of Credit in its amended form under the terms hereof, or (B) the beneficiary of such Letter of Credit does not accept the proposed amendment to such Letter of Credit.

(vi) The L/C Issuer shall act on behalf of the Lenders with respect to any Letters of Credit issued by it and the documents associated therewith, and the L/C Issuer shall have all of the benefits and immunities (A) provided to Administrative Agent in Article X with respect to any acts taken or omissions suffered by the L/C Issuer in connection with Letters of Credit issued by it or proposed to be issued by it and Issuer Documents pertaining to such Letters of

Credit as fully as if the term “Administrative Agent” or “Administrative Agent” as used in Article X included the L/C Issuer with respect to such acts or omissions, and (B) as additionally provided herein with respect to the L/C Issuer.

(b) **Procedures for Issuance and Amendment of Letters of Credit; Auto-Extension Letters of Credit.**

(i) Each Letter of Credit shall be issued or amended, as the case may be, upon the request of Borrower delivered to the L/C Issuer (with a copy to Administrative Agent) in the form of an L/C Application, appropriately completed and signed by a Responsible Officer of Borrower. Such L/C Application must be received by the L/C Issuer and Administrative Agent not later than 11:00 a.m. at least two (2) Business Days (or such later date and time as Administrative Agent and the L/C Issuer may agree in a particular instance in their sole discretion) prior to the proposed issuance date or date of amendment, as the case may be. In the case of a request for an initial issuance of a Letter of Credit, such L/C Application shall specify in form and detail satisfactory to the L/C Issuer: (A) the proposed issuance date of the requested Letter of Credit (which shall be a Business Day); (B) the amount thereof; (C) the expiry date thereof; (D) the name and address of the beneficiary thereof; (E) the documents to be presented by such beneficiary in case of any drawing thereunder; (F) the full text of any certificate to be presented by such beneficiary in case of any drawing thereunder; (G) the purpose and nature of the requested Letter of Credit; and (H) such other matters as the L/C Issuer may require. In the case of a request for an amendment of any outstanding Letter of Credit, such L/C Application shall specify in form and detail satisfactory to the L/C Issuer (1) the Letter of Credit to be amended; (2) the proposed date of amendment thereof (which shall be a Business Day); (3) the nature of the proposed amendment; and (4) such other matters as the L/C Issuer may require. Additionally, Borrower shall furnish to the L/C Issuer and Administrative Agent such other documents and information pertaining to such requested Letter of Credit issuance or amendment, including any Issuer Documents, as the L/C Issuer or Administrative Agent may require.

(ii) Promptly after receipt of any L/C Application at the address set forth in Section 11.02 for receiving L/C Applications and related correspondence, the L/C Issuer will confirm with Administrative Agent (by telephone or in writing) that Administrative Agent has received a copy of such L/C Application from Borrower and, if not, the L/C Issuer will provide Administrative Agent with a copy thereof. Unless the L/C Issuer has received written notice from any Lender, Administrative Agent or any Loan Party, at least one (1) Business Day prior to the requested date of issuance or amendment of the applicable Letter of Credit, that one or more applicable conditions in Article V shall not then be satisfied, then, subject to the terms and conditions hereof, the L/C Issuer shall, on the requested date, issue a Letter of Credit for the account of Borrower or enter into the applicable amendment, as the case may be, in each case in accordance with the L/C Issuer's usual and customary business practices. Immediately upon the issuance of each Letter of Credit, each Lender shall be deemed to, and hereby

irrevocably and unconditionally agrees to, purchase from the L/C Issuer a risk participation in such Letter of Credit in an amount equal to the product of such Lender's Applicable Percentage times the amount of such Letter of Credit.

(iii) If Borrower so requests in any applicable Letter of Credit Application, the L/C Issuer may, in its sole and absolute discretion, agree (subject to the consent of Administrative Agent and the Required Lenders) to issue a Letter of Credit that has automatic extension provisions (each, an "**Auto-Extension Letter of Credit**"); provided that any such Auto-Extension Letter of Credit must permit the L/C Issuer to prevent any such extension at least once in each twelve-month period (commencing with the date of issuance of such Letter of Credit) by giving prior notice to the beneficiary thereof not later than a day (the "**Non-Extension Notice Date**") in each such twelve-month period to be agreed upon at the time such Letter of Credit is issued. Unless otherwise directed by the L/C Issuer, Borrower shall not be required to make a specific request to the L/C Issuer for any such extension. Once an Auto-Extension Letter of Credit has been issued, the Lenders shall be deemed to have authorized (but may not require) the L/C Issuer to permit the extension of such Letter of Credit at any time to an expiry date not later than the Letter of Credit Expiration Date; provided, however, that the L/C Issuer shall not permit any such extension if (A) the L/C Issuer has determined that it would not be permitted, or would have no obligation, at such time to issue such Letter of Credit in its revised form (as extended) under the terms hereof (by reason of the provisions of clause (ii) or (iii) of Section 2.03(a) or otherwise), or (B) it has received notice (which may be by telephone or in writing) on or before the day that is seven Business Days before the Non-Extension Notice Date (1) from Administrative Agent that the Required Lenders have elected not to permit such extension or (2) from Administrative Agent, any Lender or Borrower that one or more of the applicable conditions specified in Section 5.02 is not then satisfied, and in each such case directing the L/C Issuer not to permit such extension.

(iv) Promptly after its delivery of any Letter of Credit or any amendment to a Letter of Credit to an advising bank with respect thereto or to the beneficiary thereof, the L/C Issuer will also deliver to Borrower and Administrative Agent a true and complete copy of such Letter of Credit or amendment.

(c) **Drawings and Reimbursements; Funding of Participations.**

(i) Upon receipt from the beneficiary of any Letter of Credit of any notice of a drawing under such Letter of Credit, the L/C Issuer shall notify Borrower and Administrative Agent thereof. Not later than 11:00 a.m. on the date of any payment by the L/C Issuer under a Letter of Credit (each such date, an "**Honor Date**"), Borrower shall reimburse the L/C Issuer through Administrative Agent in an amount equal to the amount of such drawing. If Borrower fails to so reimburse the L/C Issuer by such time, Administrative Agent shall promptly notify each Lender of the Honor Date, the amount of the unreimbursed drawing

(the “**Unreimbursed Amount**”), and the amount of such Lender’s Applicable Percentage thereof. In such event, Borrower shall be deemed to have requested a Borrowing of Base Rate Loans to be disbursed on the Honor Date in an amount equal to the Unreimbursed Amount, without regard to the minimum and multiples specified in Section 2.02 for the principal amount of Base Rate Loans, but subject to the amount of the unutilized portion of the Aggregate Commitments and the conditions set forth in Section 5.02 (other than the delivery of a Loan Notice). Any notice given by the L/C Issuer or Administrative Agent pursuant to this Section 2.03(c)(i) may be given by telephone if immediately confirmed in writing; provided that the lack of such an immediate confirmation shall not affect the conclusiveness or binding effect of such notice.

(ii) Each Lender shall upon receipt of any notice pursuant to Section 2.03(c)(i) make funds available (and Administrative Agent may apply Cash Collateral provided for this purpose) to Administrative Agent for the account of the L/C Issuer at Administrative Agent’s Office in an amount equal to its Applicable Percentage of the Unreimbursed Amount not later than 1:00 p.m. on the Business Day specified in such notice by Administrative Agent, whereupon, subject to the provisions of Section 2.03(c)(iii), each Lender that so makes funds available shall be deemed to have made a Base Rate Loan to Borrower in such amount. Administrative Agent shall remit the funds so received to the L/C Issuer.

(iii) With respect to any Unreimbursed Amount that is not fully refinanced by a Borrowing of Base Rate Loans because the conditions set forth in Section 5.02 cannot be satisfied or for any other reason, Borrower shall be deemed to have incurred from the L/C Issuer an L/C Borrowing in the amount of the Unreimbursed Amount that is not so refinanced, which L/C Borrowing shall be due and payable on demand (together with interest) and shall bear interest at the Default Rate. In such event, each Lender’s payment to Administrative Agent for the account of the L/C Issuer pursuant to Section 2.03(c)(ii) shall be deemed payment in respect of its participation in such L/C Borrowing and shall constitute an L/C Advance from such Lender in satisfaction of its participation obligation under this Section 2.03.

(iv) Until each Lender funds its Loan or L/C Advance pursuant to this Section 2.03(c) to reimburse the L/C Issuer for any amount drawn under any Letter of Credit, interest in respect of such Lender’s Applicable Percentage of such amount shall be solely for the account of the L/C Issuer.

(v) Each Lender’s obligation to make Loans or L/C Advances to reimburse the L/C Issuer for amounts drawn under Letters of Credit, as contemplated by this Section 2.03(c), shall be absolute and unconditional and shall not be affected by any circumstance, including (A) any setoff, counterclaim, recoupment, defense or other right which such Lender may have against the L/C Issuer, Borrower or any other Person for any reason whatsoever; (B) the occurrence or continuance of a Default, or (C) any other occurrence, event or

condition, whether or not similar to any of the foregoing; provided, however, that each Lender's obligation to make Loans pursuant to this Section 2.03(c) is subject to the conditions set forth in Section 5.02 (other than delivery by Borrower of a Loan Notice). No such making of an L/C Advance shall relieve or otherwise impair the obligation of Borrower to reimburse the L/C Issuer for the amount of any payment made by the L/C Issuer under any Letter of Credit, together with interest as provided herein.

(vi) If any Lender fails to make available to Administrative Agent for the account of the L/C Issuer any amount required to be paid by such Lender pursuant to the foregoing provisions of this Section 2.03(c) by the time specified in Section 2.03(c)(ii), then, without limiting any other provision of this Agreement, the L/C Issuer shall be entitled to recover from such Lender (acting through Administrative Agent), on demand, such amount with interest thereon for the period from the date such payment is required to the date on which such payment is immediately available to the L/C Issuer at a rate per annum equal to the greater of the Federal Funds Rate and a rate determined by the L/C Issuer in accordance with banking industry rules on interbank compensation, plus any administrative, processing or similar fees customarily charged by the L/C Issuer in connection with the foregoing. If such Lender pays such amount (with interest and fees as aforesaid), the amount so paid shall constitute such Lender's Loan included in the relevant Borrowing or L/C Advance in respect of the relevant L/C Borrowing, as the case may be. A certificate of the L/C Issuer submitted to any Lender (through Administrative Agent) with respect to any amounts owing under this clause (vi) shall be conclusive absent manifest error.

(d) **Repayment of Participations.**

(i) At any time after the L/C Issuer has made a payment under any Letter of Credit and has received from any Lender such Lender's L/C Advance in respect of such payment in accordance with Section 2.03(c), if Administrative Agent receives for the account of the L/C Issuer any payment in respect of the related Unreimbursed Amount or interest thereon (whether directly from Borrower or otherwise, including proceeds of Cash Collateral applied thereto by Administrative Agent), Administrative Agent will distribute to such Lender its Applicable Percentage thereof (appropriately adjusted, in the case of interest payments, to reflect the period of time during which such Lender's L/C Advance was outstanding) in the same funds as those received by Administrative Agent.

(ii) If any payment received by Administrative Agent for the account of the L/C Issuer pursuant to Section 2.03(c)(i) is required to be returned under any of the circumstances described in Section 11.05 (including pursuant to any settlement entered into by the L/C Issuer in its discretion), each Lender shall pay to Administrative Agent for the account of the L/C Issuer its Applicable Percentage thereof on demand of Administrative Agent, plus interest thereon from the date of such demand to the date such amount is returned by such Lender, at a rate per annum equal to the Federal Funds Rate from time to time in effect. The



obligations of Lenders under this clause shall survive the payment in full of the Obligations and the termination of this Agreement.

(e) **Obligations Absolute.** The obligation of Borrower to reimburse the L/C Issuer for each drawing under each Letter of Credit and to repay each L/C Borrowing shall be absolute, unconditional and irrevocable, and shall be paid strictly in accordance with the terms of this Agreement under all circumstances, including the following:

(i) any lack of validity or enforceability of such Letter of Credit, this Agreement, or any other Loan Document;

(ii) the existence of any claim, counterclaim, setoff, defense or other right that Borrower or any Subsidiary may have at any time against any beneficiary or any transferee of such Letter of Credit (or any Person for whom any such beneficiary or any such transferee may be acting), the L/C Issuer or any other Person, whether in connection with this Agreement, the transactions contemplated hereby or by such Letter of Credit or any agreement or instrument relating thereto, or any unrelated transaction;

(iii) any draft, demand, certificate or other document presented under such Letter of Credit proving to be forged, fraudulent, invalid or insufficient in any respect or any statement therein being untrue or inaccurate in any respect; or any loss or delay in the transmission or otherwise of any document required in order to make a drawing under such Letter of Credit;

(iv) waiver by the L/C Issuer of any requirement that exists for the L/C Issuer's protection and not the protection of Borrower or any waiver by the L/C Issuer which does not in fact materially prejudice Borrower;

(v) honor of a demand for payment presented electronically even if such Letter of Credit requires that demand be in the form of a draft;

(vi) any payment made by the L/C Issuer in respect of an otherwise complying item presented after the date specified as the expiration date of, or the date by which documents must be received under such Letter of Credit if presentation after such date is authorized by the UCC or the ISP, as applicable;

(vii) any payment by the L/C Issuer under such Letter of Credit against presentation of a draft or certificate that does not strictly comply with the terms of such Letter of Credit; or any payment made by the L/C Issuer under such Letter of Credit to any Person purporting to be a trustee in bankruptcy, debtor-in-possession, assignee for the benefit of creditors, liquidator, receiver or other representative of or successor to any beneficiary or any transferee of such Letter of Credit, including any arising in connection with any proceeding under any Debtor Relief Law; or

(viii) any other circumstance or happening whatsoever, whether or not similar to any of the foregoing, including any other circumstance that might

otherwise constitute a defense available to, or a discharge of, Borrower or any Subsidiary.

Borrower shall promptly examine a copy of each Letter of Credit and each amendment thereto that is delivered to it and, in the event of any claim of noncompliance with Borrower's instructions or other irregularity, Borrower will immediately notify the L/C Issuer. Borrower shall be conclusively deemed to have waived any such claim against the L/C Issuer and its correspondents unless such notice is given as aforesaid.

(f) **Role of L/C Issuer.** Each Lender and Borrower agree that, in paying any drawing under a Letter of Credit, the L/C Issuer shall not have any responsibility to obtain any document (other than any sight draft, certificates and documents expressly required by the Letter of Credit) or to ascertain or inquire as to the validity or accuracy of any such document or the authority of the Person executing or delivering any such document. None of the L/C Issuer, Administrative Agent, any of their respective Related Parties nor any correspondent, participant or assignee of the L/C Issuer shall be liable to any Lender for (i) any action taken or omitted in connection herewith at the request or with the approval of Lenders or the Required Lenders, as applicable; (ii) any action taken or omitted in the absence of gross negligence or willful misconduct; or (iii) the due execution, effectiveness, validity or enforceability of any document or instrument related to any Letter of Credit or Issuer Document. Borrower hereby assumes all risks of the acts or omissions of any beneficiary or transferee with respect to its use of any Letter of Credit; provided, however, that this assumption is not intended to, and shall not, preclude Borrower's pursuing such rights and remedies as it may have against the beneficiary or transferee at law or under any other agreement. None of the L/C Issuer, Administrative Agent, any of their respective Related Parties nor any correspondent, participant or assignee of the L/C Issuer, shall be liable or responsible for any of the matters described in clauses (i) through (v) of Section 2.03(e); provided, however, that anything in such clauses to the contrary notwithstanding, Borrower may have a claim against the L/C Issuer, and the L/C Issuer may be liable to Borrower, to the extent, but only to the extent, of any direct, as opposed to consequential or exemplary, damages suffered by Borrower which Borrower proves were caused by the L/C Issuer's willful misconduct or gross negligence or the L/C Issuer's willful failure to pay under any Letter of Credit after the presentation to it by the beneficiary of a sight draft and certificate(s) strictly complying with the terms and conditions of a Letter of Credit unless the L/C Issuer is prevented or prohibited from so paying as a result of any order or directive of any court or other Governmental Authority. In furtherance and not in limitation of the foregoing, the L/C Issuer may accept documents that appear on their face to be in order, without responsibility for further investigation, regardless of any notice or information to the contrary, and the L/C Issuer shall not be responsible for the validity or sufficiency of any instrument transferring or assigning or purporting to transfer or assign a Letter of Credit or the rights or benefits thereunder or proceeds thereof, in whole or in part, which may prove to be invalid or ineffective for any reason. The L/C Issuer may send a Letter of Credit or conduct any communication to or from the beneficiary via the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") message or overnight courier, or any other commercially reasonable means of communicating with a beneficiary.

(g) **Cash Collateral.** Borrower shall provide Cash Collateral as and when required pursuant to Sections 2.05, 2.15, 2.16 and 9.02(c).

(h) **Applicability of ISP; Limitation of Liability.** Unless otherwise expressly agreed by the L/C Issuer and Borrower when a Letter of Credit is issued (including any such agreement applicable to an Existing Letter of Credit), the rules of the ISP shall apply to each standby Letter of Credit. Notwithstanding the foregoing, the L/C Issuer shall not be responsible to Borrower for, and the L/C Issuer's rights and remedies against Borrower shall not be impaired by, any action or inaction of the L/C Issuer required or permitted under any law, order, or practice that is required or permitted to be applied to any Letter of Credit or this Agreement, including the Law or any order of a jurisdiction where the L/C Issuer or the beneficiary is located, the practice stated in the ISP, as applicable, or in the decisions, opinions, practice statements, or official commentary of the ICC Banking Commission, the Bankers Association for Finance and Trade - International Financial Services Association (BAFT-IFSA), or the Institute of International Banking Law & Practice, whether or not any Letter of Credit chooses such law or practice.

(i) **L/C Fees.** Borrower shall pay to Administrative Agent for the account of each Lender in accordance, subject to Section 2.16, with its Applicable Percentage an L/C fee (the "**L/C Fee**") for each Letter of Credit equal to the Applicable Rate times the daily amount available to be drawn under such Letter of Credit. For purposes of computing the daily amount available to be drawn under any Letter of Credit, the amount of such Letter of Credit shall be determined in accordance with Section 1.06. Letter of Credit Fees shall be (A) non-refundable, (B) due and payable on the first Business Day after the end of each March, June, September and December, commencing with the first such date to occur after the issuance of such Letter of Credit, on the L/C Expiration Date and thereafter on demand and (C) computed on a quarterly basis in arrears. If there is any change in the Applicable Rate during any quarter, the daily amount available to be drawn under each standby Letter of Credit shall be computed and multiplied by the Applicable Rate separately for each period during such quarter that such Applicable Rate was in effect. Notwithstanding anything to the contrary contained herein, upon the request of the Required Lenders, while any Event of Default exists, all L/C Fees shall accrue at the Default Rate.

(j) **Fronting Fee and Documentary and Processing Charges Payable to L/C Issuer.** Borrower shall pay directly to the L/C Issuer for its own account a fronting fee with respect to each Letter of Credit, at a rate per annum agreed to by Borrower and the L/C Issuer, computed on the daily maximum amount available to be drawn under such Letter of Credit (whether or not such maximum amount is then in effect under such Letter of Credit) and on a quarterly basis in arrears. Such fronting fee shall be due and payable on the first Business Day after the end of each of March, June, September and December, in respect of the most recently-ended quarterly period (or portion thereof, in the case of the first payment), commencing with the first such date to occur after the issuance of such Letter of Credit, on the L/C Expiration Date, and thereafter, on demand. For purposes of computing the daily amount available to be drawn under any Letter of Credit, the amount of such Letter of Credit shall be determined in accordance with Section 1.06. In addition, Borrower shall pay directly to the L/C Issuer for its own account the customary issuance, presentation, amendment and other processing fees, and other standard costs and charges, of the L/C Issuer relating to letters of credit as from time to time in effect. Such individual customary fees and standard costs and charges are due and payable on demand and are nonrefundable.

(k) **Conflict with Issuer Documents.** In the event of any conflict between the terms hereof and the terms of any Issuer Document, the terms hereof shall control.

2.04 **Reserved.**

2.05 **Prepayments.**

(a) Borrower may, upon notice to Administrative Agent, at any time or from time to time voluntarily prepay Loans in whole or in part without premium or penalty; provided that (i) such notice must be received by Administrative Agent not later than 8:00 a.m. (A) three (3) Business Days prior to any date of prepayment of Eurodollar Rate Loans and (B) on the date of prepayment of Base Rate Loans; (ii) any prepayment of Eurodollar Rate Loans shall be in a principal amount of Two Million Dollars (\$2,000,000) or a whole multiple of One Million Dollars (\$1,000,000) in excess thereof or, if less, the entire principal amount thereof then outstanding; (iii) any prepayment of Base Rate Loans shall be in a principal amount of One Million Dollars (\$1,000,000) or a whole multiple of Five Hundred Thousand Dollars (\$500,000) in excess thereof or, in each case, if less, the entire principal amount thereof then outstanding. Each such notice shall specify the date and amount of such prepayment and the Type(s) of Loans to be prepaid and, if Eurodollar Rate Loans are to be prepaid, the Interest Period(s) of such Loans. Administrative Agent will promptly notify each Lender of its receipt of each such notice, and of the amount of such Lender's Applicable Percentage of such prepayment. If such notice is given by Borrower, Borrower shall make such prepayment and the payment amount specified in such notice shall be due and payable on the date specified therein. Any prepayment of a Eurodollar Rate Loan shall be accompanied by all accrued interest on the amount prepaid, together with any additional amounts required pursuant to Section 3.05. Subject to Section 2.16, each such prepayment shall be applied to the Loans of Lenders in accordance with their respective Applicable Percentages.

(b) **Reserved.**

(c) If for any reason the Total Outstandings at any time exceed the Aggregate Commitments then in effect, Borrower shall immediately prepay Loans and/or Cash Collateralize the L/C Obligations in an aggregate amount equal to such excess; provided, however, that Borrower shall not be required to Cash Collateralize the L/C Obligations pursuant to this Section 2.05(c) unless after the prepayment in full of the Loans, the Total Outstandings exceed the Aggregate Commitments then in effect. All amounts required to be paid pursuant to this Section 2.05(c) shall be applied to Loans and (after all Loans have been repaid) to Cash Collateralize L/C Obligations. Within the parameters of the applications set forth above, prepayments shall be applied first to Base Rate Loans and then to Eurodollar Rate Loans in direct order of Interest Period maturities. All prepayments under this Section 2.05(c) shall be subject to Section 3.05.

2.06 **Termination or Reduction of Commitments; Increase of Commitment.**

(a) **Termination or Reduction of Commitments.** Borrower may, upon notice to Administrative Agent, terminate the Aggregate Commitments, or from time to time permanently reduce the Aggregate Commitments; provided that (i) any such notice shall be

received by Administrative Agent not later than 10:00 a.m. five (5) Business Days prior to the date of termination or reduction, (ii) any such partial reduction shall be in an aggregate amount of Five Million Dollars (\$5,000,000) or any whole multiple of One Million Dollars (\$1,000,000) in excess thereof, (iii) Borrower shall not terminate or reduce the Aggregate Commitments if, after giving effect thereto and to any concurrent prepayments hereunder, the Total Outstandings would exceed the Aggregate Commitments, and (iv) if, after giving effect to any reduction of the Aggregate Commitments or the L/C Sublimit exceeds the amount of the Aggregate Commitments, such Sublimit shall be automatically reduced by the amount of such excess. Administrative Agent will promptly notify the Lenders of any such notice of termination or reduction of the Aggregate Commitments, *provided*, that any such notice (whether to terminate the Aggregate Commitments or to permanently reduce the Aggregate Commitments) may state that it is conditioned upon the effectiveness of other transactions, in which case such notice may be revoked or delayed by Borrower (by notice to Administrative Agent on or prior to the specified effective date) if such condition is not satisfied. Any reduction of the Aggregate Commitments shall be applied to the Commitment of each Lender according to its Applicable Percentage. All fees accrued until the effective date of any termination of the Aggregate Commitments shall be paid on the effective date of such termination.

(b) **Increase of Commitments.**

(i) If no Default or Event of Default shall have occurred and be continuing, upon written notice to Administrative Agent (each such notice, a “**Commitment Increase Notice**”), Borrower may from time to time prior to the Maturity Date, request an increase of the Aggregate Commitments (but not the L/C Sublimit) by an amount (for all such requests) not exceeding One Hundred Million Dollars (\$100,000,000); provided that, (i) any such request for an increase shall be in a minimum amount of Twenty Five Million Dollars (\$25,000,000); and (ii) Borrower may make a maximum of two (2) such requests. Any such Commitment Increase Notice delivered with respect to any proposed increase in the Commitment may offer one or more Lenders an opportunity to subscribe for its Applicable Percentage (with respect to the existing Commitment (prior to such increase)) of the increased Aggregate Commitments. Administrative Agent shall promptly, and in any event within five (5) Business Days after receipt of a Commitment Increase Notice, notify each Lender of such request. Each Lender desiring to increase its Commitment shall notify Administrative Agent in writing no later than ten (10) Business Days after receipt of notice from Administrative Agent. Any Lender that does not notify Administrative Agent within the time period specified above that it will, in its sole discretion, increase its Commitment will be deemed to have rejected such offer. Any agreement by a Lender to increase its Commitment shall be irrevocable.

(ii) If any proposed increase in the Commitment is not fully subscribed by the existing Lenders pursuant to the procedure outlined in Section 2.06(b)(i), Borrower may, in its sole discretion, offer to any existing Lender or to one or more additional banks or financial institutions which is an Eligible Assignee (each, a “**New Lender**”) the opportunity to participate in all or a portion of such unsubscribed portion of the increased Aggregate Commitments, by notifying

Administrative Agent in writing. Promptly and in any event within five (5) Business Days after receipt of notice from Borrower of its desire to offer such unsubscribed commitments to certain existing Lenders or to any New Lender identified therein, Administrative Agent shall notify such proposed lenders of the opportunity to participate in all or a portion of such unsubscribed portion of the increased Aggregate Commitments.

(iii) Any New Lender which accepts Borrower's offer to participate in the increased Commitment shall execute and deliver to Administrative Agent and Borrower a New Lender Addendum, an Administrative Questionnaire and such other documents, instruments and agreements as Administrative Agent may reasonably request, and upon the receipt thereof and the effectiveness of such New Lender Addendum such New Lender shall become a Lender for all purposes and to the same extent as if originally a party hereto and shall be bound by and entitled to the benefits of this Agreement, and the signature pages hereof shall be deemed to be amended to add the name of such New Lender.

(iv) If the Aggregate Commitments are increased in accordance with this Section, Administrative Agent and Borrower shall determine the effective date (the "**Increase Effective Date**") and the final allocation of such increase. Administrative Agent shall promptly notify Borrower and the Lenders of the final allocation of such increase and the Increase Effective Date.

(v) As a condition precedent to such increase, Borrower shall deliver to Administrative Agent a certificate of each Loan Party dated as of the Increase Effective Date (in sufficient copies for each Lender) signed by a Responsible Officer of such Loan Party (x) certifying and attaching the resolutions adopted by such Loan Party approving or consenting to such increase, and (y) in the case of Borrower, certifying that, before and after giving effect to such increase, (A) the representations and warranties contained in Article VI and the other Loan Documents are true and correct in all material respects on and as of the Increase Effective Date, except that (x) if a qualifier relating to materiality, Material Adverse Effect or a similar concept applies, such representation and warranty shall be required to be true and correct in all respects, (y) to the extent that such representations and warranties specifically refer to an earlier date, in which case they are true and correct as of such earlier date, and (z) for purposes of this Section 2.06, the representations and warranties contained in subsections (a) and (b) of Section 6.05 shall be deemed to refer to the most recent statements furnished pursuant to subsections (a) and (b), respectively, of Section 7.01, and (B) no Default exists. Borrower shall prepay any Loans outstanding on the Increase Effective Date (and pay any additional amounts required pursuant to Section 3.05) to the extent necessary to keep the outstanding Loans ratable with any revised Applicable Percentages arising from any nonratable increase in the Commitments under this Section.

(vi) On each Increase Effective Date, subject to the satisfaction of the terms and conditions set forth in this Section, (A) each of the existing Lenders

shall assign to each of the New Lenders, and each of the New Lenders shall purchase from each of the existing Lenders, as applicable, at the principal amount thereof (together with accrued interest), such interests in the Loans outstanding on such date as shall be necessary in order that, after giving effect to all such assignments and purchases, such Loans will be held by existing Lenders and New Lenders ratably in accordance with their Commitments after giving effect to the addition of such new Commitments to the total Aggregate Commitments hereunder, (B) each new Commitment shall be deemed for all purposes a “Commitment” and each Loan made thereunder shall be deemed, for all purposes, a “Loan”, (C) each New Lender shall become a “Lender” with respect to the new Commitment and all matters relating thereto and (D) and Borrower shall compensate each Lender who shall have assigned any portion of any Eurodollar Rate Loans previously held by such Lender compensation in the amount that would have been payable to such Lender under Section 3.05 hereof had Borrower made a prepayment of such Eurodollar Rate Loans by an amount equal to such assigned portion thereof. Upon any increase in the Commitment pursuant to this Section 2.06, Schedule 2.01 shall be deemed amended to reflect such new Commitment and the Applicable Percentage of each Lender (including any New Lender), as thereby increased or decreased, as appropriate.

(vii) This Section shall supersede any provisions in Section 2.13 or 11.01 to the contrary.

**2.07 Repayment of Loans.**

(a) Borrower shall repay to Lenders on the Maturity Date the aggregate principal amount of Loans outstanding on such date.

**2.08 Interest.**

(a) Subject to the provisions of subsection (b) below, (i) each Eurodollar Rate Loan shall bear interest on the outstanding principal amount thereof for each Interest Period at a rate per annum equal to the Eurodollar Rate for such Interest Period plus the Applicable Rate; and (ii) each Base Rate Loan shall bear interest on the outstanding principal amount thereof from the applicable borrowing date at a rate per annum equal to the Base Rate plus the Applicable Rate.

(b) (i) If any amount of principal of any Loan is not paid when due (without regard to any applicable grace periods), whether at stated maturity, by acceleration or otherwise, such amount shall thereafter bear interest at a fluctuating interest rate per annum at all times equal to the Default Rate to the fullest extent permitted by applicable Laws.

(i) If any amount (other than principal of any Loan) payable by Borrower under any Loan Document is not paid when due (without regard to any applicable grace periods), whether at stated maturity, by acceleration or otherwise, then upon the request of the Required Lenders, such amount shall

thereafter bear interest at a fluctuating interest rate per annum at all times equal to the Default Rate to the fullest extent permitted by applicable Laws.

(ii) Upon the request of the Required Lenders, while any Event of Default exists (other than as set forth in clauses (b)(i) and (b)(ii) above), Borrower shall pay interest on the principal amount of all outstanding Obligations hereunder at a fluctuating interest rate per annum at all times equal to the Default Rate to the fullest extent permitted by applicable Laws.

(iii) Accrued and unpaid interest on past due amounts (including interest on past due interest) shall be due and payable upon demand.

(c) Interest on each Loan shall be due and payable in arrears on each Interest Payment Date applicable thereto and at such other times as may be specified herein. Interest hereunder shall be due and payable in accordance with the terms hereof before and after judgment, and before and after the commencement of any proceeding under any Debtor Relief Law.

2.09 **Fees.** In addition to certain fees described in subsections (i) and (j) of Section 2.03:

(a) **Commitment Fee.** Borrower shall pay to Administrative Agent for the account of each Lender in accordance with its Applicable Percentage, a commitment fee (the “**Commitment Fee**”) equal to the two tenths of one percent (0.20%) times the actual daily amount by which the Aggregate Commitments exceed the sum of (i) the Outstanding Amount of Loans and (ii) the Outstanding Amount of L/C Obligations. The commitment fee shall accrue at all times during the Availability Period, including at any time during which one or more of the conditions in Article V is not met, and shall be due and payable quarterly in arrears on the first Business Day of each of March, June, September and December, commencing with the first such date to occur after the Closing Date, and on the last day of the Availability Period. The Commitment Fee shall be calculated quarterly in arrears.

(b) **Lenders’ Upfront Fee.** On the Closing Date, Borrower shall pay to Administrative Agent, for the account of each Lender in accordance with their respective Applicable Percentages, an upfront fee in an amount equal to One Hundred Fifty Thousand Dollars (\$150,000). Such upfront fees are for the credit facilities committed by Lenders under this Agreement and are fully earned on the date paid. The upfront fee paid to each Lender is solely for its own account, if fully-earned and is nonrefundable for any reason whatsoever.

(c) **Other Fees.**

(i) Borrower shall pay to Administrative Agent and the Arranger for their own respective accounts fees in the amounts and at the times specified in the Fee Letter. Such fees shall be fully-earned when paid and shall not be refundable for any reason whatsoever.

(ii) Borrower shall pay to Administrative Agent for the account of the Lenders such fees as shall have been separately agreed upon in writing by



Borrower and such Lenders in the amounts and at the times so specified. Such fees shall be fully-earned when paid and shall not be refundable for any reason whatsoever.

**2.10 Computation of Interest and Fees.**

(a) All computations of interest for Base Rate Loans when the Base Rate is determined by MUFG Union Bank, N.A.'s "reference rate" shall be made on the basis of a year of 365 or 366 days, as the case may be, and actual days elapsed. All other computations of fees and interest shall be made on the basis of a 360-day year and actual days elapsed (which results in more fees or interest, as applicable, being paid than if computed on the basis of a 365-day year). Interest shall accrue on each Loan for the day on which the Loan is made, and shall not accrue on a Loan, or any portion thereof, for the day on which the Loan or such portion is paid, provided that any Loan that is repaid on the same day on which it is made shall, subject to Section 2.12(a), bear interest for one (1) day. Each determination by Administrative Agent of an interest rate or fee hereunder shall be conclusive and binding for all purposes, absent manifest error.

(b) If, for any reason (including inaccurate reporting on financial statements or a Compliance Certificate or any restatement of or other adjustment to the financial statements of Borrower), it is determined that a higher Applicable Rate should have applied to a period than was actually applied, then the proper Applicable Rate shall be applied retroactively and Borrower shall immediately pay to Administrative Agent, for the ratable benefit of Lenders, an amount equal to the difference between the amount of interest and fees that would have accrued using the proper margin and the amount actually paid, provided that notwithstanding the foregoing, such amounts shall be due and payable within five (5) Business Days following the written demand of Administrative Agent and no Default or Event of Default shall be deemed to have occurred as a result of such non-payment until the expiration of such five (5) Business Day period. All such amounts payable by Borrower shall be due and payable on demand (or, after the occurrence of an actual or deemed entry of an order for relief with respect to Borrower under a Debtor Relief Law, automatically and without further action by Administrative Agent or any Lender). This paragraph shall not limit the rights of Administrative Agent or any Lender under any other provision of this Agreement or the other Loan Documents.

**2.11 Evidence of Debt.**

(a) The Credit Extensions made by each Lender shall be evidenced by one or more accounts or records maintained by such Lender and by Administrative Agent in the ordinary course of business. The accounts or records maintained by Administrative Agent and each Lender shall be conclusive absent manifest error of the amount of the Credit Extensions made by Lenders to Borrower and the interest and payments thereon. Any failure to so record or any error in doing so shall not, however, limit or otherwise affect the obligation of Borrower hereunder to pay any amount owing with respect to the Obligations. In the event of any conflict between the accounts and records maintained by any Lender and the accounts and records of Administrative Agent in respect of such matters, the accounts and records of Administrative Agent shall control in the absence of manifest error. Upon the request of any Lender made through Administrative Agent, Borrower shall execute and deliver to such Lender (through

Administrative Agent) a Note, which shall evidence such Lender's Loans in addition to such accounts or records. Each Lender may attach schedules to its Note and endorse thereon the date, Type (if applicable), amount and maturity of its Loans and payments with respect thereto.

(b) In addition to the accounts and records referred to in subsection (a), each Lender and Administrative Agent shall maintain in accordance with its usual practice accounts or records evidencing the purchases and sales by such Lender of participations in Letters of Credit. In the event of any conflict between the accounts and records maintained by Administrative Agent and the accounts and records of any Lender in respect of such matters, the accounts and records of Administrative Agent shall control in the absence of manifest error.

#### 2.12 **Payments Generally; Administrative Agent's Clawback.**

(a) **General.** All payments to be made by Borrower shall be made without condition or deduction for any counterclaim, defense, recoupment or setoff. Except as otherwise expressly provided herein, all payments by Borrower hereunder shall be made to Administrative Agent, for the account of the respective Lenders to which such payment is owed, at Administrative Agent's Office in Dollars and in immediately available funds not later than 12:00 noon on the date specified herein. Administrative Agent will promptly distribute to each Lender its Applicable Percentage (or other applicable share as provided herein) of such payment in like funds as received by wire transfer to such Lender's Lending Office. All payments received by Administrative Agent after 12:00 noon shall be deemed received on the next succeeding Business Day and any applicable interest or fee shall continue to accrue. If any payment to be made by Borrower shall come due on a day other than a Business Day, payment shall be made on the next succeeding Business Day, and such extension of time shall be reflected in computing interest or fees, as the case may be.

(i) On each date when the payment of any principal, interest or fees are due hereunder or under any Note, Borrower agrees to maintain on deposit in an ordinary checking account maintained by Borrower with Administrative Agent (as such account shall be designated by Borrower in a written notice to Administrative Agent from time to time, the "**Borrower Account**") an amount sufficient to pay such principal, interest or fees in full on such date. Borrower hereby authorizes Administrative Agent (A) to deduct automatically all principal, interest or fees when due hereunder or under any Note from Borrower Account, and (B) if and to the extent any payment of principal, interest or fees under this Agreement or any Note is not made when due to deduct any such amount from any or all of the accounts of Borrower maintained at Administrative Agent. Administrative Agent agrees to provide written notice to Borrower of any automatic deduction made pursuant to this Section 2.12(a)(i) showing in reasonable detail the amounts of such deduction. Lenders agree to reimburse Borrower based on their Applicable Percentage for any amounts deducted from such accounts in excess of amount due hereunder and under any other Loan Documents.

(b) **Funding by Lenders; Presumption by Administrative Agent.** Unless Administrative Agent shall have received notice from a Lender prior to the proposed date of any

Borrowing of Eurodollar Rate Loans (or, in the case of any Borrowing of Base Rate Loans, prior to 9:00 a.m. on the date of such Borrowing) that such Lender will not make available to Administrative Agent such Lender's share of such Borrowing, Administrative Agent may assume that such Lender has made such share available on such date in accordance with Section 2.02 (or, in the case of a Borrowing of Base Rate Loans, that such Lender has made such share available in accordance with and at the time required by Section 2.02) and may, in reliance upon such assumption, make available to Borrower a corresponding amount. In such event, if a Lender has not in fact made its share of the applicable Borrowing available to Administrative Agent, then the applicable Lender and Borrower severally agree to pay to Administrative Agent forthwith on demand such corresponding amount in immediately available funds with interest thereon, for each day from and including the date such amount is made available to Borrower to but excluding the date of payment to Administrative Agent, at (A) in the case of a payment to be made by such Lender, the greater of the Federal Funds Rate and a rate determined by Administrative Agent in accordance with banking industry rules on interbank compensation, plus any administrative, processing or similar fees customarily charged by Administrative Agent in connection with the foregoing and (B) in the case of a payment to be made by Borrower, the interest rate applicable to Base Rate Loans. If Borrower and such Lender shall pay such interest to Administrative Agent for the same or an overlapping period, Administrative Agent shall promptly remit to Borrower the amount of such interest paid by Borrower for such period. If such Lender pays its share of the applicable Borrowing to Administrative Agent, then the amount so paid shall constitute such Lender's Loan included in such Borrowing. Any payment by Borrower shall be without prejudice to any claim Borrower may have against a Lender that shall have failed to make such payment to Administrative Agent.

(i) **Payments by Borrower; Presumptions by Administrative Agent.**

Unless Administrative Agent shall have received notice from Borrower prior to the date on which any payment is due to Administrative Agent for the account of the Lenders or the L/C Issuer hereunder that Borrower will not make such payment, Administrative Agent may assume that Borrower has made such payment on such date in accordance herewith and may, in reliance upon such assumption, distribute to Lenders or the L/C Issuer, as the case may be, the amount due. In such event, if Borrower has not in fact made such payment, then each of Lenders or the L/C Issuer, as the case may be, severally agrees to repay to Administrative Agent forthwith on demand the amount so distributed to such Lender or the L/C Issuer, in immediately available funds with interest thereon, for each day from and including the date such amount is distributed to it to but excluding the date of payment to Administrative Agent, at the greater of the Federal Funds Rate and a rate determined by Administrative Agent in accordance with banking industry rules on interbank compensation. A notice of Administrative Agent to any Lender or Borrower with respect to any amount owing under this subsection (b) shall be conclusive, absent manifest error.

(c) **Failure to Satisfy Conditions Precedent.** If any Lender makes available to Administrative Agent funds for any Loan to be made by such Lender as provided in the foregoing provisions of this Article II, and such funds are not made available to Borrower by Administrative Agent because the conditions to the applicable Credit Extension set forth in Article V are not satisfied or waived in accordance with the terms hereof, Administrative Agent

shall return such funds (in like funds as received from such Lender) to such Lender, without interest.

(d) **Obligations of Lenders Several.** The obligations of Lenders hereunder to make Loans, to fund participations in Letters of Credit and to make payments under Section 11.04(c) are several and not joint. The failure of any Lender to make any Loan, to fund any such participation or to make any payment under Section 11.04(c) on any date required hereunder shall not relieve any other Lender of its corresponding obligation to do so on such date, and no Lender shall be responsible for the failure of any other Lender to so make its Loan, purchase its participation or to make its payment under Section 11.04(c).

(e) **Funding Source.** Nothing herein shall be deemed to obligate any Lender to obtain the funds for any Loan in any particular place or manner or to constitute a representation by any Lender that it has obtained or will obtain the funds for any Loan in any particular place or manner.

2.13 **Sharing of Payments.** If any Lender shall, by exercising any right of setoff or counterclaim or otherwise, obtain payment in respect of any principal of or interest on any of the Loans made by it, or the participations in L/C Obligations held by it resulting in such Lender's receiving payment of a proportion of the aggregate amount of such Loans or participations and accrued interest thereon greater than its pro rata share thereof as provided herein, then the Lender receiving such greater proportion shall (a) notify Administrative Agent of such fact, and (b) purchase (for cash at face value) participations in the Loans and sub-participations in L/C Obligations of the other Lenders, or make such other adjustments as shall be equitable, so that the benefit of all such payments shall be shared by the Lenders ratably in accordance with the aggregate amount of principal of and accrued interest on their respective Loans and other amounts owing them, provided that:

(i) if any such participations or sub-participations are purchased and all or any portion of the payment giving rise thereto is recovered, such participations or sub-participations shall be rescinded and the purchase price restored to the extent of such recovery, without interest; and

(ii) the provisions of this Section shall not be construed to apply to (x) any payment made by or on behalf of Borrower pursuant to and in accordance with the express terms of this Agreement (including the application of funds arising from the existence of a Defaulting Lender), (y) the application of Cash Collateral provided for in Section 2.15, or (z) any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Loans or sub-participations in L/C Obligations to any assignee or participant, other than to Borrower or any Subsidiary thereof (as to which the provisions of this Section shall apply).

Each Loan Party consents to the foregoing and agrees, to the extent it may effectively do so under applicable law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against such Loan Party rights of setoff and counterclaim with

respect to such participation as fully as if such Lender were a direct creditor of such Loan Party in the amount of such participation.

2.14 **Replacement of Lenders.** If any Lender requests compensation under Section 3.04, or if Borrower is required to pay any Indemnified Taxes or additional amounts to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 3.01 and, in each case, such Lender has declined or is unable to designate a different lending office in accordance with Section 3.06, or if any Lender is a Defaulting Lender or a Non-Consenting Lender (any such Lender, a “**Subject Lender**”), then so long as (a) no Default shall have occurred and be continuing and Borrower has obtained a commitment from another Lender or an Eligible Assignee to purchase at par the Subject Lender’s Loans and assume the Subject Lender’s Commitments and all other obligations of the Subject Lender hereunder, and (b) the Subject Lender is not the L/C Issuer with respect to any Letters of Credit outstanding (unless all such Letters of Credit are terminated or arrangements acceptable to the L/C Issuer (such as a “back-to-back” letter of credit) are made), Borrower may, at its sole expense and effort, upon notice to such Lender and Administrative Agent, require such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in, and consents required by, Section 11.06), all of its interests, rights (other than its existing rights to payments pursuant to Section 3.04 or Section 3.01) and obligations under this Agreement and the related Loan Documents to an Eligible Assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment); provided that:

(a) Borrower shall have paid to Administrative Agent the assignment fee (if any) specified in Section 11.06;

(b) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and participations in L/C Disbursements, accrued interest thereon, accrued fees and all other amounts payable to it hereunder and under the other Loan Documents (including all amounts under Sections 3.01, 3.04 or 3.05 (if applicable)) from the assignee (to the extent of such outstanding principal and accrued interest and fees) or Borrower (in the case of all other amounts);

(c) in the case of any such assignment resulting from a claim for compensation under Section 3.04 or payments required to be made pursuant to Section 3.01, such assignment will result in a reduction in such compensation or payments thereafter;

(d) such assignment does not conflict with applicable law; and

(e) in the case of any assignment resulting from a Lender becoming a Non-Consenting Lender, the applicable assignee shall have consented to the applicable amendment, waiver or consent.

A Lender shall not be required to make any such assignment or delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling Borrower to require such assignment and delegation cease to apply.

2.15 **Cash Collateral.** If (i) the L/C Issuer has honored any full or partial drawing request under any Letter of Credit and such drawing has resulted in an L/C Borrowing, (ii) as of

the L/C Expiration Date, any L/C Obligation for any reason remains outstanding, (iii) Borrower shall be required to provide Cash Collateral pursuant to Section 9.02(c), or (iv) there shall exist a Defaulting Lender, Borrower shall immediately (in the case of clause (iii) above) or within one (1) Business Day (in all other cases) following any request by Administrative Agent or the L/C Issuer, provide Cash Collateral in an amount not less than the applicable Minimum Collateral Amount (determined in the case of Cash Collateral provided pursuant to clause (iv) above, after giving effect to Section 2.16(a)(iv) and any Cash Collateral provided by the Defaulting Lender). In addition, Borrower shall provide Cash Collateral in an amount not less than the applicable Minimum Collateral Amount not less than: (a) five (5) Business Days prior to the Maturity Date, and (b) five (5) Business Days prior to any cancellation or termination of the Commitments or this Agreement, and the provision of such Cash Collateral shall be a condition precedent to any such cancellation or termination.

(a) **Grant of Security Interest.** Borrower, and to the extent provided by any Defaulting Lender, such Defaulting Lender, hereby grants to (and subjects to the control of) Administrative Agent, for the benefit of the L/C Issuer and the Lenders, and agrees to maintain, a continuing first-priority security interest in all such Cash Collateral (and all proceeds thereof) as security for the then Outstanding Amount of all L/C Obligations and any Defaulting Lender's obligation to fund participations in respect of L/C Obligations, to be applied pursuant to clause (b) below. If at any time Administrative Agent determines that Cash Collateral is subject to any right or claim of any Person other than Administrative Agent and the L/C Issuer as herein provided, or that the total amount of such Cash Collateral is less than the Minimum Collateral Amount, Borrower will, promptly upon demand by Administrative Agent, pay or provide to Administrative Agent additional Cash Collateral in an amount sufficient to eliminate such deficiency (after giving effect to any Cash Collateral provided by the Defaulting Lender). All Cash Collateral (other than credit support not constituting funds subject to deposit) shall be maintained in blocked, non-interest bearing deposit accounts at Union Bank. Borrower shall pay on demand therefor from time to time all customary account opening, activity and other administrative fees and charges in connection with the maintenance and disbursement of Cash Collateral.

(b) **Application.** Notwithstanding anything to the contrary contained in this Agreement, Cash Collateral provided under this Section 2.15 or Sections 2.03, 2.05, 2.16 or 9.02 in respect of Letters of Credit shall be held and applied to the satisfaction of the specific L/C Obligations, obligations to fund participations therein (including, as to Cash Collateral provided by a Defaulting Lender, any interest accrued on such obligation) and other obligations for which the Cash Collateral was so provided, prior to any other application of such property as may otherwise be provided for herein.

(c) **Termination of Requirement.** Cash Collateral (or the appropriate portion thereof) provided to reduce the L/C Issuer's Fronting Exposure or to secure other obligations shall be released promptly following (i) the elimination of the applicable Fronting Exposure or other obligations giving rise thereto (including by the termination of Defaulting Lender status of the applicable Lender (or, as appropriate, its assignee following compliance with Section 11.06(b)(vi)), or (ii) the determination by Administrative Agent and the L/C Issuer that there exists excess Cash Collateral; provided however, (x) any such release shall be without prejudice to, and any disbursement or other transfer of Cash Collateral shall be and remain

subject to, any other Lien conferred under the Loan Documents and the other applicable provisions of the Loan Documents, and (y) the Person providing Cash Collateral and the L/C Issuer may agree that Cash Collateral shall not be released but instead held to support future anticipated Fronting Exposure or other obligations, and provided further that to the extent that such Cash Collateral was provided by Borrower, such Cash Collateral shall remain subject to the security interest granted pursuant to the Loan Documents.

## 2.16 **Defaulting Lenders.**

(a) **Defaulting Lender Adjustments.** Notwithstanding anything to the contrary contained in this Agreement, if any Lender becomes a Defaulting Lender, then, until such time as such Lender is no longer a Defaulting Lender, to the extent permitted by applicable Law:

(i) **Waivers and Amendments.** Such Defaulting Lender's right to approve or disapprove any amendment, waiver or consent with respect to this Agreement shall be restricted as set forth in the definition of Required Lenders and Section 11.01.

(ii) **Defaulting Lender Waterfall.** Any payment of principal, interest, fees or other amounts received by Administrative Agent for the account of such Defaulting Lender (whether voluntary or mandatory, at maturity, pursuant to Article IX or otherwise) or received by Administrative Agent from a Defaulting Lender pursuant to Section 11.08 shall be applied at such time or times as may be determined by Administrative Agent as follows: *first*, to the payment of any amounts owing by such Defaulting Lender to Administrative Agent hereunder; *second*, to the payment on a pro rata basis of any amounts owing by such Defaulting Lender to the L/C Issuer; *third*, to Cash Collateralize the L/C Issuer's Fronting Exposure with respect to such Defaulting Lender in accordance with Section 2.15; *fourth*, as Borrower may request (so long as no Default or Event of Default exists), to the funding of any Loan in respect of which such Defaulting Lender has failed to fund its portion thereof as required by this Agreement, as determined by Administrative Agent; *fifth*, if so determined by Administrative Agent and Borrower, to be held in a deposit account and released pro rata in order to (x) satisfy such Defaulting Lender's potential future funding obligations with respect to Loans under this Agreement and (y) Cash Collateralize the L/C Issuer's future Fronting Exposure with respect to such Defaulting Lender with respect to future Letters of Credit issued under this Agreement, in accordance with Section 2.15; *sixth*, to the payment of any amounts owing to the Lenders or the L/C Issuer as a result of any judgment of a court of competent jurisdiction obtained by any Lender or the L/C Issuer against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement; *seventh*, so long as no Default or Event of Default exists, to the payment of any amounts owing to Borrower as a result of any judgment of a court of competent jurisdiction obtained by Borrower against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement; and *eighth*, to such Defaulting Lender or as otherwise directed by a court of competent jurisdiction; provided that if (x) such payment is a payment of the principal

amount of any Loans or L/C Borrowings in respect of which such Defaulting Lender has not fully funded its appropriate share, and (y) such Loans were made or the related Letters of Credit were issued at a time when the conditions set forth in Section 5.02 were satisfied or waived, such payment shall be applied solely to pay the Loans of, and L/C Obligations owed to, all Non-Defaulting Lenders on a pro rata basis prior to being applied to the payment of any Loans of, or L/C Obligations owed to, such Defaulting Lender until such time as all Loans and funded and unfunded participations in L/C Obligations are held by the Lenders pro rata in accordance with the Commitments hereunder without giving effect to Section 2.16(a)(iv). Any payments, prepayments or other amounts paid or payable to a Defaulting Lender that are applied (or held) to pay amounts owed by a Defaulting Lender or to post Cash Collateral pursuant to this Section 2.16(a)(ii) shall be deemed paid to and redirected by such Defaulting Lender, and each Lender irrevocably consents hereto.

(iii) **Certain Fees.**

(A) No Defaulting Lender shall be entitled to receive any Commitment Fee for any period during which that Lender is a Defaulting Lender (and Borrower shall not be required to pay any such fee that otherwise would have been required to have been paid to that Defaulting Lender).

(B) Each Defaulting Lender shall be entitled to receive L/C Fees for any period during which that Lender is a Defaulting Lender only to the extent allocable to its Applicable Percentage of the stated amount of Letters of Credit for which it has provided Cash Collateral pursuant to Section 2.15.

(C) With respect to any fee not required to be paid to any Defaulting Lender pursuant to clause (A) or (B) above, Borrower shall (x) pay to each Non-Defaulting Lender that portion of any such fee otherwise payable to such Defaulting Lender with respect to such Defaulting Lender's participation in L/C Obligations that has been reallocated to such Non-Defaulting Lender pursuant to clause (iv) below, (y) pay to the L/C Issuer the amount of any such fee otherwise payable to such Defaulting Lender to the extent allocable to the L/C Issuer's Fronting Exposure to such Defaulting Lender, and (z) not be required to pay the remaining amount of any such fee.

(iv) **Reallocation of Participations to Reduce Fronting Exposure.** All or any part of such Defaulting Lender's participation in L/C Obligations shall be reallocated among the Non-Defaulting Lenders in accordance with their respective Applicable Percentages (calculated without regard to such Defaulting Lender's Commitment) but only to the extent that (x) the conditions set forth in Section 4.02 are satisfied at the time of such reallocation (and, unless Borrower shall have otherwise notified Administrative Agent at such time, Borrower shall



be deemed to have represented and warranted that such conditions are satisfied at such time), and (y) such reallocation does not cause the aggregate Credit Exposure of any Non-Defaulting Lender to exceed such Non-Defaulting Lender's Commitment. No reallocation hereunder shall constitute a waiver or release of any claim of any party hereunder against a Defaulting Lender arising from that Lender having become a Defaulting Lender, including any claim of a Non-Defaulting Lender as a result of such Non-Defaulting Lender's increased exposure following such reallocation.

(v) **Cash Collateral.** If the reallocation described in clause (iv) above cannot, or can only partially, be effected, Borrower shall, without prejudice to any right or remedy available to it hereunder or under law, Cash Collateralize the L/C Issuer's Fronting Exposure in accordance with the procedures set forth in Section 2.15.

(b) **Defaulting Lender Cure.** If Borrower, Administrative Agent and the L/C Issuer agree in writing that a Lender is no longer a Defaulting Lender, Administrative Agent will so notify the parties hereto, whereupon as of the effective date specified in such notice and subject to any conditions set forth therein (which may include arrangements with respect to any Cash Collateral), that Lender will, to the extent applicable, purchase at par that portion of outstanding Loans of the other Lenders or take such other actions as Administrative Agent may determine to be necessary to cause the Loans and funded and unfunded participations in Letters of Credit to be held on a pro rata basis by the Lenders in accordance with their Applicable Percentages (without giving effect to Section 2.16(a)(iv)), whereupon such Lender will cease to be a Defaulting Lender; provided that no adjustments will be made retroactively with respect to fees accrued or payments made by or on behalf of Borrower while that Lender was a Defaulting Lender; and provided, further, that except to the extent otherwise expressly agreed by the affected parties, no change hereunder from Defaulting Lender to Lender will constitute a waiver or release of any claim of any party hereunder arising from that Lender's having been a Defaulting Lender.

(c) **New Letters of Credit.** So long as any Lender is a Defaulting Lender, no L/C Issuer shall be required to issue, extend, renew or increase any Letter of Credit unless it is satisfied that it will have no Fronting Exposure after giving effect thereto.

### ARTICLE III

#### TAXES, YIELD PROTECTION AND ILLEGALITY

##### 3.01 Taxes.

(a) **Payments Free of Taxes; Obligation to Withhold; Payments on Account of Taxes.**

(i) Any and all payments by or on account of any obligation of any Loan Party under any Loan Document shall be made without deduction or withholding for any Taxes, except as required by applicable Laws. If any

applicable Law (as determined in the good faith discretion of an applicable Withholding Agent) requires the deduction or withholding of any Tax from any such payment by a Withholding Agent, then the applicable Withholding Agent shall be entitled to make such deduction or withholding, upon the basis of the information and documentation to be delivered pursuant to subsection (e) below.

(ii) If any Loan Party or Administrative Agent shall be required by the Code to withhold or deduct any Taxes, including both United States Federal backup withholding and withholding taxes, from any payment, then (A) Administrative Agent shall withhold or make such deductions as are determined by Administrative Agent to be required based upon the information and documentation it has received pursuant to subsection (e) below, (B) Administrative Agent shall timely pay the full amount deducted or withheld or deducted to the relevant Governmental Authority in accordance with the Code and (C) to the extent that the withholding or deduction is made on account of Indemnified Taxes, the sum payable by the applicable Loan Party shall be increased as necessary so that after any required withholding of Indemnified Taxes or Other Taxes or the making of all required deductions of Indemnified Taxes or Other Taxes (including such deductions applicable to additional sums payable under this Section 3.01) the applicable Recipient receives an amount equal to the sum it would have received had no such withholding or deduction of Indemnified Taxes or Other Taxes been made.

(iii) If any Loan Party or Administrative Agent shall be required by any applicable Laws other than the Code to withhold or deduct any Taxes from any payment, then (A) such Loan Party or Administrative Agent, as required by such Laws, shall withhold or make such deductions as are determined by it to be required based upon the information and documentation it has received pursuant to subsection (e) below, (B) such Loan Party or Administrative Agent, to the extent required by such Laws, shall timely pay the full amount withheld or deducted to the relevant Governmental Authority in accordance with such Laws, and (C) to the extent that the withholding or deduction is made on account of Indemnified Taxes, the sum payable by the applicable Loan Party shall be increased as necessary so that after any required withholding of Indemnified Taxes or Other Taxes or the making of all required deductions of Indemnified Taxes or Other Taxes (including such deductions applicable to additional sums payable under this Section 3.01) the applicable Recipient receives an amount equal to the sum it would have received had no such withholding or deduction of Indemnified Taxes or Other Taxes been made.

(b) **Payment of Other Taxes by Borrower.** Without limiting the provisions of subsection (a) above, the Loan Parties shall timely pay to the relevant Governmental Authority in accordance with applicable law, or at the option of Administrative Agent timely reimburse it for the payment of, any Other Taxes.

(c) **Tax Indemnifications.**

(i) **Indemnification by Borrower.** Without limiting the provisions of subsection (a) or (b) above, each Loan Party shall, and does hereby, indemnify each Recipient, and shall make payment in respect thereof within ten (10) days after demand therefor, for the full amount of any Indemnified Taxes or Other Taxes (including Indemnified Taxes or Other Taxes imposed or asserted on or attributable to amounts payable under this Section 3.01) payable or paid by such Recipient or required to be withheld or deducted from a payment to such Recipient and any penalties, interest and reasonable expenses arising therefrom or with respect thereto, whether or not such Indemnified Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to Borrower by a Lender (with a copy to Administrative Agent), or by Administrative Agent on its own behalf or on behalf of a Lender, shall be conclusive absent manifest error. Borrower shall, and does hereby, indemnify Administrative Agent, and shall make payment in respect thereof within 10 days after demand therefor, for any amount which a Lender or the L/C Issuer for any reason fails to pay indefeasibly to Administrative Agent as required pursuant to Section 3.01(c)(ii) below.

(ii) **Indemnification by the Lenders.** Each Lender shall, and does hereby, severally indemnify, and shall make payment in respect thereof within 10 days after demand therefor, for (x) Administrative Agent against any Indemnified Taxes attributable to such Lender (but only to the extent that Borrower has not already indemnified Administrative Agent for such Indemnified Taxes and without limiting the obligation of Borrower to do so), (y) Administrative Agent and Borrower, as applicable, against any Taxes attributable to such Lender's failure to comply with the provisions of Section 11.06(d) relating to the maintenance of a Participant Register and (z) Administrative Agent and Borrower, as applicable, against any Excluded Taxes attributable to such Lender, in each case, that are payable or paid by Administrative Agent or Borrower in connection with any Loan Document, and any reasonable expenses arising therefrom or with respect thereto, whether or not such Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to any Lender by Administrative Agent shall be conclusive absent manifest error. Each Lender hereby authorizes Administrative Agent to set off and apply any and all amounts at any time owing to such Lender under any Loan Document or otherwise payable by Administrative Agent to the Lender from any other source against any amount due to Administrative Agent under this subsection (c)(ii).

(d) **Evidence of Payments.** As soon as practicable, and upon request of Administrative Agent or Borrower, as the case may be, after any payment of Taxes by any Loan Party or by Administrative Agent, to a Governmental Authority pursuant to this Section 3.01, Borrower shall deliver to Administrative Agent or Administrative Agent shall deliver to Borrower, as applicable, the original or a certified copy of a receipt issued by such Governmental

Authority evidencing such payment, a copy of the return reporting such payment or other evidence of such payment reasonably satisfactory to Administrative Agent.

(e) **Status of Lenders; Tax Documentation.**

(i) Any Lender that is entitled to an exemption from or reduction of withholding Tax with respect to payments made under any Loan Document shall deliver to Borrower and Administrative Agent, at the time or times required by law or reasonably requested by Borrower or Administrative Agent, such properly completed and executed documentation reasonably requested by Borrower or Administrative Agent as will permit such payments to be made without withholding or at a reduced rate of withholding. In addition, any Lender shall deliver such other documentation prescribed by applicable law or reasonably requested by Borrower or Administrative Agent as will enable Borrower or Administrative Agent to determine whether or not such Lender is subject to backup withholding or information reporting requirements. Notwithstanding anything to the contrary in the preceding two sentences, the completion, execution and submission of such documentation (other than such documentation set forth in Section 3.01(e)(ii)(A), (ii)(B) and (ii)(D) below) shall not be required if in the Lender's reasonable judgment such completion, execution or submission would subject such Lender to any material unreimbursed cost or expense or would materially prejudice the legal or commercial position of such Lender.

(ii) Without limiting the generality of the foregoing, in the event that Borrower is a U.S. Borrower,

(A) any Lender that is a U.S. Person shall deliver to Borrower and Administrative Agent on or prior to the date on which such Lender becomes a Lender under this Agreement (and from time to time thereafter upon the reasonable request of Borrower or Administrative Agent), executed originals of IRS Form W-9 certifying that such Lender is exempt from U.S. federal backup withholding tax;

(B) any Foreign Lender shall, to the extent it is legally entitled to do so, deliver to Borrower and Administrative Agent (in such number of copies as shall be required by law or requested by the recipient) on or prior to the date on which such Foreign Lender becomes a Lender under this Agreement (and from time to time thereafter as required by law or upon the reasonable request of Borrower or Administrative Agent), whichever of the following is applicable:

(I) in the case of a Foreign Lender claiming the benefits of an income tax treaty to which the United States is a party (x) with respect to payments of interest under any Loan Document, executed originals of IRS Form W-8BENE (or W-8BEN, as applicable) establishing an exemption from, or reduction of, U.S. federal withholding Tax pursuant to the

“interest” article of such tax treaty and (y) with respect to any other applicable payments under any Loan Document, IRS Form W-8BENE (or W-8BEN, as applicable) establishing an exemption from, or reduction of, U.S. federal withholding Tax pursuant to the “business profits” or “other income” article of such tax treaty;

(II) executed originals of IRS Form W-8ECI;

(III) in the case of a Foreign Lender claiming the benefits of the exemption for portfolio interest under Section 881(c) of the Code, (x) a certificate substantially in the form of **Exhibit J-1** to the effect that such Foreign Lender is not a “bank” within the meaning of Section 881(c)(3) (A) of the Code, a “10 percent shareholder” of Borrower within the meaning of Section 881(c)(3)(B) of the Code, or a “controlled foreign corporation” described in Section 881(c)(3)(C) of the Code (a “**U.S. Tax Compliance Certificate**”) and (y) executed originals of IRS Form W-8BENE (or W-8BEN, as applicable) ; or

(IV) to the extent a Foreign Lender is not the beneficial owner, executed originals of IRS Form W-8IMY, accompanied by IRS Form W-8ECI, IRS Form W-8BENE (or W-8BEN, as applicable) , a U.S. Tax Compliance Certificate substantially in the form of **Exhibit J-2** or **Exhibit J-3**, IRS Form W-9, and/or other certification documents from each beneficial owner, as applicable; provided that if the Foreign Lender is a partnership and one or more direct or indirect partners of such Foreign Lender are claiming the portfolio interest exemption, such Foreign Lender may provide a U.S. Tax Compliance Certificate substantially in the form of **Exhibit J-4** on behalf of each such direct and indirect partner;

(C) any Foreign Lender shall, to the extent it is legally entitled to do so, deliver to Borrower and Administrative Agent (in such number of copies as shall be requested by the recipient) on or prior to the date on which such Foreign Lender becomes a Lender under this Agreement (and from time to time thereafter upon the reasonable request of Borrower or Administrative Agent), executed originals of any other form prescribed by applicable law as a basis for claiming exemption from or a reduction in U.S. federal withholding Tax, duly completed, together with such supplementary documentation as may be prescribed by applicable law to permit Borrower or Administrative Agent to determine the withholding or deduction required to be made; and

(D) if a payment made to a Lender under any Loan Document would be subject to U.S. federal withholding Tax imposed by FATCA if such Lender were to fail to comply with the applicable reporting

requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Code, as applicable), such Lender shall deliver to Borrower and Administrative Agent at the time or times prescribed by law and at such time or times reasonably requested by Borrower or Administrative Agent such documentation prescribed by applicable law (including as prescribed by Section 1471(b)(3)(C)(i) of the Code) and such additional documentation reasonably requested by Borrower or Administrative Agent as may be necessary for Borrower and Administrative Agent to comply with their obligations under FATCA and to determine that such Lender has complied with such Lender's obligations under FATCA or to determine the amount to deduct and withhold from such payment. Solely for purposes of this clause (D), "FATCA" shall include any amendments made to FATCA after the date of this Agreement.

Each Lender agrees that if any form or certification it previously delivered expires or becomes obsolete or inaccurate in any respect, it shall update such form or certification or promptly notify Borrower and Administrative Agent in writing of its legal inability to do so.

(f) **Treatment of Certain Refunds.** Unless required by applicable Laws, at no time shall Administrative Agent have any obligation to file for or otherwise pursue on behalf of a Lender or the L/C Issuer, or have any obligation to pay to any Lender or the L/C Issuer, any refund of Taxes withheld or deducted from funds paid for the account of such Lender or the L/C Issuer, as the case may be. If any Recipient determines, in its sole discretion, that it has received a refund of any Taxes or Other Taxes as to which it has been indemnified pursuant to this Section 3.01 (including by the payment of additional amounts pursuant to this Section 3.01), it shall pay to the indemnifying party an amount equal to such refund (but only to the extent of indemnity payments made under this Section with respect to the Taxes giving rise to such refund), net of all out-of-pocket expenses (including Taxes) incurred by such Recipient, as the case may be, and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund), provided that Borrower, upon the request of Administrative Agent or such Recipient, agrees to repay the amount paid over to Borrower (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) to the Recipient in the event the Recipient is required to repay such refund to such Governmental Authority. Notwithstanding anything to the contrary in this subsection, in no event will the applicable Recipient be required to pay any amount to an indemnifying party pursuant to this subsection the payment of which would place the Recipient in a less favorable net after-Tax position than such Recipient would have been in if the Tax subject to indemnification and giving rise to such refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This subsection shall not be construed to require any Recipient to make available its tax returns (or any other information relating to its taxes that it deems confidential) to Borrower or any other Person.

(g) **Survival.** Each party's obligations under this Section 3.01 shall survive the resignation or replacement of Administrative Agent or any assignment of rights by, or the

replacement of, a Lender, the termination of the Aggregate Commitments and the repayment, satisfaction or discharge of all obligations under any Loan Document.

3.02 **Illegality.** If any Lender determines that any Law has made it unlawful, or that any Governmental Authority has asserted that it is unlawful, for any Lender or its Lending Office to make, maintain or fund Loans whose interest is determined by reference to the Eurodollar Rate, or to determine or charge interest rates based upon the Eurodollar Rate, or any Governmental Authority has imposed material restrictions on the authority of such Lender to purchase or sell, or to take deposits of, Dollars in the London interbank market, then, on notice thereof by such Lender to Borrower through Administrative Agent, (i) any obligation of such Lender to make or continue Eurodollar Rate Loans or to convert Base Rate Loans to Eurodollar Rate Loans shall be suspended, and (ii) if such notice asserts the illegality of such Lender making or maintaining Base Rate Loans the interest rate on which is determined by reference to the Eurodollar Rate component of the Base Rate, the interest rate on which Base Rate Loans of such Lender shall, if necessary to avoid such illegality, be determined by Administrative Agent without reference to the Eurodollar Rate component of the Base Rate, in each case until such Lender notifies Administrative Agent and Borrower that the circumstances giving rise to such determination no longer exist. Upon receipt of such notice, (x) Borrower shall, upon demand from such Lender (with a copy to Administrative Agent), prepay or, if applicable, convert all Eurodollar Rate Loans of such Lender to Base Rate Loans (the interest rate on which Base Rate Loans of such Lender shall, if necessary to avoid such illegality, be determined by Administrative Agent without reference to the Eurodollar Rate component of the Base Rate), either on the last day of the Interest Period therefor, if such Lender may lawfully continue to maintain such Eurodollar Rate Loans to such day, or immediately, if such Lender may not lawfully continue to maintain such Eurodollar Rate Loans, and (y) if such notice asserts the illegality of such Lender determining or charging interest rates based upon the Eurodollar Rate, Administrative Agent shall during the period of such suspension compute the Base Rate applicable to such Lender without reference to the Eurodollar Rate component thereof until Administrative Agent is advised in writing by such Lender that it is no longer illegal for such Lender to determine or charge interest rates based upon the Eurodollar Rate. Upon any such prepayment or conversion, Borrower shall also pay accrued interest on the amount so prepaid or converted and all amounts due under Section 3.05 in accordance with the terms thereof due to such prepayment or conversion.

3.03 **Inability to Determine Rates.** If Administrative Agent determines in connection with any request for a Eurodollar Rate Loan or a conversion to or continuation thereof that (a) Dollar deposits are not being offered to banks in the London interbank eurodollar market for the applicable amount and Interest Period of such Eurodollar Rate Loan, (b) adequate and reasonable means do not exist for determining the Eurodollar Base Rate for any requested Interest Period with respect to a proposed Eurodollar Rate Loan or in connection with an existing or proposed Base Rate Loan, or (c) the Eurodollar Base Rate for any requested Interest Period with respect to a proposed Eurodollar Rate Loan does not adequately and fairly reflect the cost to such Lenders of funding such Loan, Administrative Agent will promptly so notify Borrower and each Lender. Thereafter, (x) the obligation of Lenders to make or maintain Eurodollar Rate Loans shall be suspended, and (y) in the event of a determination described in the preceding sentence with respect to the Eurodollar Rate component of the Base Rate, the utilization of the Eurodollar Rate component in determining the Base Rate shall be suspended, in each case until

Administrative Agent (upon the instruction of the Required Lenders) revokes such notice. Upon receipt of such notice, Borrower may revoke any pending request for a Borrowing of, conversion to or continuation of Eurodollar Rate Loans or, failing that, will be deemed to have converted such request into a request for a Borrowing of Base Rate Loans in the amount specified therein.

3.04 **Increased Costs; Reserves on Eurodollar Rate Loans.**

(a) **Increased Costs Generally.** If any Change in Law shall:

(i) impose, modify or deem applicable any reserve, special deposit, compulsory loan, insurance charge or similar requirement against assets of, deposits with or for the account of, or credit extended or participated in by, any Lender (except any reserve requirement contemplated by Section 3.04(e) or reflected in the Eurodollar Rate) or the L/C Issuer;

(ii) subject any Recipient to any Taxes (other than (A) Indemnified Taxes, (B) Taxes described in clauses (b) through (d) of the definition of Excluded Taxes and (C) Connection Income Taxes) on its loans, loan principal, letters of credit, commitments, or other obligations, or its deposits, reserves, other liabilities or capital attributable thereto; or

(iii) impose on any Lender or the L/C Issuer or the London interbank market any other condition, cost or expense (other than Taxes) affecting this Agreement or Loans made by such Lender or any Letter of Credit or participation therein;

and the result of any of the foregoing shall be to increase the cost to such Lender or such other Recipient of making, converting to, continuing or maintaining any Loan the interest on which is determined by reference to the Eurodollar Rate (or of maintaining its obligation to make any such Loan), or to increase the cost to such Lender, the L/C Issuer or such other Recipient of participating in, issuing or maintaining any Letter of Credit (or of maintaining its obligation to participate in or to issue any Letter of Credit), or to reduce the amount of any sum received or receivable by such Lender, L/C Issuer or other Recipient hereunder (whether of principal, interest or any other amount) then, upon request of such Lender, L/C Issuer or other Recipient, Borrower will pay to such Lender, L/C Issuer or other Recipient, as the case may be, such additional amount or amounts as will compensate such Lender, L/C Issuer or other Recipient, as the case may be, for such additional costs incurred or reduction suffered.

(b) **Capital Requirements.** If any Lender or L/C Issuer determines that any Change in Law affecting such Lender or L/C Issuer or any Lending Office of such Lender or such Lender's or L/C Issuer's holding company, if any, regarding capital or liquidity requirements, has or would have the effect of reducing the rate of return on such Lender's or L/C Issuer's capital or on the capital of such Lender's or L/C Issuer's holding company, if any, as a consequence of this Agreement, the Commitments of such Lender or the Loans made by, or participations in Letters of Credit held by, such Lender, or the Letters of Credit issued by the L/C Issuer, to a level below that which such Lender or L/C Issuer or such Lender's or L/C Issuer's holding company could have achieved but for such Change in Law (taking into consideration



such Lender's or L/C Issuer's policies and the policies of such Lender's or L/C Issuer's holding company with respect to capital adequacy), then from time to time Borrower will pay to such Lender or L/C Issuer, as the case may be, such additional amount or amounts as will compensate such Lender or L/C Issuer or such Lender's or L/C Issuer's holding company for any such reduction suffered.

(c) **Certificates for Reimbursement.** A certificate of a Lender or L/C Issuer setting forth the amount or amounts necessary to compensate such Lender or L/C Issuer or its holding company, as the case may be, as specified in paragraph (a) or (b) of this Section and delivered to Borrower, shall be conclusive absent manifest error. Borrower shall pay such Lender or L/C Issuer, as the case may be, the amount shown as due on any such certificate within 10 days after receipt thereof.

(d) **Delay in Requests.** Failure or delay on the part of any Lender or L/C Issuer to demand compensation pursuant to this Section shall not constitute a waiver of such Lender's or L/C Issuer's right to demand such compensation; provided that Borrower shall not be required to compensate a Lender or L/C Issuer pursuant to this Section for any increased costs incurred or reductions suffered more than nine months prior to the date that such Lender or L/C Issuer, as the case may be, notifies Borrower of the Change in Law giving rise to such increased costs or reductions, and of such Lender's or L/C Issuer's intention to claim compensation therefor (except that, if the Change in Law giving rise to such increased costs or reductions is retroactive, then the nine-month period referred to above shall be extended to include the period of retroactive effect thereof).

(e) **Reserves on Eurodollar Rate Loans.** Borrower shall pay to each Lender, as long as such Lender shall be required to maintain reserves with respect to liabilities or assets consisting of or including Eurocurrency funds or deposits (currently known as "Eurocurrency liabilities"), additional interest on the unpaid principal amount of each Eurodollar Rate Loan equal to the actual costs of such reserves allocated to such Loan by such Lender (as determined by such Lender in good faith, which determination shall be conclusive), which shall be due and payable on each date on which interest is payable on such Loan, provided Borrower shall have received at least 10 days' prior notice (with a copy to Administrative Agent) of such additional interest from such Lender. If a Lender fails to give notice 10 days prior to the relevant Interest Payment Date, such additional interest shall be due and payable 10 days from receipt of such notice.

3.05 **Compensation for Losses.** Upon demand of any Lender (with a copy to Administrative Agent) from time to time, Borrower shall promptly compensate such Lender for and hold such Lender harmless from any loss, cost or expense incurred by it as a result of:

(a) any continuation, conversion, payment or prepayment of any Loan other than a Base Rate Loan on a day other than the last day of the Interest Period for such Loan (whether voluntary, mandatory, automatic, by reason of acceleration, or otherwise); or

(b) any failure by Borrower (for a reason other than the failure of such Lender to make a Loan) to prepay, borrow, continue or convert any Loan other than a Base Rate Loan on the date or in the amount notified by Borrower; or

(c) any assignment of a Eurodollar Rate Loan on a day other than the last day of the Interest Period therefor as a result of a request by Borrower pursuant to Section 2.14;

including any loss of anticipated profits and any loss or expense arising from the liquidation or reemployment of funds obtained by it to maintain such Loan or from fees payable to terminate the deposits from which such funds were obtained. Borrower shall also pay any customary administrative fees charged by such Lender in connection with the foregoing. For purposes of calculating amounts payable by Borrower to Lenders under this Section 3.05, each Lender shall be deemed to have funded each Eurodollar Rate Loan made by it at the Eurodollar Base Rate used in determining the Eurodollar Rate for such Loan by a matching deposit or other borrowing in the London interbank eurodollar market for a comparable amount and for a comparable period, whether or not such Eurodollar Rate Loan was in fact so funded.

### 3.06 **Mitigation Obligations; Replacement of Lenders.**

(a) **Designation of Lending Office.** Each Lender may make any Credit Extension to Borrower through any Lending Office, provided that the exercise of this option shall not affect the obligation of Borrower to repay the Credit Extension in accordance with the terms of this Agreement. If any Lender requests compensation under Section 3.04, or requires Borrower to pay any Indemnified Taxes or additional amounts to any Lender or Governmental Authority for the account of any Lender, pursuant to Section 3.01, then such Lender shall (at the request of Borrower) use reasonable efforts to designate a different Lending Office for funding or booking its Loans hereunder or to assign its rights and obligations hereunder to another of its offices, branches or affiliates, if, in the judgment of such Lender, such designation or assignment (a) would eliminate or reduce amounts payable pursuant to Section 3.01 or 3.04, as the case may be, in the future, and (b) in each case, would not subject such Lender to any unreimbursed cost or expense and would not otherwise be disadvantageous to such Lender, as the case may be. Borrower hereby agrees to pay all reasonable costs and expenses incurred by any Lender or the L/C Issuer in connection with any such designation or assignment.

(b) **Replacement of Lenders.** If any Lender requests compensation under Section 3.04, or if Borrower is required to pay any Indemnified Taxes or additional amounts to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 3.01 and, in each case, such Lender has declined or is unable to designate a different Lending Office in accordance with Section 3.06(a), Borrower may replace such Lender in accordance with Section 2.14.

3.07 **Survival.** All of Borrower's obligations under this Article III shall survive termination of the Aggregate Commitments, and repayment of all other Obligations hereunder and resignation of Administrative Agent.

## **ARTICLE IV**

### **GUARANTY**

4.01 **The Guaranty.** Each of the Guarantors hereby jointly and severally guarantees to each Secured Party as hereinafter provided, as primary obligor and not as surety, the prompt

payment of the Secured Obligations in full when due (whether at stated maturity, as a mandatory prepayment, by acceleration, as a mandatory Cash Collateralization or otherwise) strictly in accordance with the terms thereof. The Guarantors hereby further agree that if any of the Secured Obligations are not paid in full when due (whether at stated maturity, as a mandatory prepayment, by acceleration, as a mandatory Cash Collateralization or otherwise), the Guarantors will, jointly and severally, promptly pay the same, without any demand or notice whatsoever, and that in the case of any extension of time of payment or renewal of any of the Secured Obligations, the same will be promptly paid in full when due (whether at extended maturity, as a mandatory prepayment, by acceleration, as a mandatory Cash Collateralization or otherwise) in accordance with the terms of such extension or renewal. This Guaranty is in addition to any other guaranties of the Secured Obligations, is continuing and covers all Secured Obligations, including those arising under successive transactions which continue or increase the Secured Obligations from time to time, renew all or part of the Secured Obligations after they have been satisfied, or create new Secured Obligations. A separate action or actions may be brought and prosecuted against any one or more guarantors, whether action is brought against Borrower or other guarantors of the Secured Obligations, and whether Borrower or others are joined in any such action.

Notwithstanding any provision to the contrary contained herein or in any other of the Loan Documents, Swap Contracts or Cash Management Agreements, the obligations of each Guarantor under this Agreement and the other Loan Documents shall be limited to an aggregate amount equal to the largest amount that would not render such obligations subject to avoidance under the Debtor Relief Laws or any comparable provisions of any applicable state law.

**4.02 Obligations Unconditional.** The obligations of the Guarantors under Section 4.01 are joint and several, absolute and unconditional, irrespective of the value, genuineness, validity, regularity or enforceability of any of the Loan Documents, Swap Contracts or Cash Management Agreements, or any other agreement or instrument referred to therein, or any substitution, release, impairment or exchange of any other guarantee of or security for any of the Secured Obligations, and, to the fullest extent permitted by applicable law, irrespective of any law or regulation or other circumstance whatsoever which might otherwise constitute a legal or equitable discharge or defense of a surety or guarantor, it being the intent of this Section 4.02 that the obligations of the Guarantors hereunder shall be absolute and unconditional under any and all circumstances. Each Guarantor agrees that such Guarantor shall have no right of subrogation, indemnity, reimbursement or contribution against Borrower or any other Guarantor for amounts paid under this Article IV until such time as the Secured Obligations (other than contingent indemnification obligations that survive the termination of this Agreement and obligations arising under Cash Management Agreements that survive the termination of this Agreement) have been paid in full and the Commitments have expired or terminated and the Facility Termination Date has occurred. Without limiting the generality of the foregoing, it is agreed that, to the fullest extent permitted by law, the occurrence of any one or more of the following shall not alter or impair the liability of any Guarantor hereunder, which shall remain absolute and unconditional as described above:

(a) at any time or from time to time, without notice to any Guarantor, the time for any performance of or compliance with any of the Secured Obligations shall be extended, or such performance or compliance shall be waived;

(b) any of the acts mentioned in any of the provisions of any of the Loan Documents, any Swap Contract between any Loan Party and any Hedge Bank, or any Cash Management Agreement between any Loan Party and any Cash Management Bank, or any other agreement or instrument referred to in the Loan Documents, such Swap Contracts or such Cash Management Agreements shall be done or omitted;

(c) the maturity of any of the Secured Obligations shall be accelerated, or any of the Secured Obligations shall be modified, supplemented or amended in any respect, or any right under any of the Loan Documents, any Swap Contract between any Loan Party and any Hedge Bank or any Cash Management Agreement between any Loan Party and any Cash Management Bank, or any other agreement or instrument referred to in the Loan Documents, such Swap Contracts or such Cash Management Agreements shall be waived or any other guarantee of any of the Secured Obligations or any security therefor shall be released, impaired or exchanged in whole or in part or otherwise dealt with;

(d) any Lien granted to, or in favor of, Administrative Agent or any Lender or Lenders as security for any of the Secured Obligations shall fail to attach or be perfected; or

(e) any of the Secured Obligations shall be determined to be void or voidable (including, without limitation, for the benefit of any creditor of any Guarantor) or shall be subordinated to the claims of any Person (including, without limitation, any creditor of any Guarantor).

Each Guarantor authorizes Administrative Agent and the other Secured Parties, without notice and without affecting such Guarantor's liability under this Guaranty, from time to time, to (a) renew, compromise, extend, accelerate, release, subordinate, waive, amend and restate, or otherwise amend or change, the interest rate, time or place for payment or any other terms of all or any part of the Secured Obligations; (b) accept delinquent or partial payments on the Secured Obligations; (c) take or not take security or other credit support for this Guaranty or for all or any part of the Secured Obligations, and exchange, enforce, waive, release, subordinate, fail to enforce or perfect, sell, or otherwise dispose of any such security or credit support; (d) apply proceeds of any such security or credit support and direct the order or manner of its sale or enforcement as Administrative Agent and the Required Lenders, at their sole discretion, may determine; and (e) release or substitute Borrower or any guarantor or other person or entity liable on the Secured Obligations.

Each Guarantor warrants having established with Borrower adequate means of obtaining, on an ongoing basis, such information as such Guarantor may require concerning all matters bearing on the risk of nonpayment or nonperformance of the Secured Obligations. Each Guarantor assumes sole, continuing responsibility for obtaining such information from sources other than from Secured Parties. No Secured Party has any duty to provide any information to any Guarantor.

With respect to its obligations hereunder, each Guarantor hereby expressly waives diligence, presentment, demand of payment, protest and all notices whatsoever (including notices of dishonor, notices of acceptance of this Guaranty and of the existence or creation of new or additional Secured Obligations), and any requirement that Administrative Agent or any Lender

exhaust any right, power or remedy or proceed against any Person under any of the Loan Documents, any Swap Contract between any Loan Party and any Hedge Bank or any Cash Management Agreement between any Loan Party and any Cash Management Bank, or any other agreement or instrument referred to in the Loan Documents, such Swap Contracts or such Cash Management Agreements, or against any other Person under any other guarantee of, or security for, any of the Secured Obligations.

4.03 **Reinstatement.** The obligations of the Guarantors under this Article IV shall be automatically reinstated if and to the extent that for any reason any payment by or on behalf of any Person in respect of the Secured Obligations is rescinded or must be otherwise restored by any holder of any of the Secured Obligations, whether as a result of any proceedings in bankruptcy or reorganization or otherwise, and each Guarantor agrees that it will indemnify Administrative Agent and each Lender on demand for all reasonable costs and expenses (including, without limitation, the fees, charges and disbursements of counsel) incurred by Administrative Agent or such Lender in connection with such rescission or restoration, including any such costs and expenses incurred in defending against any claim alleging that such payment constituted a preference, fraudulent transfer or similar payment under any bankruptcy, insolvency or similar law.

4.04 **Certain Additional Waivers.**

(a) Each Guarantor agrees that such Guarantor shall have no right of recourse to security for the Secured Obligations, except through the exercise of rights of subrogation pursuant to Section 4.02 and through the exercise of rights of contribution pursuant to Section 4.06.

(b) To the maximum extent permitted by law, each Guarantor waives (i) all rights to require any Secured Party to proceed against Borrower, or any other guarantor, or proceed against, enforce or exhaust any security for the Secured Obligations or to marshal assets or to pursue any other remedy in any Secured Party's power whatsoever; (ii) all defenses arising by reason of any disability or other defense of Borrower, the cessation for any reason of the liability of Borrower, any defense that any other indemnity, guaranty or security was to be obtained, any claim that any Secured Party has made such Guarantor's obligations more burdensome or more burdensome than Borrower's or any other Guarantor's obligations, and the use of any proceeds of the Secured Obligations other than as intended or understood by any Secured Party or any Guarantor; (iii) all conditions precedent to the effectiveness of this Guaranty; (iv) all rights to file a claim in connection with the Secured Obligations in any bankruptcy or insolvency filed by or against Borrower; (v) all rights to require any Secured Party to enforce any of its remedies; (vi) any setoff, defense or counterclaim against any Secured Party, (vii) the benefit of any act or omission by any Secured Party which directly or indirectly results in or aids the discharge of Borrower or any other Guarantor from any of the Secured Obligations by operation of law or otherwise; (viii) the benefit of California Civil Code Section 2815 permitting the revocation of this Guaranty as to future transactions and the benefit of California Civil Code Sections 2809, 2810, 2819, 2839, 2845, 2848, 2849, 2850, 2899 and 1432 with respect to certain suretyship defenses, provided, that with respect to Sections 2847, 2848 and 2849 of the California Civil Code, such waivers shall only be effective until the Facility

Termination Date; and (ix) all rights, remedies and defenses such Guarantor may have or acquire against Borrower or any other Guarantor.

(c) Each Guarantor understands that if Bank forecloses by trustee's sale on a deed of trust securing any of the Secured Obligations, Guarantor would then have a defense preventing Administrative Agent from thereafter enforcing Guarantor's liability for the unpaid balance of the Secured Obligations. This defense arises because the trustee's sale would eliminate such Guarantor's right of subrogation, and therefore Guarantor would be unable to obtain reimbursement from Borrower. Each Guarantor specifically waives this defense and all rights and defenses that Guarantor may have because the Secured Obligations are secured by real property. This means, among other things: (i) Administrative Agent and the other Secured Parties may collect from each Guarantor without first foreclosing on any real or personal property collateral pledged by Borrower; and (ii) if Administrative Agent or any of the other Secured Parties forecloses on any real property collateral pledged by Borrower: (A) the amount of the Secured Obligations may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price; and (ii) Administrative Agent and the other Secured Parties may collect from Guarantor even if Administrative Agent and the other Secured Parties, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from Borrower. This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because the Secured Obligations are, or may be, secured by real property. These rights and defenses include, but are not limited to, any rights or defenses based upon Section 580a, 580b, 580d or 726 of the California Code of Civil Procedure or similar laws in other states.

4.05 **Remedies.** The Guarantors agree that, to the fullest extent permitted by law, as between the Guarantors, on the one hand, and Administrative Agent and the Lenders, on the other hand, the Secured Obligations may be declared to be forthwith due and payable as provided in Section 9.02 (and shall be deemed to have become automatically due and payable in the circumstances provided in said Section 9.02) for purposes of Section 4.01 notwithstanding any stay, injunction or other prohibition preventing such declaration (or preventing the Secured Obligations from becoming automatically due and payable) as against any other Person and that, in the event of such declaration (or the Secured Obligations being deemed to have become automatically due and payable), the Secured Obligations (whether or not due and payable by any other Person) shall forthwith become due and payable by the Guarantors for purposes of Section 4.01. The Guarantors acknowledge and agree that their obligations hereunder are secured in accordance with the terms of the Collateral Documents and that the Lenders may exercise their remedies thereunder in accordance with the terms thereof.

4.06 **Rights of Contribution.** The Guarantors agree among themselves that, in connection with payments made hereunder, each Guarantor shall have contribution rights against the other Guarantors as permitted under applicable law. Such contribution rights shall be subordinate and subject in right of payment to the obligations of such Guarantors under the Loan Documents and no Guarantor shall exercise such rights of contribution until all Secured Obligations (other than contingent indemnification obligations that survive the termination of this Agreement and obligations arising under Cash Management Agreements that survive the termination of this Agreement) have been paid in full and the Facility Termination Date shall have occurred.

4.07 **Subordination.** All obligations of Borrower to each Guarantor which presently or in the future may exist (“**Guarantor’s Claims**”) are hereby subordinated to the Secured Obligations, provided, that so long as no Event of Default exists, or would result after giving effect thereto, Borrower may make payments of principal and interest with respect to such obligations. At Administrative Agent’s request, Guarantor’s Claims will be enforced and performance thereon received by Guarantor only as a trustee for Administrative Agent and the Secured Parties, and each Guarantor will promptly pay over to Administrative Agent all proceeds recovered for application to the Secured Obligations without reducing or affecting such Guarantor’s liability under other provisions of this Guaranty. Any Lien or charge on the property securing the obligations, and on the revenue and income to be realized therefrom, which any Guarantor may have or obtain shall be, and such lien or charge hereby is, subordinated to Administrative Agent’s Lien on such property. Each Guarantor agrees that it shall file any and all claims against Borrower in any bankruptcy or insolvency proceeding in which the filing of claims is required by law on any Indebtedness of Borrower to such Guarantor, and will assign to Administrative Agent, for the benefit of Lenders, all rights of such Guarantor. If such Guarantor does not file such claim, Administrative Agent, as attorney-in-fact for Guarantor, is authorized to do so in the name of Guarantor or, in Administrative Agent’s sole discretion, to assign the claim and to file a proof of claim in the name of Administrative Agent or Administrative Agent’s nominee. In all such cases, whether in bankruptcy or otherwise, the person or persons authorized to pay such claim shall pay to Administrative Agent the full amount of any such claim, and, to the full extent necessary for that purpose, Guarantor assigns to Administrative Agent all of Guarantor’s rights to any such payments or distributions to which Guarantor would otherwise be entitled. All monies or other property of any Guarantor at any time in Administrative Agent’s or any Secured Party’s possession may be held by Administrative Agent or such Secured Party as security for any and all obligations of such Guarantor to Administrative Agent or the other Secured Parties no matter how or when arising, whether absolute or contingent, whether due or to become due, and whether under this Guaranty or otherwise. Guarantor also agrees that Administrative Agent books and records showing the account between Administrative Agent and Borrower or any other guarantor shall be admissible in any action or proceeding and shall be binding upon each Guarantor for the purpose of establishing the terms set forth therein and shall constitute prima facie proof thereof.

4.08 **Guarantee of Payment; Continuing Guarantee.** The guarantee in this Article IV is a guaranty of payment and not of collection, is a continuing guarantee, and shall apply to all Secured Obligations whenever arising.

4.09 **The Keepwell.**

(a) Each Qualified ECP Guarantor hereby jointly and severally absolutely, unconditionally and irrevocably undertakes to provide such funds or other support as may be needed from time to time by each other Guarantor to honor all of its obligations under this guarantee in respect of all Swap Obligations (provided, however, that each Qualified ECP Guarantor shall only be liable under this Section 4.09 for the maximum amount of such liability that can be hereby incurred without rendering its obligations under this Section 4.09, or otherwise under this Guarantee as it relates to such other Guarantor, voidable under applicable law relating to fraudulent conveyance or fraudulent transfer, and not for any greater amount). The obligations of each Qualified ECP Guarantor under this Section 4.09 shall remain in full

force and effect until a full discharge of the Guarantor Obligations. Each Qualified ECP Guarantor intends that this Section 4.09 constitute, and this Section 4.09 shall be deemed to constitute, a “keepwell, support, or other agreement” for the benefit of each other Loan Party for all purposes of Section 1a(18)(A)(v)(II) of the Commodity Exchange Act. Notwithstanding anything herein to the contrary, if a Guarantor or a Swap Counterparty makes a written representation to the Lenders in connection with a Guarantee, a Swap Contract, or any master agreement governing a Swap Obligation to the effect that Guarantor is or will be an “eligible contract participant” as defined in the Commodity Exchange Act on the date the Guarantee becomes effective with respect to such Swap Obligation (this date shall be the date of the execution of the Swap Contract if the corresponding Guarantee is then in effect, and otherwise it shall be the date of execution and delivery of such Guarantee unless the Guarantee specifies a subsequent effective date), and such representation proves to have been incorrect when made or deemed to have been made, the Lenders reserve all of their contractual and other rights and remedies, at law or in equity, including (to the extent permitted by applicable law) the right to claim, and pursue a separate cause of action, for damages as a result of such misrepresentation, provided that such Guarantor’s liability for such damages shall not exceed the amount of the Excluded Swap Obligations with respect to such Swap Obligation.

## ARTICLE V

### CONDITIONS PRECEDENT TO CREDIT EXTENSIONS

5.01 **Conditions of Initial Credit Extension.** This Agreement shall become effective upon and the obligation of the L/C Issuer and each Lender to make its initial Credit Extension hereunder is subject to satisfaction of the following conditions precedent:

(a) Administrative Agent’s receipt of the following, each of which shall be originals or telecopies (followed promptly by originals) unless otherwise specified, each properly executed by a Responsible Officer of the signing Loan Party, each dated the Closing Date (or, in the case of certificates of governmental officials, a recent date before the Closing Date) and each in form and substance satisfactory to Administrative Agent and each of the Lenders:

(i) executed counterparts of this Agreement, the Security Agreement, the Pledge Agreement, sufficient in number for distribution to Administrative Agent, each Lender and Borrower;

(ii) a Note executed by Borrower in favor of each Lender requesting a Note;

(iii) each of the Collateral Documents required by Administrative Agent to be executed and delivered on the date hereof, duly executed by each Loan Party, together with:

(A) copies of the Organization Documents of each Loan Party certified to be true and complete as of a recent date by the appropriate Governmental Authority of the state or other jurisdiction of its



incorporation or organization, where applicable, and certified by a secretary or assistant secretary of such Loan Party to be true and correct;

(B)all certificates representing any Equity Interests required to be delivered thereby accompanied by undated transfer powers executed in blank, as applicable,

(C)proper financing statements in form appropriate for filing under the Uniform Commercial Code of all jurisdictions that Administrative Agent may deem necessary or desirable in order to perfect the Liens created under such Collateral Documents, covering the Collateral described therein, in each case as a first priority Lien (subject only to Permitted Liens),

(D)completed requests for information, dated on or before the date of the initial Credit Extension, listing the financing statements referred to in clause (C) above and all other effective financing statements filed in the jurisdictions referred to in clause (B) above that name any Loan Party as debtor, together with copies of such other financing statements, and

(E)evidence of the completion of all other actions, recordings and filings of or with respect to the Collateral Documents that Administrative Agent may deem necessary or desirable in order to perfect the Liens created thereby, in each case as a first priority Lien (subject only to Permitted Liens);

(iv) such certificates of resolutions or other action, incumbency certificates and/or other certificates of Responsible Officers of each Loan Party as Administrative Agent may require evidencing the identity, authority and capacity of each Responsible Officer thereof authorized to act as a Responsible Officer in connection with this Agreement and the other Loan Documents to which such Loan Party is a party;

(v) such documents and certifications as Administrative Agent may reasonably require to evidence that each Loan Party is duly organized or formed, and that each Loan Party is validly existing, in good standing and qualified to engage in business in each jurisdiction where its ownership, lease or operation of properties or the conduct of its business requires such qualification, except to the extent that failure to do so could not reasonably be expected to have a Material Adverse Effect;

(vi) a favorable opinion of Wilson Sonsini Goodrich & Rosati, counsel to the Loan Parties, addressed to Administrative Agent and each Lender, in form and substance reasonably satisfactory to Administrative Agent and the Required Lenders;

(vii) a certificate of a Responsible Officer of each Loan Party either (A) attaching copies of all consents, licenses and approvals required in connection with the execution, delivery and performance by such Loan Party and the validity against such Loan Party of the Loan Documents to which it is a party, and such consents, licenses and approvals shall be in full force and effect, or (B) stating that no such consents, licenses or approvals are so required;

(viii) a certificate signed by a Responsible Officer of Borrower certifying (A) that the conditions specified in Sections 5.02(a) and (b) have been satisfied, (B) that there has been no event or circumstance since the date of the Audited Financial Statements that has had or could be reasonably expected to have, either individually or in the aggregate, a Material Adverse Effect, (C) after giving effect to this Agreement and the other Loan Documents (including after giving effect to the initial Loans under this Agreement), Borrower will be Solvent, (D) a calculation of the Consolidated Leverage Ratio as of the last day of the fiscal quarter of Borrower most recently ended, and (E) the other matters set forth on Exhibit L;

(ix) a complete search of the records of each filing office where a financing statement (including under the Uniform Commercial Code), judgment Lien, tax Lien or other Lien naming a Loan Party or any other party must be filed to perfect Administrative Agent's security interest and Lien, for the benefit of the Secured Parties, in any of the Collateral, which searches shall be reasonably satisfactory to Administrative Agent;

(x) evidence that all insurance required to be maintained pursuant to the Loan Documents has been obtained and is in effect;

(xi) a duly completed Compliance Certificate as of the last day of the fiscal quarter of Borrower ended March 31, 2015, signed by a Responsible Officer of Borrower; and

(xii) such other assurances, certificates, documents, consents or opinions as Administrative Agent, the L/C Issuer or the Required Lenders reasonably may require.

(b) Any fees required to be paid in connection with this Agreement on or before the Closing Date shall have been paid.

(c) Unless waived by Administrative Agent, Borrower shall have paid all reasonable fees, charges and disbursements of counsel to Administrative Agent (directly to such counsel if requested by Administrative Agent) to the extent invoiced prior to or on the Closing Date, plus such additional amounts of such fees, charges and disbursements as shall constitute its reasonable estimate of such fees, charges and disbursements incurred or to be incurred by it through the closing proceedings (provided that such estimate shall not thereafter preclude a final settling of accounts between Borrower and Administrative Agent).

(d) The Closing Date shall have occurred on or before June 30, 2015.

Without limiting the generality of the provisions of the last paragraph of Section 10.03(d), for purposes of determining compliance with the conditions specified in this Section 5.01, each Lender that has signed this Agreement shall be deemed to have consented to, approved or accepted or to be satisfied with, each document or other matter required thereunder to be consented to or approved by or acceptable or satisfactory to a Lender unless Administrative Agent shall have received notice from such Lender prior to the proposed Closing Date specifying its objection thereto.

5.02 **Conditions to all Credit Extensions.** The obligation of each Lender to honor any Request for Credit Extension (other than a conversion or continuation of a Loan) is subject to the satisfaction of the following conditions precedent:

(a) The representations and warranties of Borrower and each other Loan Party contained in Article VI or any other Loan Document, or which are contained in any document furnished at any time under or in connection herewith or therewith, shall be true and correct in all material respects on and as of the date of such Credit Extension, except that (w) if a qualifier relating to materiality, Material Adverse Effect or a similar concept applies, such representation and warranty shall be required to be true and correct in all respects, (x) to the extent such representations and warranties specifically refer to an earlier date, such representations and warranties shall be true and correct as of such earlier date, and (y) for purposes of this Section 5.02, the representations and warranties contained in subsections (a) and (b) of Section 6.05 shall be deemed to refer to the most recent statements furnished pursuant to subsections (a) and (b), respectively, of Section 7.01.

(b) No Default shall exist, or would result from such proposed Credit Extension or from the application of the proceeds thereof.

(c) Administrative Agent and, if applicable, the L/C Issuer shall have received a Request for Credit Extension in accordance with the requirements hereof.

(d) No event or circumstance has occurred or exists that could reasonably be expected to have a Material Adverse Effect.

Each Request for Credit Extension submitted by Borrower shall be deemed to be a representation and warranty that the conditions specified in Sections 5.02(a) and (b) have been satisfied on and as of the date of the applicable Credit Extension.

## **ARTICLE VI**

### **REPRESENTATIONS AND WARRANTIES**

Each Loan Party represents and warrants (and each request for a disbursement of the proceeds of each Loan shall be deemed a representation and warranty made on the date of such request) to Administrative Agent and the Lenders that:

6.01 **Existence, Qualification and Power.** Each Loan Party and each Subsidiary thereof (a) is duly organized or formed, validly existing and, as applicable, in good standing under the Laws of the jurisdiction of its incorporation or organization, (b) has all requisite power

and authority and all requisite governmental licenses, authorizations, consents and approvals to (i) own or lease its assets and carry on its business and (ii) execute, deliver and perform its obligations under the Loan Documents to which it is a party, and (c) is duly qualified and is licensed and, as applicable, in good standing under the Laws of each jurisdiction where its ownership, lease or operation of properties or the conduct of its business requires such qualification or license; except in each case referred to in clause (b)(i) or (c), to the extent that failure to do so could not reasonably be expected to have a Material Adverse Effect. Each Loan Party and each Subsidiary thereof possesses all permits, consents, approvals, franchises and licenses required and rights to all trademarks, trade names, patents, and fictitious names, if any, necessary to enable it to conduct the business in which it is now engaged in compliance with applicable Law, except where the failure to do so could not reasonably be expected to have a Material Adverse Effect. As of the Closing Date, Borrower's principal place of business and chief executive office is located at 1100 Park Place, 4th Floor, San Mateo, California 94403.

6.02 **Authorization; No Contravention.** The execution, delivery and performance by each Loan Party of each Loan Document to which such Person is party, have been duly authorized by all necessary corporate or other organizational action, and do not and will not (a) contravene the terms of any of such Person's Organization Documents; (b) conflict with or result in any breach or contravention of, or except for the Liens created pursuant to the Loan Documents, the creation of any Lien under, or require any payment to be made under (i) any Contractual Obligation to which such Person is a party or affecting such Person or the properties of such Person or any of its Subsidiaries or (ii) any order, injunction, writ or decree of any Governmental Authority or any arbitral award to which such Person or its property is subject; or (c) violate in any material respect any Law (including, without limitation, Regulation U or Regulation X issued by the FRB).

6.03 **Governmental Authorization; Other Consents.** No approval, consent, exemption, authorization, or other action by, or notice to, or filing with, any Governmental Authority or any other Person is necessary or required in connection with the execution, delivery or performance by, or enforcement against, any Loan Party of this Agreement or any other Loan Document other than (a) those that have already been obtained and are in full force and effect, (b) authorizations, approvals, actions, notices and filings contemplated by the Collateral Documents, (c) notices and filings which customarily are required in connection with the exercise of remedies in respect of the Collateral, and (d) those approvals, consents, exemptions, authorizations, actions, notices or filings the failure of which to obtain, take, give or make could not be reasonably expected to have a Material Adverse Effect.

6.04 **Binding Effect.** This Agreement has been, and each other Loan Document, when delivered hereunder, will have been, duly executed and delivered by each Loan Party that is party thereto. This Agreement constitutes, and each other Loan Document when so delivered will constitute, a legal, valid and binding obligation of such Loan Party, enforceable against each Loan Party that is party thereto in accordance with its terms, except as enforcement may be limited by Debtor Relief Law or equitable principles relating to the granting of specific performance and other equitable remedies as a matter of judicial discretion.

**6.05 Financial Statements; No Material Adverse Effect.**

(a) The Audited Financial Statements (i) were prepared in accordance with GAAP consistently applied throughout the period covered thereby, except as otherwise expressly noted therein; (ii) fairly present in all material respects the financial condition of Borrower and its Subsidiaries on a consolidated basis as of the date thereof and their results of operations for the period covered thereby in accordance with GAAP consistently applied throughout the period covered thereby (subject in the case of interim unaudited financial statements, to normal year-end adjustments and the absence of footnotes); and (iii) show all material indebtedness and other liabilities, direct or contingent, of Borrower and its Subsidiaries, on a consolidated basis, as of the date thereof, including liabilities for taxes, material commitments and Indebtedness.

(b) The unaudited consolidated and consolidating balance sheets of Borrower and its Subsidiaries dated March 31, 2015, and the related consolidated and consolidating statements of income or operations, shareholders' equity and cash flows for the fiscal quarter ended on that date (i) were prepared in accordance with GAAP consistently applied throughout the period covered thereby, except as otherwise expressly noted therein, and (ii) fairly present in all material respects the financial condition of Borrower and its Subsidiaries, on a consolidated basis, as of the date thereof and their results of operations for the period covered thereby, subject, in the case of clauses (i) and (ii), to the absence of footnotes and to normal year-end audit adjustments. Schedule 6.05 to the Disclosure Letter sets forth all material indebtedness and other liabilities, direct or contingent, of Borrower and its consolidated Subsidiaries as of the date of such financial statements, including liabilities for taxes, material commitments and Indebtedness.

(c) Since the date of the Audited Financial Statements, (i) there has been no event or circumstance, either individually or in the aggregate, that has had or could reasonably be expected to have a Material Adverse Effect, (ii) Borrower has not mortgaged, pledged, granted a security interest in or otherwise encumbered any of its assets or properties except for Permitted Liens and except for Liens to secure the Existing Credit Agreement; (iii) there has been no Disposition by any Loan Party or any Subsidiary, or any Involuntary Disposition, of any material part of the business or property of any Loan Party or any Subsidiary; and (iv) there has been no purchase or other Acquisition by any of them of any business or property (including any Equity Interests of any other Person) material to any Loan Party or any Subsidiary, in each case, which is not reflected in the foregoing financial statements or in the notes thereto or has not otherwise been disclosed in writing to Administrative Agent. Borrower is not aware of any fact, occurrence or circumstance which Borrower has not disclosed to Administrative Agent, the L/C Issuer and the Lenders in writing which has, or could reasonably be expected to have, a material adverse effect on Borrower's or any other Loan Party's ability to repay the Obligations or perform its obligations under this Agreement or the other Loan Documents.

(d) The consolidated and consolidating forecasted balance sheet and statements of income and cash flows of Borrower and its Subsidiaries delivered to Administrative Agent prior to the Closing Date were prepared in good faith on the basis of the assumptions stated therein, which assumptions were fair in light of the conditions existing at the time of delivery of such forecasts, and represented, at the time of delivery, Borrower's best estimate of its future financial condition and performance (it being understood that forecasts and projections are not to be viewed as facts and that actual results during the period or periods

covered by the forecasts or projections may differ from the forecasts and projections and that such differences may be material).

6.06 **Litigation.** Except for matters specifically disclosed in Schedule 6.06 to the Disclosure Letter or disclosed pursuant to Section 7.02, there are no actions, suits, proceedings, claims or disputes pending, or, to the knowledge of Borrower, after due and diligent investigation, threatened in writing or contemplated in writing, at law, in equity, in arbitration or before any Governmental Authority, arbitrator or administrative agency, by or against Borrower or any of its Subsidiaries or against any of their properties or revenues (a) that purport to affect or pertain to this Agreement or any other Loan Document, or any of the transactions contemplated hereby, (b) where the amount in controversy is \$500,000 or more or (c) either individually or in the aggregate could reasonably be expected to have a Material Adverse Effect.

6.07 **No Default.** Neither any Loan Party nor any Subsidiary thereof is in default under or with respect to any Contractual Obligation that could, either individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. No Default has occurred and is continuing or would result from the consummation of the transactions contemplated by this Agreement or any other Loan Document.

6.08 **Ownership of Property; Liens.** Each Loan Party and each Subsidiary of each Loan Party has good record and valid title in fee simple to, or valid leasehold interests in, all real property necessary or used in the ordinary conduct of its business, except for such exceptions in title as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. The property of each Loan Party and each of their Subsidiaries is subject to no Liens, other than Liens permitted by Section 8.01. Borrower is the sole owner of, or has rights to use, Borrower's Intellectual Property, except for non-exclusive licenses granted by Borrower to its customers in the ordinary course of business.

6.09 **Environmental Compliance.** Each Loan Party is in compliance with all applicable Environmental Laws, which govern or affect any of such Loan Party's operations and/or properties, including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Superfund Amendments and Reauthorization Act of 1986, the Federal Resource Conservation and Recovery Act of 1976, and the Federal Toxic Substances Control Act, as any of the same may be amended, modified or supplemented from time to time except to the extent such non-compliance could not reasonably be expected to have a Material Adverse Effect. None of the operations of any Loan Party is the subject of any federal or state investigation evaluating whether any remedial action involving a material expenditure is needed to respond to a release of any toxic or hazardous waste or substance into the environment. No Loan Party has any material contingent liability in connection with any release of any toxic or hazardous waste or substance into the environment.

6.10 **Insurance.** The properties of each Loan Party and each of their Subsidiaries are insured with financially sound and reputable insurance companies not Affiliates of Borrower, in such amounts, with such deductibles and covering such risks as are customarily carried by companies engaged in similar businesses and owning similar properties in localities where the Loan Party or the applicable Subsidiary operates. The insurance coverage of the Loan Parties

and their Subsidiaries as in effect on the Closing Date is outlined as to carrier, policy number, expiration date, type, amount and deductibles on Schedule 6.10 to the Disclosure Letter.

6.11 **Taxes.** Each Loan Party and each of their Subsidiaries have filed or caused to be filed (or have obtained appropriate extensions for filing of) all Federal and state income and other material tax returns and reports required to be filed, and have paid or caused to be paid all Federal and state income and other material taxes, assessments, fees and other governmental charges levied or imposed upon them or their properties, income or assets otherwise due and payable, except (a) those which are being contested in good faith by appropriate proceedings diligently conducted and for which adequate reserves have been provided in accordance with GAAP and which could not reasonably be expected to result in any Lien upon the Collateral other than a Permitted Lien or (b) which individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect. There is no proposed tax assessment against Borrower or any Subsidiary that would, if made, have a Material Adverse Effect. With respect to any contest referenced in clause (a) above, Borrower shall notify Administrative Agent in writing of the commencement of, and any material development in, the proceedings.

6.12 **ERISA Compliance.**

(a) Each Plan is in compliance in all material respects with the applicable provisions of ERISA, the Code and other Federal or state Laws. Each Plan that is intended to qualify under Section 401(a) of the Code has received a favorable determination, advisory or opinion letter from the IRS or an application for such a letter is currently being processed by the IRS with respect thereto and, to the best knowledge of Borrower, nothing has occurred which would prevent, or cause the loss of, such qualification. Borrower and each ERISA Affiliate have made all required contributions to each Plan subject to Section 412 of the Code, and no application for a funding waiver or an extension of any amortization period pursuant to Section 412 of the Code has been made with respect to any Plan.

(b) There are no pending or, to the best knowledge of Borrower, threatened claims, actions or lawsuits, or action by any Governmental Authority, with respect to any Plan that could be reasonably be expected to have a Material Adverse Effect. Neither Borrower nor any ERISA Affiliate has engaged in any non-exempt prohibited transaction under Section 4975 of the Code or Section 406 of ERISA, or any violation of the fiduciary responsibility rules under Section 404 of ERISA with respect to any Plan that has resulted or could reasonably be expected to result in a Material Adverse Effect.

(c) (i) No ERISA Event has occurred or is reasonably expected to occur; (ii) no Pension Plan has any Unfunded Pension Liability in excess of \$250,000; (iii) neither Borrower nor any ERISA Affiliate has incurred, or reasonably expects to incur, any liability under Title IV of ERISA with respect to any Pension Plan (other than premiums due and not delinquent under Section 4007 of ERISA); (iv) neither Borrower nor any ERISA Affiliate has incurred, or reasonably expects to incur, any liability (and no event has occurred which, with the giving of notice under Section 4219 of ERISA, would result in such liability) under Section 4201 or 4243 of ERISA with respect to a Multiemployer Plan; and (v) neither Borrower nor any ERISA Affiliate has engaged in a transaction that could be subject to Section 4069(a) or 4212(c) of ERISA.

6.13 **Subsidiaries; Equity Interests.** As of the Closing Date, Borrower has no Subsidiaries other than those specifically disclosed in Part (a) of Schedule 6.13 to the Disclosure Letter, and (a) all of the outstanding Equity Interests in such Subsidiaries have been validly issued, are fully paid and nonassessable and (b) are owned by a Loan Party in the amounts specified on Part (a) of Schedule 6.13 to the Disclosure Letter free and clear of all Liens other than Liens permitted by Section 8.01. As of the Closing Date, Borrower has no direct or indirect equity investments in any other Person other than those specifically disclosed in Part (b) of Schedule 6.13 to the Disclosure Letter. As of the Closing Date, Borrower has no Material Subsidiaries. All of the outstanding Equity Interests in each Loan Party have been validly issued and are fully paid and nonassessable. Borrower does not own any Equity Interests in any Person except for Permitted Investments.

6.14 **Margin Regulations; Investment Company Act; OFAC; Patriot Act, Etc.**

(a) Borrower is not engaged and will not engage, principally or as one of its important activities, in the business of, and no part of the Credit Extensions will be used directly or indirectly for, purchasing or carrying margin stock (within the meaning of Regulation U issued by the FRB), or extending credit for the purpose of purchasing or carrying margin stock. Following the application of the proceeds of each Borrowing or drawing under each Letter of Credit, not more than 25% of the value of the assets (either of Borrower only or of Borrower and its Subsidiaries on a consolidated basis) subject to the provisions of Article VIII or subject to any restriction contained in any agreement or instrument between Borrower and any Lender or any Affiliate of any Lender relating to Indebtedness and within the scope of Section 9.01(e) will be margin stock.

(b) No Loan Party, or any Person Controlling Borrower, nor any Subsidiary or any Loan Party is, or is required to be registered as, an “investment company” under the Investment Company Act of 1940.

(c) No Loan Party or any of their Subsidiaries, nor, to the knowledge of any Loan Party, any Related Party, (i) is currently the subject or target of any Sanctions, (ii) is located, organized or residing in any Designated Jurisdiction, (iii) is or has been (within the previous five (5) years) engaged in any transaction with any Person who is now or was then the subject of Sanctions or who is located, organized or residing in any Designated Jurisdiction, (iv) included on OFAC’s List of Specially Designated Nationals, HMT’s Consolidated List of Financial Sanctions Targets and the Investment Ban List, or any similar list enforced by any other relevant sanctions authority. No Loan, nor the proceeds from any Loan, has been used, directly or indirectly, to lend, contribute, provide or has otherwise made available to fund any activity or business in any Designated Jurisdiction or to fund any activity or business of any Person located, organized or residing in any Designated Jurisdiction or who is the subject of any Sanctions, or in any other manner that will result in any violation by any Person (including any Lender, Administrative Agent or the L/C Issuer) of Sanctions.

(d) Borrower and its Subsidiaries are in compliance with (1) the Trading with the Enemy Act, as amended, and each of the foreign assets control regulations of the United States Treasury Department (31 CFR, Subtitle B, Chapter V, as amended) and any other enabling legislation or executive order relating thereto, and (2) the Patriot Act. Borrower and its



Subsidiaries have conducted their businesses in compliance with the United States Foreign Corrupt Practices Act of 1977, the UK Bribery Act 2010, and other similar anti-corruption legislation in other jurisdictions, and have instituted and maintained policies and procedures designed to promote and achieve compliance with such laws. No part of the proceeds of any Credit Extension, will be used, directly or indirectly, for any payments to any governmental official or employee, political party, official of a political party, candidate for political office, or anyone else acting in an official capacity, in order to obtain, retain or direct business or obtain any improper advantage, in violation of the United States Foreign Corrupt Practices Act of 1977, as amended.

6.15 **Disclosure.** Each Loan Party has disclosed to Administrative Agent and Lenders all agreements, instruments and corporate or other restrictions to which it or any of its Subsidiaries is subject, and all other matters known to it, that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect. No report, financial statement, certificate or other information furnished (whether in writing or orally) by or on behalf of any Loan Party to Administrative Agent or any Lender in connection with the transactions contemplated hereby and the negotiation of this Agreement or delivered hereunder or under any other Loan Document (in each case, as modified or supplemented by other information so furnished and taken together with Borrower's filings with the SEC) contains any material misstatement of fact or omits to state any material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided that, with respect to projected financial information, the Loan Parties represent only that such information was prepared in good faith based upon assumptions believed to be reasonable at the time (it being understood that forecasts and projections are not to be viewed as facts and that actual results during the period or periods covered by the forecasts or projections may differ from the forecasts and projections and that such differences may be material).

6.16 **Compliance with Laws.** Each Loan Party and each Subsidiary thereof is in compliance in all material respects with the requirements of all Laws and all orders, writs, injunctions and decrees applicable to it or to its properties, except in such instances in which (a) such requirement of Law or order, writ, injunction or decree is being contested in good faith by appropriate proceedings diligently conducted or (b) the failure to comply therewith, either individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect. Borrower and each of its Subsidiaries has complied in all material respects with the Federal Fair Labor Standards Act.

6.17 **Solvency.** Borrower and the other Loan Parties, taken as a whole, are Solvent.

6.18 **Labor Matters.** There are no collective bargaining agreements or Multiemployer Plans covering the employees of Borrower or any of its Domestic Subsidiaries or such other Subsidiaries located in the United States as of the Closing Date.

6.19 **Business Locations.** Set forth on Schedule 6.19(a) to the Disclosure Letter is a list of all real property located in the United States that is owned by the Loan Parties as of the Closing Date. Set forth on Schedule 6.19(b) to the Disclosure Letter is the tax payer identification number and organizational identification number of each Loan Party as of the Closing Date. The exact legal name and state of organization of each Loan Party is as set forth

on the signature pages hereto or as notified to Administrative Agent pursuant to Section 7.02(g). Except as set forth on Schedule 6.19(c) to the Disclosure Letter, no Loan Party has during the five years preceding the Closing Date (i) changed its legal name, (ii) changed its state of formation, or (iii) been party to a merger, consolidation or other change in structure.

**6.20 Intellectual Property; Licenses, Etc.**

(a) Each Loan Party and its Subsidiaries own, or possess the legal right to use, all of the IP Rights that are reasonably necessary for the operation of their respective businesses. Set forth on Part A of Schedule 6.20 to the Disclosure Letter is a list of all IP Rights registered or in respect of which an application for registration has been filed or recorded with the United States Copyright Office or the United States Patent and Trademark Office and owned by each Loan Party as of the Closing Date. Except for such claims and infringements that could not reasonably be expected to have a Material Adverse Effect, no claim has been asserted and is pending by any Person challenging or questioning the use of any IP Rights or the validity or enforceability of any IP Rights, alleging any violation of such Person's privacy rights, nor does any Loan Party know of any such claim, and, to the knowledge of the Loan Parties, the use of any IP Rights by any Loan Party or any of its Subsidiaries or the granting of a right or a license in respect of any IP Rights from any Loan Party or any of its Subsidiaries does not infringe, violate or misappropriate the rights of any Person. Except as set forth on Part A of Schedule 6.20 to the Disclosure Letter, none of the Material IP Rights owned by any of the Loan Parties or any of its Subsidiaries is subject to any licensing agreement or similar arrangement (other than nonexclusive licenses granted to customers and other relevant parties in the ordinary course of business).

**6.21 Rights in Collateral; Priority of Liens.** Borrower and each other Loan Party own or have rights in the property granted by it as Collateral under the Collateral Documents, free and clear of any and all Liens in favor of third parties except Liens permitted pursuant to Section 8.01. Upon the due and proper filing of UCC financing statements, and the taking of the other actions required by the Required Lenders to perfect the security interests in the Collateral, the Liens granted pursuant to the Collateral Documents will constitute valid and enforceable first, prior and perfected Liens on the Collateral, subject only to Permitted Liens, in favor of Administrative Agent, for the ratable benefit of Administrative Agent and Lenders. There is no agreement, indenture, contract or instrument to which Borrower or any other Loan Party is a party or by which any Loan Party may be bound that requires the subordination in right of payment of any of Borrower's or such Loan Party's obligations subject to this Agreement or any other Loan Document to any other obligation of Borrower or the other Loan Parties. Except as disclosed on Schedule 6.21 of the Disclosure Letter or as timely disclosed in writing to Administrative Agent pursuant hereto, no Loan Party is a party to, or is bound by, any Restricted Agreement.

**ARTICLE VII**

**AFFIRMATIVE COVENANTS**

So long as any Lender shall have any Commitment hereunder, any Loan (together with any and all accrued interest fees or expenses hereunder shall remain unpaid or unsatisfied, any

Letter of Credit or L/C Obligations shall remain outstanding or any Secured Obligations with respect to Cash Management Agreements remain outstanding as to which cash collateral or other arrangements with respect thereto satisfactory to the applicable Cash Management Bank, in its good faith business judgment, have not been made, Borrower and each Loan Party, as applicable shall, and shall (except in the case of the covenants set forth in Sections 7.01, 7.02, and 7.03) cause each Subsidiary to:

7.01 **Financial Statements.** Deliver to Administrative Agent and each Lender, in form and detail satisfactory to Administrative Agent and the Required Lenders:

(a) as soon as available, but in any event within ninety (90) days after the end of each fiscal year of Borrower (or if earlier, 5 Business Days after the date required to be filed with the SEC), a consolidated balance sheet of Borrower and its Subsidiaries as at the end of such fiscal year, and the related consolidated statements of income or operations, retained earnings, changes in shareholders' equity and cash flows for such fiscal year, setting forth in each case in comparative form the figures for the previous fiscal year, all in reasonable detail and prepared in accordance with GAAP, such consolidated statements to be audited and accompanied by a report and opinion of an independent certified public accountant of nationally recognized standing reasonably acceptable to Administrative Agent and the Required Lenders, which report and opinion shall be prepared in accordance with generally accepted auditing standards and the applicable Securities Laws and shall not be subject to any "going concern" or like qualification or exception or any qualification or exception as to the scope of such audit and such consolidating statements to be certified by the chief executive officer, chief financial officer, treasurer or controller of Borrower to the effect that such statement are fairly stated in all material respects;

(b) as soon as available, but in any event within forty five (45) days after the end of each of the fiscal quarters of each fiscal year of Borrower (or if earlier, 5 Business Days after the date required to be filed with the SEC), a consolidated balance sheet of Borrower and its Subsidiaries as at the end of such fiscal quarter, and the related consolidated statements of income or operations, for such fiscal quarter and for the portion of Borrower's fiscal year then ended, and the related consolidated statements of changes in shareholders' equity, and cash flows for the portion of Borrower's fiscal year then ended, in each case setting forth in comparative form, as applicable, the figures for the corresponding fiscal quarter of the previous fiscal year and the corresponding portion of the previous fiscal year, all in reasonable detail, such consolidated statements to be certified by the chief executive officer, chief financial officer, treasurer or controller of Borrower as fairly presenting in all material respects the financial condition, results of operations, shareholders' equity and cash flows of Borrower and its Subsidiaries in accordance with GAAP, subject only to normal year end audit adjustments and the absence of footnotes.

7.02 **Certificates; Other Information.** Deliver to Administrative Agent and each Lender, in form and detail satisfactory to Administrative Agent and the Required Lenders:

(a) concurrently with the delivery of the financial statements referred to in Sections 7.01(a) and (b), a duly completed Compliance Certificate signed by the chief executive officer, chief financial officer, treasurer or controller of Borrower;

(b) promptly after any reasonable request by Administrative Agent or any Lender, copies of any detailed audit reports, management letters or recommendations submitted to the board of directors (or the audit committee of the board of directors) of Borrower by independent accountants in connection with the accounts or books of Borrower or any Subsidiary, or any audit of any of them;

(c) promptly after the same are available, copies of each annual report, proxy or financial statement or other report or communication sent to the stockholders of Borrower, and copies of all annual, regular, periodic and special reports and registration statements which Borrower may file or be required to file with the SEC under Section 13 or 15(d) of the Securities Exchange Act of 1934, and not otherwise required to be delivered to Administrative Agent pursuant hereto;

(d) promptly after the furnishing thereof, copies of any statement or report furnished to any holder of debt securities of any Loan Party or any Subsidiary thereof pursuant to the terms of any indenture, loan or credit or similar agreement and not otherwise required to be furnished to the Lenders pursuant to Section 7.01 or any other clause of this Section 7.02;

(e) promptly, and in any event within five (5) Business Days after receipt thereof by any Loan Party or any Subsidiary thereof, copies of each notice or other correspondence received from the SEC (or comparable agency in any applicable non-U.S. jurisdiction) concerning any investigation or possible investigation or other inquiry by such agency regarding financial or other operational results of any Loan Party or any Subsidiary thereof;

(f) promptly upon any Responsible Officer of any Loan Party obtaining actual knowledge of (i) any litigation, action, suit, proceeding, claim or dispute pending, threatened (in writing) or contemplated, at law, in equity, in arbitration or before any Governmental Authority, arbitrator or administrative agency, by or against Borrower or any of its Subsidiaries or against any of their properties or revenues (A) that purport to affect or pertain to this Agreement or any other Loan Document, or any of the transactions contemplated hereby, (B) where the amount in controversy is greater than the Threshold Amount or (C) that either individually or in the aggregate could reasonably be expected to have a Material Adverse Effect, or (i) any development in any of the foregoing matters could be reasonably expected to have a Material Adverse Effect, or seeks to enjoin or otherwise prevent the consummation of, or to recover any damages or obtain relief as a result of, the transactions contemplated hereby, written notice thereof together with such other information as may be reasonably available to any Loan Party to enable Lenders and their counsel to evaluate such matters;

(g) prompt written notice of any change (i) in any Loan Party's legal name, (i) in any Loan Party's identity or organizational structure, (i) in any Loan Party's jurisdiction of organization or incorporation, or (i) in any Loan Party's Federal Taxpayer Identification Number or state organizational identification number. Borrower agrees not to effect or permit any change referred to in the preceding sentence until it shall have given Administrative Agent not less than 10 Business Days' prior written notice, or such lesser notice period agreed to by Administrative Agent, of its intention so to do, clearly describing such change and providing such other information in connection therewith as Administrative Agent may reasonably request, in order

for Administrative Agent to continue at all times following such change to have a valid, legal and perfected security interest in all the Collateral as contemplated in the Collateral Documents;

(h) concurrently with the delivery of the financial statements referred to in Section 7.01(b) (but only with respect to the second fiscal quarter of any fiscal year), a certificate of a Responsible Officer of Borrower (i) listing (A) all applications by any Loan Party, if any, for Copyrights, Patents or Trademarks made since the date of the prior certificate (or, in the case of the first such certificate, the Closing Date), (B) all issuances of registrations or letters on existing applications by any Loan Party for Copyrights, Patents and Trademarks received since the date of the prior certificate (or, in the case of the first such certificate, the Closing Date), (C) all Trademark Licenses, Copyright Licenses and Patent Licenses entered into by any Loan Party since the date of the prior certificate (or, in the case of the first such certificate, the Closing Date) and (ii) attaching the insurance binder or other evidence of insurance for any insurance coverage of any Loan Party or any Subsidiary that was renewed, replaced or modified during the period covered by such financial statements;

(i) **Reserved.**

(j) promptly after entering into any Swap Contract with any Hedge Bank, notify Administrative Agent of the entrance into such Swap Contract and provide Administrative Agent with the identity of the Hedge Bank that is party to such Swap Contract and such other information regarding such Swap Contract as Administrative Agent shall reasonably require.

(k) promptly, such additional information regarding the business, financial or corporate affairs of Borrower or any Subsidiary, or compliance with the terms of the Loan Documents, as Administrative Agent or any Lender may from time to time reasonably request.

Documents required to be delivered pursuant to Section 7.01(a) or (b) or Section 7.02(c) (to the extent any such documents are included in materials otherwise filed with the SEC) may be delivered electronically and if so delivered, shall be deemed to have been delivered on the date (i) on which Borrower posts such documents, or provides a link thereto on Borrower's website on the Internet at the website address listed on Schedule 11.02; or (ii) on which such documents are posted on Borrower's behalf on an Internet or intranet website, if any, to which each Lender and Administrative Agent have access (whether a commercial, third-party website or whether sponsored by Administrative Agent); provided that (i) Borrower shall deliver paper copies of such documents to Administrative Agent or any Lender that requests Borrower to deliver such paper copies until a written request to cease delivering paper copies is given by Administrative Agent or such Lender; and (ii) Borrower shall notify Administrative Agent and each Lender (by facsimile or electronic mail) of the posting of any such documents and provide to Administrative Agent by electronic mail electronic versions (i.e., soft copies) of such documents. Administrative Agent shall have no obligation to request the delivery or to maintain copies of the documents referred to above, and in any event shall have no responsibility to monitor compliance by Borrower with any such request for delivery, and each Lender shall be solely responsible for requesting delivery to it or maintaining its copies of such documents.

7.03 **Notices.**

(a) Promptly (and in any event, within three (3) Business Days after knowledge thereof by a Responsible Officer of a Loan Party) notify Administrative Agent and each Lender of the occurrence of any Default;

(b) Promptly (and in any event more than five (5) Business Days after knowledge thereof by a Responsible Officer of a Loan Party ) notify Administrative Agent and each Lender of:

(i) the occurrence of each such event or that has resulted or could reasonably be expected to result in a Material Adverse Effect, including (i) breach or non-performance of, or any default under, a Contractual Obligation of Borrower or any Subsidiary; (ii) any dispute, litigation, investigation, proceeding or suspension between Borrower or any Subsidiary and any Governmental Authority; or (iii) the commencement of, or any material development in, any litigation or proceeding affecting Borrower or any Subsidiary, including pursuant to any applicable Environmental Laws;

(ii) the occurrence of any ERISA Event;

(iii) any termination or cancellation of any insurance policy which any Loan Party is required to maintain, or any uninsured or partially uninsured loss through liability or property damage, or through fire, theft or any other cause affecting any Loan Party's property;

(iv) any material change in accounting policies or financial reporting practices by Borrower or any Subsidiary including any determination by Borrower referred to in Section 2.10(b);

(v) any material dispute arising between any Loan Party or any of their respective Subsidiaries and any government regulatory body or law enforcement body, other than any good faith dispute arising in the ordinary course of business between a Loan Party and any government regulatory body or law enforcement body that is a client of such Loan Party; or

(vi) any Involuntary Disposition in excess of the Threshold Amount.

Each notice pursuant to this Section shall be accompanied by a statement of a Responsible Officer of Borrower setting forth details of the occurrence referred to therein and stating what action Borrower has taken and proposes to take with respect thereto. Each notice pursuant to Section 7.03(a) shall describe with particularity any and all provisions of this Agreement and any other Loan Document that have been breached.

7.04 **Payment of Obligations.** Pay and discharge as the same shall become due and payable, all its obligations and liabilities, including: (a) all Federal and all other material tax liabilities, assessments and governmental charges or levies upon it or its properties or assets, unless the same are being contested in good faith by appropriate proceedings diligently

conducted and adequate reserves in accordance with GAAP are being maintained by the applicable Loan Party or such Subsidiary; (b) all lawful claims which, if unpaid, would by law become a Lien upon its property not permitted pursuant to Section 8.01; and (c) all material Indebtedness, as and when due and payable, but subject to any subordination provisions contained in any instrument or agreement evidencing such Indebtedness. If Administrative Agent reasonably requests, Borrower shall furnish to Administrative Agent a receipt evidencing payment of such taxes or other amounts, or the tax returns or other reports filed with respect to such taxes or other amounts.

7.05 **Preservation of Existence, Etc.**

(a) Preserve, renew and maintain in full force and effect its legal existence under the Laws of the jurisdiction of its organization except with respect to Subsidiaries of Borrower only (i) in a transaction permitted by Section 8.04 or 8.05 or (ii) to the extent the failure to do so could not reasonably be expected to have a Material Adverse Effect.

(b) Preserve, renew and maintain in full force and effect its good standing under the Laws of the jurisdiction of its organization and each other jurisdiction where required by applicable Law, except to the extent the failure to do so could not reasonably be expected to have a Material Adverse Effect.

(c) Take all reasonable action to maintain all rights, privileges, permits, licenses and franchises necessary or desirable in the normal conduct of its business, except to the extent that failure to do so could not reasonably be expected to have a Material Adverse Effect;

(d) Preserve or renew all of its registered IP Rights or IP Rights in respect of which an application for registration has been filed or recorded with the United States Copyright Office or the United States Patent and Trademark Office, the non-preservation of which could reasonably be expected to have a Material Adverse Effect.

(e) Use commercially reasonable efforts to: (i) protect, defend and maintain the validity and enforceability of all IP Rights except where Borrower, in the exercise of its reasonable business judgment, deems it in its best interest not to do so; (ii) promptly advise Administrative Agent in writing of infringements of its Material IP Rights; and (iii) not allow any Material IP Rights to be abandoned, forfeited or dedicated to the public without Administrative Agent's and the Required Lenders' written consent.

7.06 **Maintenance of Properties.** (a) Maintain, preserve and protect all of its material properties and equipment necessary in the operation of its business in good working order and condition, ordinary wear and tear excepted; (b) make all necessary repairs thereto and renewals and replacements thereof except where the failure to do so could not reasonably be expected to have a Material Adverse Effect; (c) use the standard of care typical in the industry in the operation and maintenance of its facilities; and (d) maintain such Loan Party's primary operating and other deposit accounts and securities accounts with Cash Management Banks, and use Cash Management Banks for such Loan Party's primary cash management requirements. Borrower shall provide Administrative Agent not less than ten (10) days' prior written notice (or prompt notice following the closing of any Acquisition of any Material Subsidiary that is permitted

pursuant to Section 8.02) before Borrower or any other Loan Party establishes any deposit account, securities account, investment account, commodities account or similar account at or with any bank or financial institution other than Administrative Agent or Administrative Agent's Affiliates. For each such account that any Loan Party at any time maintains, Borrower shall cause the applicable bank or financial institution at or with which any such account is maintained to execute and deliver a control agreement, no later than forty-five (45) days after the Closing Date, with respect to such account to perfect Administrative Agent's Lien in such account and all funds and other property deposited therein or credited thereto and to provide Administrative Agent with "control" (within the meaning of the UCC) over such account, which account control agreement shall be in form and substance satisfactory to Administrative Agent in its sole discretion and may not be terminated without the prior written consent of Administrative Agent. The provisions of this Section 7.06 shall not apply to (i) deposit accounts exclusively used for payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of Borrower's or any Loan Party's employees and identified to Administrative Agent by Borrower or such Loan Party as such, (ii) Client Trust Accounts and (iii) Excluded Accounts (as defined in the Security Agreement). Notwithstanding anything in this Agreement, in connection with the Acquisition of any Material Subsidiary that is permitted pursuant to Section 8.02, Borrower shall have sixty (60) days from the date of closing of such acquisition to provide Administrative Agent, for the benefit of the Lenders, with "control" (within the meaning of the UCC) over any deposit accounts, securities accounts or investment accounts maintained by such Material Subsidiary.

7.07 **Maintenance of Insurance.** Maintain with financially sound and reputable insurance companies that are not Affiliates of Borrower and are acceptable to Administrative Agent, insurance with respect to its properties and business against loss or damage of the kinds customarily insured against by Persons engaged in the same or similar business, of such types and in such amounts (after giving effect to any self-insurance compatible with the following standards) as are acceptable to Administrative Agent and are customarily carried under similar circumstances by such other Persons. Borrower shall deliver to Administrative Agent endorsements to all of the following: (a) "All Risk" and business interruption insurance policies of Borrower naming Administrative Agent, for the benefit of Administrative Agent and Lenders, as a loss payee, as its interests may appear, and (b) general liability and other liability policies of Borrower naming Administrative Agent, for the benefit of Administrative Agent and Lenders, as an additional insured. All policies of insurance on personal property will include an endorsement, in form and substance acceptable to Administrative Agent, showing loss payable to Administrative Agent as its interests may appear, for the benefit of Administrative Agent and Lenders (Form 438 BFU or other form acceptable to Administrative Agent) and such other endorsements as Administrative Agent shall reasonably request. Such endorsement, or an independent instrument furnished to Administrative Agent, will provide that the insurer will give at least 30 days' prior written notice to Administrative Agent before any such policy or policies of insurance shall be altered or canceled (or, if such cancellation relates to a liability insurance policy and is due to non-payment of premium, at least 10 days' (or such greater time as Administrative Agent may agree in writing) notice) and that no act or default of Borrower or any other Person shall affect the right of Administrative Agent, on behalf of Administrative Agent and Lenders, to recover under such policy or policies of insurance in case of loss or damage. So long as no Event of Default has occurred and is continuing, Borrower shall have the option of applying the proceeds of any casualty, in an aggregate amount not to exceed the Threshold



Amount in the aggregate in any period of twelve (12) consecutive months, toward the replacement or repair of destroyed or damaged property or the purchase of other property useful in the business of Borrower; provided that any such replaced or repaired property or other property useful to Borrower's business, to the extent replacing Collateral, shall be deemed Collateral in which Bank has been granted a first priority security interest subject to Permitted Liens, and (b) after the occurrence and during the continuance of an Event of Default, all proceeds payable under such casualty policy shall, at the option of Administrative Agent, be applied to the Obligations to the extent such proceeds constitute Collateral. Administrative Agent reserves the right at any time, upon review of Borrower's risk profile, to require additional forms and limits of insurance to adequately protect Administrative Agent's interests in accordance with Administrative Agent's normal practices for similarly situated borrowers.

7.08 **Subordination.** All Indebtedness of Borrower and the other Loan Parties to Borrower's stockholders and Affiliates shall be and remain subordinated in right of payment at all times to the Secured Obligations, and any and all Liens in property of Borrower or any other Loan Party held by any such stockholder or Affiliate shall be subordinated to the Liens of Bank, in each case, as evidenced by and subject to the terms of subordination agreements in form and substance satisfactory to Administrative Agent and the Required Lenders.

7.09 **Compliance with Laws.** Comply in all material respects with the requirements of all Laws and all orders, writs, injunctions and decrees applicable to it or to its business or property, except in such instances in which (a) such requirement of Law or order, writ, injunction or decree is being contested in good faith by appropriate proceedings diligently conducted; or (b) the failure to comply therewith could not reasonably be expected to have a Material Adverse Effect.

7.10 **Books and Records.** (a) Maintain proper books of record and account, in which true and correct and complete entries in conformity with GAAP consistently applied shall be made of all financial transactions and matters involving the assets and business of Borrower or such Subsidiary, as the case may be; and (b) maintain such books of record and account in material conformity with all applicable requirements of any Governmental Authority having regulatory jurisdiction over Borrower or such Subsidiary, as the case may be. Borrower shall maintain at all times books and records pertaining to the Collateral in such detail, form and scope as Administrative Agent or any Lender shall reasonably require.

7.11 **Inspection Rights.** Permit representatives and independent contractors of Administrative Agent and each Lender to visit, audit and inspect any of the properties of any Loan Party, to examine the corporate, financial and operating records of any Loan Party, and make copies thereof or abstracts therefrom, and to discuss the affairs, finances and accounts of any Loan Party with such Loan Party's directors, officers, and independent public accountants, all at the expense of Borrower and at such reasonable times during normal business hours and as often as may be reasonably requested, upon reasonable advance notice to Borrower; provided, however, that (i) absent an Event of Default, Borrower shall only be required to permit and pay for one such visit and/or inspection per fiscal year and (ii) when an Event of Default exists Administrative Agent or any Lender (or any of their respective representatives or independent contractors) may do any of the foregoing at the expense of Borrower at any time during normal business hours and without advance notice.

7.12 **Use of Proceeds.** Use the proceeds of the Loans shall only be used for Acquisitions permitted hereunder and the Credit Extensions shall otherwise only be used for general corporate purposes not in contravention of any Law or of any Loan Document. In no event shall Borrower use any proceeds of the Credit Extensions for personal, family, household or agricultural purposes.

7.13 **Financial Covenants.**

(a) **Consolidated Leverage Ratio.** Maintain a Consolidated Leverage Ratio for the four quarter period then ended, that is at all times less than or equal to 3.00 to 1.00.

(b) **Interest Coverage Ratio.** Maintain at all times, on a consolidated basis, an Interest Coverage Ratio, that is not less than 1.50 to 1.00. This ratio will be calculated at the end of each reporting period for which this Agreement requires Borrower to deliver financial statements (but no less frequently than quarterly), using the results of the twelve month (or four fiscal quarter) period ending with that reporting period.

7.14 **Additional Guarantors.** The payment and performance of all Secured Obligations are and shall be guaranteed, jointly and severally, by each current and future Material Subsidiary of Borrower pursuant to a Guaranty duly executed by each Guarantor in form and amount acceptable to Administrative Agent, which Guaranty shall be secured by unconditional, continuing pledges and Liens in and to all of the assets and properties of each such Material Subsidiary, as evidenced by and subject to the terms of guaranties, deeds, debentures, and security agreements in form and substance reasonably satisfactory to Administrative Agent. On each Material Subsidiary Assessment Date, Borrower shall determine whether there exists any new or additional Material Subsidiaries (whether as a result of a Person becoming a Material Subsidiary or being designated as a Material Subsidiary for purposes of satisfying the 95% Threshold), and if any new Material Subsidiary exists, Borrower and such new Subsidiary shall: (a) promptly notify Administrative Agent of the creation, acquisition or designation of such new Material Subsidiary, (b) take all such action as may be reasonably required by Administrative Agent to cause such Subsidiary to Guarantee the Secured Obligations and grant such first-priority pledges and security interests to Administrative Agent for the benefit of the Secured Parties, as Administrative Agent or the Required Lenders may require (including executing and delivering to Administrative Agent a counterpart of the Guaranty or such other document as Administrative Agent shall deem appropriate for such purpose), (c) grant and pledge to Administrative Agent for the benefit of the Secured Parties, a first-priority security interest in the Equity Interests of, and any Indebtedness owing from, such Subsidiary, and (d) deliver to Administrative Agent documents of the types referred to in clauses (iii) and (iv) of [Section 5.01\(a\)](#) and favorable opinions of counsel to such Person (which shall cover, among other things, the legality, validity, binding effect and enforceability of the documentation referred to in clauses (b), (c) and (d) above), all in form, content and scope reasonably satisfactory to Administrative Agent. Notwithstanding anything to the contrary herein, Borrower shall at all times cause such of its Subsidiaries necessary to meet the 95% Threshold to be Guarantors and to execute and deliver the documents, instruments and agreements noted above, provided, however, that the 95% Threshold shall only be tested on each Material Subsidiary Assessment Date.

7.15 **Collateral Records.** To execute and deliver promptly, and to cause each other Loan Party to execute and deliver promptly, to Administrative Agent, from time to time, solely for Administrative Agent's convenience in maintaining a record of the Collateral, such written statements and schedules as Administrative Agent may reasonably request designating, identifying or describing the Collateral. The failure by Borrower or any other Loan Party, however, to promptly give Administrative Agent such statements or schedules shall not affect, diminish, modify or otherwise limit the Liens on the Collateral granted pursuant to the Collateral Documents.

7.16 **Security Interests.** To, and to cause each other Loan Party to, (a) defend the Collateral against all claims and demands of all Persons at any time claiming the same or any interest therein, (b) comply with the requirements of all state and federal laws in order to grant to Administrative Agent and Lenders valid and perfected first priority security interests in the Collateral, and (c) do whatever Administrative Agent may reasonably request, from time to time, to effect the purposes of this Agreement and the other Loan Documents, including filing notices of liens, UCC financing statements, fixture filings and amendments, renewals and continuations thereof; cooperating with Administrative Agent's representatives; keeping stock records; obtaining waivers from landlords and mortgagees and from warehousemen and their landlords and mortgages; and, paying claims which might, if unpaid, become a Lien on the Collateral. Administrative Agent is hereby authorized by Borrower to file any UCC financing statements covering the Collateral whether or not Borrower's signatures appear thereon.

7.17 **Restricted Agreements.** Prior to entering into or becoming bound by any Restricted Agreement: (i) provide written notice to Administrative Agent of the material terms of such license or agreement with a description of its likely impact on Borrower's or its Subsidiaries' business and financial condition; and (ii) use commercially reasonable efforts to obtain the consent of, or waiver by, any Person whose consent or waiver is necessary for each Loan Party's interest in such Restricted Agreement and the rights and benefits thereunder to be deemed Collateral and for Administrative Agent, for the benefit of the Secured Parties, to have a first-priority security interest in such Restricted Agreement and the rights and benefits thereunder, and to have the power to exercise rights thereunder and to assign such Restricted Agreement and rights in connection with an enforcement of remedies under the Loan Documents, that might otherwise be restricted by the terms of the applicable license or agreement, whether now existing or entered into in the future.

7.18 **Access Agreements.** Use commercially reasonable efforts to deliver to Administrative Agent, in each case in form and substance satisfactory to Administrative Agent, with respect to each real property designated by Administrative Agent to Borrower, access agreements from the landlords on such real property together with such other documents as may be required by Administrative Agent in connection therewith, as more specifically provided in the Security Agreement.

7.19 **Reserved.**

7.20 **Further Assurances.** Promptly upon request, from time to time, by Administrative Agent, or any Lender through Administrative Agent, (a) correct any material defect or error that may be discovered in any Loan Document or in the execution,

acknowledgment, filing or recordation thereof, and (b) do, execute, acknowledge, deliver, record, re-record, file, re-file, register and re-register any and all such further acts, deeds, financing statements and continuations thereof, termination statements, certificates, assurances and other instruments as Administrative Agent, or any Lender through Administrative Agent, may reasonably require from time to time in order to (i) carry out more effectively the purposes of this Agreement and any other Loan Documents, (ii) to the fullest extent permitted by applicable law, subject any Loan Party's or any of its Subsidiaries' properties, assets, rights or interests to the Liens now or hereafter intended to be covered by any of the Collateral Documents, (iii) perfect and maintain the validity, effectiveness and priority of any of the Collateral Documents and any of the Liens intended to be created thereunder and (iv) assure, convey, grant, assign, transfer, preserve, protect and confirm more effectively unto the Secured Parties the rights granted or now or hereafter intended to be granted to the Secured Parties under any Loan Document or under any other instrument executed in connection with any Loan Document to which any Loan Party or any of its Subsidiaries is or is to be a party, and cause each of its Subsidiaries to do so.

7.21 **Anti-Corruption Laws.** Conduct its businesses in compliance with the United States Foreign Corrupt Practices Act of 1977, the UK Bribery Act 2010, and other similar anti-corruption legislation in other jurisdictions. and maintain policies and procedures designed to promote and achieve compliance with such laws.

## ARTICLE VIII

### NEGATIVE COVENANTS

So long as any Lender shall have any Commitment hereunder, any Loan (together with any and all accrued interest, fees or expenses) hereunder shall remain unpaid or unsatisfied, any Letter of Credit or L/C Obligations shall remain outstanding or any Secured Obligations with respect to Cash Management Agreements remain outstanding as to which cash collateral or other arrangements with respect thereto satisfactory to the applicable Cash Management Bank, in its good faith business judgment, have not been made, no Loan Party shall, nor shall it permit any Subsidiary to, directly or indirectly:

8.01 **Liens.** Create, incur, assume or suffer to exist any Lien upon any of its property, assets or revenues, or upon the income or profits thereof, whether now owned or hereafter acquired, other than the following:

(a) Liens pursuant to any Loan Document;

(b) Liens for taxes not yet due or which are being contested in good faith and by appropriate proceedings diligently conducted, provided that (i) adequate reserves with respect thereto are maintained on the books of the applicable Person in accordance with GAAP, (ii) the Lien shall not be senior to Administrative Agent's security interests in the Collateral and (iii) a stay of enforcement of any such Lien shall be in effect;

(c) reservations, exceptions, encroachments, easements, rights of way, covenants, conditions, restrictions, leases or other similar title exceptions affecting real property

which do not in the aggregate materially detract from the value of the real property or materially interfere with their use in the ordinary course of the business of Borrower or its Subsidiaries;

(d) Liens existing on the date hereof and listed on Schedule 8.01 of the Disclosure Letter and any renewals or extensions thereof, provided that (i) the property covered thereby is not changed, (ii) the amount secured or benefited thereby is not increased except as contemplated by Section 8.03(b), (iii) the direct or any contingent obligor with respect thereto is not changed, and (iv) any renewal or extension of the obligations secured or benefited thereby is permitted by Section 8.03(b);

(e) Liens against security deposits under leases entered into in the ordinary course of business;

(f) pledges or deposits in the ordinary course of business in connection with workers' compensation, unemployment insurance and other social security legislation applicable to Borrower and its Subsidiaries, other than any Lien imposed by ERISA;

(g) Liens relating to statutory obligations of Borrower with respect to surety and appeal bonds, performance bonds and other obligations of a like nature incurred in the ordinary course of business;

(h) other Liens securing Indebtedness which does not exceed the Threshold Amount in the aggregate at any one time;

(i) Liens on equipment securing Indebtedness permitted under clause (c) of Section 8.03 granted in connection with the acquisition of such equipment by Borrower after the date hereof (including, without limitation, pursuant to Capital Leases); provided, however, that (i) each such Lien shall attach only to the equipment acquired with the Indebtedness secured thereby, and the proceeds and products thereof, and (ii) the Indebtedness secured thereby does not exceed the cost or fair market value, whichever is lower, of the property being acquired on the date of acquisition;

(j) Liens which constitute rights of setoff of a customary nature or Liens with respect to deposit or investment accounts provided that such liens only secure customary fees associated with such accounts;

(k) leases or subleases of property granted in the ordinary course of business, and leases, subleases, non-exclusive licenses or sublicenses of property granted in the ordinary course of business;

(l) Liens arising from judgments, decrees or attachments in circumstances not constituting an Event of Default, which is currently being contested in good faith by appropriate proceedings, provided that, adequate reserves have been set aside (to the extent required by GAAP) and no material property is subject to a material impending risk of loss or forfeiture;

(m) carriers', warehousemen's, mechanics', materialmen's, repairmen's or other like Liens arising in the ordinary course of business which are not overdue for a period of more than thirty (30) days or which are being contested in good faith and by appropriate

proceedings diligently conducted, if adequate reserves with respect thereto are maintained on the books of the applicable Person;

(n) until such time as Planned Benefit Systems Incorporated, a Colorado corporation (“**PBS**”) becomes a Material Subsidiary, the security interest granted by PBS to Revere Corporate Center, L.L.C., a Colorado limited liability company (“**Revere**”) pursuant to Section 30 of that certain Office Lease, dated as of May 3, 2006 by and between PBS and Revere, in the form provided to Administrative Agent prior to the Closing Date; provided, however, upon PBS becoming a Material Subsidiary, such security interest shall be terminated and released to the satisfaction of Administrative Agent, and shall no longer qualify as a Permitted Lien hereunder.

8.02 **Investments.** Make any Investments, except Permitted Investments.

8.03 **Indebtedness.** Create, incur, assume or suffer to exist any Indebtedness, except:

(a) Indebtedness under the Loan Documents;

(b) Indebtedness outstanding on the date hereof and listed on Schedule 8.03 to the Disclosure Letter and any refinancings, refundings, renewals or extensions thereof; provided that (i) the amount of such Indebtedness is not increased at the time of such refinancing, refunding, renewal or extension except by an amount equal to a reasonable premium or other reasonable amount paid, and fees and expenses reasonably incurred, in connection with such refinancing and by an amount equal to any existing commitments unutilized thereunder and (ii) the terms relating to principal amount, amortization, maturity, collateral (if any) and subordination (if any), and other material terms taken as a whole, of any such refinancing, refunding, renewing or extending Indebtedness, and of any agreement entered into and of any instrument issued in connection therewith, are no less favorable in any material respect to the Loan Parties or Lenders than the terms of any agreement or instrument governing the Indebtedness being refinanced, refunded, renewed or extended and the interest rate applicable to any such refinancing, refunding, renewing or extending Indebtedness does not exceed the then applicable market interest rate;

(c) provided that no Event of Default exists at the time such indebtedness is incurred or assumed or would result therefrom, Indebtedness in an aggregate outstanding amount not to exceed, at any time, \$5,000,000, incurred to finance the acquisition of equipment, including Capital Leases, or Indebtedness assumed in connection with the acquisition of any such equipment or secured by a Lien on any such equipment prior to the acquisition thereof, and any extension, renewal or replacement of any such Indebtedness that does not increase the outstanding principal amount thereof;

(d) unsecured Indebtedness to trade creditors incurred in the ordinary course of business and Indebtedness incurred as a result of endorsing negotiable instruments received in the ordinary course of business;

(e) Indebtedness (i) owed by a Loan Party to another Loan Party, (ii) owed by a Subsidiary (other than a Loan Party) to any Loan Party (not in excess of \$500,000 in the aggregate outstanding at any time), (iii) owed by a Loan Party to any Subsidiary (other than

another Loan Party) (not in excess of \$500,000 in the aggregate outstanding at any time); and (iv) owed by a Subsidiary (other than a Loan Party) to another Subsidiary that is not a Loan Party;

(f) Indebtedness owed by any Subsidiary to Borrower or a Guarantor in connection with current operating expenses incurred in the ordinary course of the businesses currently engaged in by Borrower or reasonably related thereto and not for extraordinary items or speculative purposes; and

(g) obligations (contingent or otherwise) of Borrower or any Subsidiary existing or arising under any Swap Contract, provided that (i) such obligations are (or were) entered into by such Person in the ordinary course of business for the purpose of directly mitigating risks associated with liabilities, commitments, investments, assets, or property held or reasonably anticipated by such Person, or changes in the value of securities issued by such Person, and not for purposes of speculation or taking a “market view”; and (ii) such Swap Contract does not contain any provision exonerating the non-defaulting party from its obligation to make payments on outstanding transactions to the defaulting party;

(h) Indebtedness corresponding to Investments (other than Acquisitions) permitted by Section 8.02;

(i) Earn-Out Obligations and deferred purchase price obligations with respect to Permitted Acquisitions; and

(j) unsecured Subordinated Debt not exceeding \$5,000,000 in the aggregate outstanding at any time; provided, that (i) no Default exists immediately prior and after giving effect thereto and (ii) after giving effect to such Subordinated Debt on a Pro Forma Basis, Borrower is in compliance with the financial covenants set forth in Section 7.13;

(k) other Indebtedness not otherwise permitted above not exceeding the Threshold Amount in the aggregate outstanding at any time.

8.04 **Fundamental Changes.** Merge, dissolve, liquidate, consolidate with or into another Person, or Dispose of (whether in one transaction or in a series of transactions) all or substantially all of its assets (whether now owned or hereafter acquired) to or in favor of any Person, except that, so long as no Default exists or would result therefrom:

(a) any Subsidiary may merge with (i) Borrower, provided that Borrower shall be the continuing or surviving Person, or (ii) any one or more other Subsidiaries, provided that when any Wholly Owned Subsidiary is merging with another Subsidiary, the Wholly Owned Subsidiary shall be the continuing or surviving Person, and, provided further that if a Guarantor is merging with another Subsidiary, the Guarantor shall be the surviving Person;

(b) Borrower and Subsidiaries of Borrower may merge or consolidate with any Person as necessary to consummate Acquisitions permitted hereunder; provided that if Borrower is party to transaction, Borrower shall be the surviving Person;

(c) any Subsidiary may Dispose of all or substantially all of its assets (upon voluntary liquidation or otherwise) to Borrower or to another Subsidiary; provided that if the transferor in such a transaction is a Wholly Owned Subsidiary, then the transferee must either be Borrower or a Wholly Owned Subsidiary, and, provided further that if the transferor of such assets is a Guarantor, the transferee must either be Borrower or a Guarantor.

8.05 **Dispositions.** Make any Disposition or enter into any agreement to make any Disposition, except the following (each a “**Permitted Disposition**”):

- (a) Dispositions of inventory in the ordinary course of business;
- (b) Dispositions consisting of licenses for the use of the IP Rights of Borrower and its Subsidiaries in the ordinary course of business that are either non-exclusive or that may be exclusive in one or more respects as to a particular field of use, geographic area or limited period of time that do not result in a legal transfer of title to or all substantial rights in the licensed property under applicable Law;
- (c) Dispositions of obsolete, unneeded or worn out property which such Person determines in good faith are no longer useful in the business of such Person, whether now owned or hereafter acquired, in the ordinary course of business to non-Affiliated third parties with a value not to exceed the Threshold Amount in any calendar year;
- (d) Dispositions of equipment or real property to the extent that (i) such property is exchanged for credit against the purchase price of similar replacement property or (ii) the proceeds of such Disposition are reasonably promptly (and in any event within 180 days) applied to the purchase price of such replacement property;
- (e) Dispositions of property by any Subsidiary to Borrower or to a Wholly Owned Subsidiary; provided that if the transferor of such property is a Guarantor, the transferee thereof must either be Borrower or a Guarantor;
- (f) Dispositions otherwise permitted by Article VIII, including, Sections 8.01, 8.02, 8.04, 8.06, and 8.08;
- (g) Dispositions of Accounts in connection with the collection or compromise thereof in the ordinary course of business and consistent with past practice; and
- (h) other Dispositions so long as (i) at least 75% of the consideration paid in connection therewith shall be cash or Cash Equivalents paid contemporaneous with consummation of the transaction and shall be in an amount not less than the fair market value of the property disposed of, (ii) such transaction is not a Sale and Leaseback Transaction, (iii) such transaction does not involve the sale or other disposition of a minority equity interest in any Subsidiary, (iv) such transaction does not involve a sale or other disposition of Accounts other than Accounts owned by or attributable to other property concurrently being disposed of in a transaction otherwise permitted under this Section 8.05, and (v) the aggregate book value of all of the assets sold or otherwise disposed of by the Loan Parties and their Subsidiaries in all such transactions shall not exceed (x) in any fiscal year of Borrower, 10% of Consolidated Total Assets (as determined as of the last day of the most recently ended fiscal quarter for which



financial statements have been delivered) and (y) during the term of this Agreement, 30% of Consolidated Total Assets (as determined as of the last day of the most recently ended fiscal quarter for which financial statements have been delivered);

provided, however, that any Disposition pursuant to clauses (a) through (h) shall be for fair market value.

8.06 **Restricted Payments.** Declare or make, directly or indirectly, any Restricted Payment or incur any obligation (contingent or otherwise) to do so; issue or sell any Disqualified Stock; or permit to exist, whether under its Organizational Documents or otherwise, any right (contingent or otherwise) of any stockholder of Borrower to demand or compel Borrower to repurchase or redeem any Equity Interests of Borrower, or to make any dividend or other distribution on account of, or any payment with respect to, any Equity Interests of Borrower; provided, however, so long as no Default or Event of Default shall have occurred and be continuing at the time of any action described below or would result therefrom:

(a) Borrower may repurchase Equity Interests issued by Borrower from former employees, officers, directors, and consultants pursuant to Borrower's customary, board-approved, equity compensation plans and stock repurchase agreements, in an aggregate amount not to exceed One Million Dollars (\$1,000,000) in any fiscal year;

(b) each Subsidiary may make Restricted Payments to Borrower, Guarantors and any other Subsidiary of Borrower that owns an Equity Interest in such Subsidiary, ratably according to their respective holdings of the type of Equity Interest in respect of which such Restricted Payment is being made;

(c) Borrower and each Subsidiary may declare and make dividend payments or other distributions payable solely in Qualified Stock of such Person;

(d) Borrower may convert any of its convertible securities into Qualified Stock pursuant to the terms of such convertible securities or otherwise in exchange thereof and make payments in cash for any fractional shares upon such conversion; and

(e) Borrower may make cash dividend payments on, and cash repurchases of, its outstanding capital stock; provided, that (i) no Default exists immediately prior to and after giving effect thereto, (ii) after giving effect to such Restricted Payment (and any Indebtedness incurred in connection therewith), on a Pro Forma Basis, both (A) Borrower is in compliance with the financial covenants set forth in Section 7.13, and (B) Borrower maintains unrestricted domestic cash of at least \$25,000,000, which amount shall be calculated net of the aggregate amount of client deposits, pre-fundings and other amounts subject to claims of clients for administration of such clients' benefits, and shall exclude any cash relating to Client Trust Accounts, and (iii) Borrower shall have delivered to Administrative Agent, a Pro Forma Compliance Certificate as to the matters set forth in clause (ii) above.

8.07 **Change in Nature of Business.** Engage in any material line of business substantially different from those lines of business conducted by Borrower and its Subsidiaries on the date hereof or any business substantially related or incidental thereto.

8.08 **Transactions with Affiliates.** Enter into any transaction of any kind with any Affiliate of Borrower, whether or not in the ordinary course of business, other than on fair and reasonable terms substantially as favorable to Borrower or such Subsidiary as would be obtainable by Borrower or such Subsidiary at the time in a comparable arm's length transaction with a Person other than an Affiliate, provided that the foregoing restriction shall not apply to: (a) transactions between or among Borrower and any Guarantor or between and among Guarantors; or (b) Permitted Investments in Subsidiaries.

8.09 **No Further Negative Pledge.** Except with respect to (a) specific property encumbered to secure payment of particular Indebtedness permitted under Section 8.03(c) or to be sold pursuant to an executed agreement with respect to an asset sale permitted under Section 8.05, (b) enforceable provisions in leases permitted under Section 8.03(c) or operating leases (including real property leases) prohibiting assignment or encumbrance of the applicable leasehold interest, (c) agreements granting Liens permitted by this Agreement, (d) agreements in effect on the Closing Date, (e) provisions in joint venture agreements and other similar agreements entered into in the ordinary course of business and not otherwise prohibited under this Agreement that restrict attachment of Liens on such joint venture (or similar entity's) assets or Equity Interests, (f) any agreement in effect at the time the Person becomes a Subsidiary so long as such agreement was not entered into in contemplation of the Person becoming a Subsidiary, (g) customary provisions in agreements entered into in the ordinary course of business restricting assignment of such agreement; provided that Borrower has complied with its obligations under Section 7.17, if applicable, and (h) any agreement amending, refinancing or replacing any of the foregoing (so long as Borrower has complied with its obligations under Section 7.17, if applicable, and any such restrictions are not materially more restrictive, taken as a whole, than those contained in the agreement so amended, refinanced or replaced), neither Borrower nor any of its Subsidiaries shall enter into any agreement prohibiting the creation or assumption of any Lien upon any of its properties or assets, whether now owned or hereafter acquired, to secure the Obligations. In addition, other than with respect to provisions in joint venture agreements and other similar agreements entered into in the ordinary course of business and not otherwise prohibited under this Agreement that may restrict dividends or guaranties from such entity, enter into any Contractual Obligation limiting the ability of any Subsidiary to (a) make Restricted Payments to Borrower or any Guarantor or to otherwise transfer property to Borrower or any Guarantor, or (b) Guarantee the Indebtedness of Borrower.

8.10 **Use of Proceeds.** Use the proceeds of any Credit Extension, whether directly or indirectly, and whether immediately, incidentally or ultimately, to purchase or carry margin stock (within the meaning of Regulation U of the FRB) or to extend credit to others for the purpose of purchasing or carrying margin stock or to refund indebtedness originally incurred for such purpose.

8.11 **Amendment or Modification of Organization Documents.** Amend, modify or change in any manner any term or provision of any Loan Party's Organization Documents in any manner that would reasonably be expected to be adverse to the interests of any Secured Party.

8.12 **Accounting Changes.** Make any change in accounting policies or reporting practices, except as required by GAAP or as may be required by applicable Law or, in the case of

any change to fiscal quarter or fiscal year-end date methodology after the Closing Date, without prompt notice thereof to Administrative Agent.

8.13 **Compliance.** Become an “investment company” or a company controlled by an “investment company”, under the Investment Company Act of 1940 or undertake as one of its or their important activities extending credit to purchase or carry margin stock (as defined in Regulation U of the FRB), or use the proceeds of any Credit Extension for that purpose; fail to meet the minimum funding requirements of ERISA, permit a Reportable Event or prohibited transaction, as defined in ERISA, to occur; fail to comply with the Federal Fair Labor Standards Act or violate any other law or regulation, if the violation could reasonably be expected to have a Material Adverse Effect; withdraw from participation in, permit partial or complete termination of, or permit the occurrence of any other event with respect to, any present Pension Plan which could reasonably be expected to result in any liability of Borrower or any Subsidiary, including any liability to the Pension Benefit Guaranty Corporation or its successors or any other governmental agency.

8.14 **Ownership of Subsidiaries.** Notwithstanding any other provisions of this Agreement to the contrary, (i) permit any Person (other than any Loan Party or any Wholly Owned Subsidiary of Borrower) to own any Equity Interests of any Subsidiary of any Loan Party, except to qualify directors where required by applicable law or to satisfy other requirements of applicable law with respect to the ownership of Equity Interests of Foreign Subsidiaries, or (ii) permit any Loan Party or any Subsidiary of any Loan Party to issue or have outstanding any shares of preferred Equity Interests.

8.15 **Sanctions.** Directly or indirectly, use the proceeds of any Credit Extension, or lend, contribute or otherwise make available such proceeds to any Subsidiary, joint venture partner or other individual or entity, to fund any activities of or business with any individual or entity, or in any Designated Jurisdiction, that, at the time of such funding, is the subject of Sanctions, or in any other manner that will result in a violation by any individual or entity (including any individual or entity participating in the transaction, whether as Lender, Arranger, Administrative Agent, L/C Issuer or otherwise) of Sanctions.

8.16 **Anti-Corruption Laws.** Directly or indirectly use the proceeds of any Credit Extension for any purpose which would breach the United States Foreign Corrupt Practices Act of 1977, the UK Bribery Act 2010, and other similar anti-corruption legislation in other jurisdictions.

## **ARTICLE IX**

### **EVENTS OF DEFAULT AND REMEDIES**

9.01 **Events of Default.** Any of the following shall constitute an Event of Default:

(a) **Non-Payment.** Borrower or any other Loan Party fails to pay (i) when and as required to be paid herein, any amount of principal of, or any interest on, any Loan or any L/C Obligation, or (ii) within three (3) days after the same becomes due, any fee due hereunder,

or (iii) within five (5) days after the same becomes due, any other amount payable hereunder or under any other Loan Document; or

(b) **Specific Covenants.** Borrower fails to perform or observe any term, covenant or agreement contained in any of Sections 7.01 (*Financial Statements*), 7.02 (*Certificates; Other Information*), 7.03 (*Notices*), 7.04 (*Payment of Obligations*), 7.07 (*Maintenance of Insurance*), 7.10 (*Books and Records*), 7.11 (*Inspection Rights*), 7.12 (*Use of Proceeds*), 7.13 (*Financial Covenants*), 7.14 (*Additional Guarantors*), 7.16 (*Security Interests*), 7.20 (*Further Assurances*), 7.21 (*Anti-Corruption Laws*) or Article VIII, or any Guarantor fails to perform or observe any term, covenant or agreement contained in the Guaranty; or

(c) **Other Defaults.** Any Loan Party fails to perform or observe any other covenant or agreement (not specified in subsection (a) or (b) above) contained in any Loan Document on its part to be performed or observed and, with respect to any such default which by its nature can be cured, such failure continues uncured for ten (10) days from its occurrence, or any default or Event of Default occurs under any other Loan Document; or

(d) **Representations and Warranties.** Any representation, warranty, certification or statement of fact made or deemed made by or on behalf of Borrower or any other Loan Party herein, in any other Loan Document, or in any document delivered in connection herewith or therewith shall be incorrect or misleading in any material respect when made or deemed made (except, if a qualifier relating to materiality, Material Adverse Effect or a similar concept applies, such representation, warranty, certification or statement of fact was incorrect or misleading in any respect when made or deemed made); or

(e) **Cross-Default.** (i) Borrower, any Loan Party or any Material Subsidiary (A) fails to make any payment when due (whether by scheduled maturity, required prepayment, acceleration, demand, or otherwise) in respect of any Indebtedness or Guarantee (other than Indebtedness hereunder and Indebtedness under Swap Contracts) having an aggregate principal amount (including undrawn committed or available amounts and including amounts owing to all creditors under any combined or syndicated credit arrangement) of more than \$5,000,000, or (B) fails to observe or perform any other agreement or condition relating to any such Indebtedness or Guarantee, having an aggregate principal amount (including undrawn committed or available amounts and including amounts owing to all creditors under any combined or syndicated credit arrangement) of more than \$5,000,000, or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event occurs, the effect of which default or other event is to cause, or to permit the holder or holders of such Indebtedness or the beneficiary or beneficiaries of such Guarantee (or a trustee or agent on behalf of such holder or holders or beneficiary or beneficiaries) to cause, with the giving of notice if required, such Indebtedness to be demanded or to become due or to be repurchased, prepaid, defeased or redeemed (automatically or otherwise), or an offer to repurchase, prepay, defease or redeem such Indebtedness to be made, prior to its stated maturity, or such Guarantee to become payable or cash collateral in respect thereof to be demanded; or (ii) there occurs under any Swap Contract an Early Termination Date (as defined in such Swap Contract) resulting from (A) any event of default under such Swap Contract as to which Borrower, any Loan Party or any Material Subsidiary is the Defaulting Party (as defined in such Swap Contract) or (B) any Termination Event (as so defined) under such Swap Contract as to which Borrower, any Loan Party or any

Material Subsidiary is an Affected Party (as so defined) and, in either event, the Swap Termination Value owed by Borrower, any such Loan Party or any such Material Subsidiary as a result thereof is greater than \$5,000,000; or

(f) **Insolvency Proceedings, Etc.** Any Loan Party or any of its Material Subsidiaries institutes or consents to the institution of any proceeding under any Debtor Relief Law, or makes an assignment for the benefit of creditors; or applies for or consents to the appointment of any receiver, trustee, custodian, conservator, liquidator, rehabilitator or similar officer for it or for all or any material part of its property; or any receiver, trustee, custodian, conservator, liquidator, rehabilitator or similar officer is appointed without the application or consent of such Person and the appointment continues undischarged or unstayed for forty-five (45) calendar days; or any proceeding under any Debtor Relief Law relating to any such Person or to all or any material part of its property is instituted without the consent of such Person and continues undismissed or unstayed for forty-five (45) calendar days, or an order for relief is entered in any such proceeding; or

(g) **Inability to Pay Debts; Attachment.** (i) Borrower or any other Loan Party or any Material Subsidiary ceases to be Solvent or otherwise becomes unable or admits in writing its inability or fails generally to pay its debts as they become due, or (ii) any writ or warrant of attachment or execution or similar process is issued or levied against all or any material part of the property of any such Person and is not released, vacated or fully bonded within thirty (30) days after its issue or levy; or (iii) any one or more Loan Parties or their respective Subsidiaries are enjoined, restrained or prevented by any Governmental Authority from conducting any material part of the business of the Loan Parties and their Subsidiaries, taken as a whole; or (iv) there is a cessation of any material part of the business of the Loan Parties and their respective Subsidiaries, taken as a whole, for a material period of time; or

(h) **Judgments.** There is entered against Borrower, any other Loan Party or any Material Subsidiary (i) one or more final judgments or orders for the payment of money in an aggregate amount (as to all such judgments or orders) exceeding \$5,000,000 (to the extent not covered by independent third-party insurance as to which the insurer does not dispute coverage), or (ii) any one or more non-monetary final judgments that have, or could reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect and, in either case, (A) enforcement proceedings are commenced by any creditor upon such judgment or order, or (B) there is a period of ten (10) consecutive days during which a stay of enforcement of such judgment, by reason of a pending appeal or otherwise, is not in effect; or

(i) **ERISA.** (i) An ERISA Event occurs with respect to a Pension Plan or Multiemployer Plan which has resulted or could reasonably be expected to result in liability of Borrower under Title IV of ERISA to the Pension Plan, Multiemployer Plan or the PBGC in an aggregate amount in excess of the Threshold Amount, or (ii) Borrower or any ERISA Affiliate fails to pay when due, after the expiration of any applicable grace period, any installment payment with respect to its withdrawal liability under Section 4201 of ERISA under a Multiemployer Plan in an aggregate amount in excess of the Threshold Amount; or

(j) **Invalidity of Loan Documents.** Any Loan Document or any provision thereof, at any time after its execution and delivery and for any reason other than as expressly

permitted hereunder or thereunder or the satisfaction in full of all the Obligations (other than contingent indemnification obligations that survive the termination of this Agreement and obligations arising under Cash Management Agreements that survive the termination of this Agreement) and the occurrence of the Facility Termination Date, ceases to be in full force and effect; or any Loan Party or any other Person contests in any manner the validity or enforceability of any Loan Document or any provision thereof; or any Loan Party denies that it has any or further liability or obligation under any Loan Document, or purports to revoke, terminate or rescind any Loan Document or any provision thereof; or

(k) **Change of Control.** There occurs any Change of Control with respect to Borrower or Borrower ceases to own and control 100% of the Equity Interests of each Subsidiary (except for transactions resulting in a Subsidiary ceasing to exist as expressly permitted under Section 8.04); or

(l) **Lien Priority.** Any Lien purported to be created under any Collateral Document shall cease to be, or shall be asserted by any Loan Party or any other Person not to be, a valid and perfected Lien on any Collateral, with the priority required by this Agreement, except as a result of the sale or other disposition of the applicable Collateral in a transaction permitted under the Loan Documents.

9.02 **Remedies Upon Event of Default.** If any Event of Default occurs and is continuing, Administrative Agent shall, at the request of, or may, with the consent of, the Required Lenders, take any or all of the following actions:

(a) declare the commitment of each Lender to make Loans and any obligation of the L/C Issuer to make L/C Credit Extensions to be terminated, whereupon such commitments and obligation shall be terminated;

(b) declare the unpaid principal amount of all outstanding Loans, all interest accrued and unpaid thereon, and all other amounts owing or payable hereunder or under any other Loan Document to be immediately due and payable, without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by Borrower;

(c) require that Borrower Cash Collateralize the L/C Obligations (in an amount equal to the Minimum Collateral Amount with respect thereto); and

(d) exercise on behalf of itself, the Lenders and the L/C Issuer all rights and remedies available to it, the Lenders and the L/C Issuer under the Loan Documents;

provided, however, that upon the occurrence of an actual or deemed entry of an order for relief with respect to Borrower under the Bankruptcy Code of the United States, the obligation of each Lender to make Loans and any obligation of the L/C Issuer to make L/C Credit Extensions shall automatically terminate, the unpaid principal amount of all outstanding Loans and all interest and other amounts as aforesaid shall automatically become due and payable, and the obligation of Borrower to Cash Collateralize the L/C Obligations as aforesaid shall automatically become effective, in each case without further act of Administrative Agent or any Lender.

9.03 **Application of Funds.** After the exercise of remedies provided for in Section 9.02 (or after the Loans have automatically become immediately due and payable and the L/C Obligations have automatically been required to be Cash Collateralized as set forth in the proviso to Section 9.02), any amounts received on account of the Secured Obligations shall, subject to the provisions of Sections 2.15 and 2.16, be applied by Administrative Agent in the following order:

First, to payment of that portion of the Secured Obligations constituting fees, indemnities, expenses and other amounts (including fees, charges and disbursements of counsel to Administrative Agent (including fees and time charges for attorneys who may be employees of Administrative Agent) and amounts payable under Article III) payable to Administrative Agent in its capacity as such;

Second, to payment of that portion of the Secured Obligations constituting fees, indemnities and other amounts (other than principal, interest and L/C Fees) payable to Lenders and the L/C Issuer (including fees, charges and disbursements of counsel to the respective Lenders and the L/C Issuer arising under the Loan Documents (including fees and time charges for attorneys who may be employees of any Lender or the L/C Issuer) and amounts payable under Article III), ratably among them in proportion to the respective amounts described in this clause Second payable to them;

Third, to payment of that portion of the Secured Obligations constituting accrued and unpaid L/C Fees and interest on the Loans, L/C Borrowings and other Secured Obligations arising under the Loan Documents, ratably among Lenders and the L/C Issuer in proportion to the respective amounts described in this clause Third payable to them;

Fourth, to payment of that portion of the Secured Obligations constituting unpaid principal of the Loans, L/C Borrowings and Secured Obligations then owing under Secured Hedge Agreements and Secured Cash Management Agreements, ratably among the Lenders, the L/C Issuer, the Hedge Banks and the Cash Management Banks in proportion to the respective amounts described in this clause Fourth held by them;

Fifth, to Administrative Agent for the account of the L/C Issuer, to Cash Collateralize that portion of L/C Obligations comprised of the aggregate undrawn amount of Letters of Credit to the extent not otherwise Cash Collateralized by Borrower pursuant to Sections 2.03 and 2.15; and

Last, the balance, if any, after all of the Secured Obligations (other than indemnities and other similar contingent obligations surviving the termination of this Agreement for which no claim has been made and which are unknown and not calculable at the time of termination) have been indefeasibly paid in full, to Borrower or as otherwise required by Law.

Subject to Sections 2.03(c) and 2.15, amounts used to Cash Collateralize the aggregate undrawn amount of Letters of Credit pursuant to clause Fifth above shall be applied to satisfy drawings under such Letters of Credit as they occur. If any amount remains on deposit as Cash Collateral after all Letters of Credit have either been fully drawn or expired, such remaining amount shall be applied to the other Secured Obligations, if any, in the order set forth above.

Notwithstanding the foregoing, Secured Obligations arising under Secured Cash Management Agreements and Secured Hedge Agreements shall be excluded from the application described above if Administrative Agent has not received a Secured Party Designation Notice, together with such supporting documentation as Administrative Agent may request, from the applicable Cash Management Bank or Hedge Bank, as the case may be. Each Cash Management Bank or Hedge Bank not a party to this Agreement that has given the notice contemplated by the preceding sentence shall, by such notice, be deemed to have acknowledged and accepted the appointment of Administrative Agent pursuant to the terms of Article X for itself and its Affiliates as if a “Lender” party hereto.

Notwithstanding anything to the contrary set forth above, Excluded Swap Obligations with respect to any Guarantor shall not be paid with amounts received from such Guarantor or its assets, but appropriate adjustments shall be made with respect to payments from other Grantors to preserve the allocation to Obligations otherwise set forth above in this section.

## **ARTICLE X**

### **AGENCY**

10.01 **Appointment and Authorization of Administrative Agent.** (a) Each of the Lenders (including in its capacities as a potential Cash Management Bank and a potential Hedge Bank) and the L/C Issuer hereby irrevocably appoint MUFG Union Bank, N.A. to act on its behalf as Administrative Agent hereunder and under the other Loan Documents and authorizes Administrative Agent to take such actions on its behalf and to exercise such powers as are delegated to Administrative Agent by the terms hereof and thereof, together with such actions and powers as are reasonably incidental thereto. The provisions of this Article X are solely for the benefit of Administrative Agent, the Lenders and the L/C Issuer, and neither Borrower nor any other Loan Party shall have rights as a third party beneficiary of any of such provisions.

(a) Administrative Agent shall also act as the “collateral agent” under the Loan Documents, and each of the Lenders (including in its capacities as a potential Hedge Bank and a potential Cash Management Bank) and the L/C Issuer hereby irrevocably appoint and authorizes Administrative Agent to act as the agent of such Lender and the L/C Issuer for purposes of acquiring, holding and enforcing any and all Liens on Collateral granted by any of the Loan Parties to secure any of the Secured Obligations, together with such powers and discretion as are reasonably incidental thereto. In this connection, Administrative Agent, as “collateral agent” and any co-agents, sub-agents and attorneys-in-fact appointed by Administrative Agent pursuant to Section 10.05 or otherwise for purposes of holding or enforcing any Lien on the Collateral (or any portion thereof) granted under the Collateral Documents, or for exercising any rights and remedies thereunder at the direction of Administrative Agent), shall be entitled to the benefits of all provisions of this Article X and Article XI (including Section 11.04(c)), as though such co-agents, sub-agents and attorneys-in-fact were the “collateral agent” under the Loan Documents as if set forth in full herein with respect thereto.

(b) The duties of Administrative Agent shall be ministerial and administrative in nature and Administrative Agent shall not have, or be deemed to have, by reason of this



Agreement, any other Loan Document, or otherwise a fiduciary relationship in respect of any Lender or the L/C Issuer. In performing its functions and duties under this Agreement and the other Loan Documents, Administrative Agent shall act solely as an agent of Lenders and the L/C Issuer and does not assume and shall not be deemed to have assumed any obligation toward or relationship of agency or trust with or for Borrower or any other Person. It is understood and agreed that the use of the term "agent" herein or in any other Loan Documents (or any other similar term) with reference to Administrative Agent is not intended to connote any fiduciary or other implied (or express) obligations arising under agency doctrine of any applicable Law. Instead such term is used as a matter of market custom, and is intended to create or reflect only an administrative relationship between contracting parties.

(c) For the avoidance of doubt, Union Bank hereby acknowledges and agrees that, with respect to the UCC financing statement filed with the Delaware Department of State on September 21, 2010, numbered 20103282831, naming Borrower as debtor, and Union Bank as secured party, as amended, previously filed by Union Bank, such UCC financing statement, and any and all recordings with the United States Patent and Trademark Office and/or United States Copyright Office, are maintained by Union Bank in its capacity as Administrative Agent for the perfection of the Liens granted to Administrative Agent, for the benefit of itself and the Lenders, under this Agreement and the Collateral Documents.

(d) Each Lender agrees that it shall not have any right individually to realize upon the Collateral granted to Administrative Agent or directly to the Lenders pursuant to any Loan Document, it being understood and agreed that such rights and remedies may be exercised by Administrative Agent for the benefit of the Lenders upon the terms thereof. Notwithstanding anything to the contrary herein or in any other Loan Document, Administrative Agent is hereby irrevocably authorized by each Lender to release any Lien in any Collateral if such release is consented to in accordance with Section 11.01.

(e) Without limiting the generality of the foregoing, or of any other provision of the Loan Documents that provides rights or powers to Administrative Agent, Administrative Agent shall have the right to exercise the following powers as long as this Agreement remains in effect: (i) maintain, in accordance with its customary business practices, ledgers and records reflecting the status of the Obligations, the Collateral, the collections of funds from Borrower and its Subsidiaries, and related matters, (ii) execute or file any and all financing or similar statements or notices, amendments, renewals, supplements, documents, instruments, proofs of claim, notices and other written agreements with respect to the Loan Documents, (iii) make Loans, for itself or on behalf of Lenders as provided in the Loan Documents, (iv) exclusively receive, apply, and distribute the funds received from Borrower and any of its Subsidiaries as provided in the Loan Documents, (v) open and maintain such bank accounts and cash management accounts as Administrative Agent deems necessary and appropriate in accordance with the Loan Documents for the foregoing purposes with respect to the Collateral and collection of funds from Borrower and its Subsidiaries, (v) perform, exercise, and enforce any and all other rights and remedies of each Lender with respect to the Loan Parties, the Obligations, the Collateral, the collection of funds from Borrower and its Subsidiaries, or otherwise related to any of same as provided in the Loan Documents, and (g) incur and pay any expenses as Administrative Agent may deem necessary or appropriate for the performance and fulfillment of its functions and powers pursuant to the Loan Documents..

10.02 **Rights as a Lender.** The Person serving as Administrative Agent hereunder shall have the same rights and powers in its capacity as a Lender as any other Lender and may exercise the same as though it were not Administrative Agent and the term “Lender” or “Lenders” shall, unless otherwise expressly indicated or unless the context otherwise requires, include the Person serving as Administrative Agent hereunder in its individual capacity. Such Person and its Affiliates may accept deposits from, lend money to, own securities of, act as the financial advisor or in any other advisory capacity for and generally engage in any kind of business with Borrower or any Subsidiary or other Affiliate thereof as if such Person were not Administrative Agent hereunder and without any duty to account therefor to Lenders.

10.03 **Exculpatory Provisions.** Administrative Agent shall not have any duties or obligations except those expressly set forth herein and in the other Loan Documents and its duties hereunder shall be administrative in nature. Without limiting the generality of the foregoing, Administrative Agent:

(a) shall not be subject to any fiduciary or other implied duties, regardless of whether a Default has occurred and is continuing;

(b) shall not have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated hereby or by the other Loan Documents that Administrative Agent is required to exercise as directed in writing by the Required Lenders (or such other number or percentage of the Lenders as shall be expressly provided for herein or in the other Loan Documents), provided that Administrative Agent shall not be required to take any action that, in its opinion or the opinion of its counsel, may expose Administrative Agent to liability or that is contrary to any Loan Document or applicable Law, including for the avoidance of doubt any action that may be in violation of the automatic stay under any Debtor Relief Law or that may effect a forfeiture, modification or termination of property of a Defaulting Lender in violation of any Debtor Relief Law; and

(c) shall not, except as expressly set forth herein and in the other Loan Documents, have any duty to disclose, and shall not be liable for the failure to disclose, any information relating to Borrower or any of its Affiliates that is communicated to or obtained by the Person serving as Administrative Agent or any of its Affiliates in any capacity.

(d) Administrative Agent shall not be liable for any action taken or not taken by it (i) with the consent or at the request of the Required Lenders (or such other number or percentage of the Lenders as shall be necessary, or as Administrative Agent shall believe in good faith shall be necessary, under the circumstances as provided in Sections 9.02 and 11.01) or (ii) in the absence of its own gross negligence or willful misconduct as determined by a court of competent jurisdiction by final and nonappealable judgment. Administrative Agent shall be deemed not to have knowledge of any Default unless and until written notice describing such Default is given to Administrative Agent by Borrower, a Lender or the L/C Issuer.

(e) Administrative Agent shall not be responsible for or have any duty to ascertain or inquire into (i) any statement, warranty or representation made in or in connection with this Agreement or any other Loan Document, (ii) the contents of any certificate, report or other document delivered hereunder or thereunder or in connection herewith or therewith,

(iii) the performance or observance of any of the covenants, agreements or other terms or conditions set forth herein or therein or the occurrence of any Default, (iv) the validity, enforceability, effectiveness or genuineness of this Agreement, any other Loan Document or any other agreement, instrument or document (v) the creation, perfection or priority of any Lien purported to be created by the Collateral Documents, (vi) the value, safekeeping or the sufficiency of any Collateral, or (vii) the satisfaction of any condition set forth in Article V or elsewhere herein, other than to confirm receipt of items expressly required to be delivered to Administrative Agent.

10.04 **Reliance by Administrative Agent.** Administrative Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing (including any electronic message, Internet or intranet website posting or other distribution) believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person. Administrative Agent also may rely upon any statement made to it orally or by telephone and believed by it to have been made by the proper Person, and shall not incur any liability for relying thereon. In determining compliance with any condition hereunder to the making of a Loan, or the issuance, extension, renewal or increase of a Letter of Credit, that by its terms must be fulfilled to the satisfaction of a Lender or the L/C Issuer, Administrative Agent may presume that such condition is satisfactory to such Lender or the L/C Issuer unless Administrative Agent shall have received notice to the contrary from such Lender or the L/C Issuer prior to the making of such Loan or the issuance of such Letter of Credit. Administrative Agent may consult with legal counsel (who may be counsel for Borrower), independent accountants and other experts selected by it, and shall not be liable for any action taken or not taken by it in accordance with the advice of any such counsel, accountants or experts.

10.05 **Delegation of Duties.** Administrative Agent may perform any and all of its duties and exercise its rights and powers hereunder or under any other Loan Document by or through any one or more sub agents appointed by Administrative Agent. Administrative Agent and any such sub agent may perform any and all of its duties and exercise its rights and powers by or through their respective Related Parties. The exculpatory provisions of this Article shall apply to any such sub agent and to the Related Parties of Administrative Agent and any such sub agent, and shall apply to their respective activities in connection with the syndication of the credit facilities provided for herein as well as activities as Administrative Agent. Administrative Agent shall not be responsible for the negligence or misconduct of any sub-agents except to the extent that a court of competent jurisdiction determines in a final and nonappealable judgment that Administrative Agent acted with gross negligence or willful misconduct in the selection of such sub-agents.

10.06 **Resignation or Removal of Administrative Agent.**

(a) Administrative Agent may at any time give notice of its resignation to Lenders, the L/C Issuer and Borrower. Upon receipt of any such notice of resignation, the Required Lenders shall have the right, in consultation with Borrower if no Event of Default has occurred and is continuing, to appoint a successor, which shall be a bank with an office in the United States, or an Affiliate of any such bank with an office in the United States. If no such successor shall have been so appointed by the Required Lenders and shall have accepted such

appointment within thirty (30) days after the retiring Administrative Agent gives notice of its resignation (or such earlier day as shall be agreed by the Required Lenders) (the “**Resignation Effective Date**”), then the retiring Administrative Agent may (but shall not be obligated to), on behalf of Lenders and the L/C Issuer, appoint a successor Administrative Agent meeting the qualifications set forth above; provided that in no event shall any such successor Administrative Agent be a Defaulting Lender. Whether or not a successor agent has been appointed, such resignation shall nonetheless become effective on the Resignation Effective Date.

(b) If the Person serving as Administrative Agent is a Defaulting Lender pursuant to clause (d) of the definition thereof, the Required Lenders may, to the extent permitted by applicable law, by notice in writing to Borrower and such Person remove such Person as Administrative Agent and, in consultation with Borrower, appoint a successor. If no such successor shall have been so appointed by the Required Lenders and shall have accepted such appointment within 30 days (or such earlier day as shall be agreed by the Required Lenders) (the “**Removal Effective Date**”), then such removal shall nonetheless become effective in accordance with such notice on the Removal Effective Date.

(c) With effect from the Resignation Effective Date or the Removal Effective Date (as applicable) (1) the retiring or removed Administrative Agent shall be discharged from its duties and obligations hereunder and under the other Loan Documents (except that in the case of any collateral security held by Administrative Agent on behalf of the Lenders or the L/C Issuer under any of the Loan Documents, the retiring or removed Administrative Agent shall continue to hold such collateral security until such time as a successor Administrative Agent is appointed) and (2) except for any indemnity payments or other amounts then owed to the retiring or removed Administrative Agent, all payments, communications and determinations provided to be made by, to or through Administrative Agent shall instead be made by or to each Lender and the L/C Issuer directly, until such time as the Required Lenders appoint a successor Administrative Agent as provided for above. Upon the acceptance of a successor’s appointment as Administrative Agent hereunder, such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring (or retired) or removed Administrative Agent (other than as provided in Section 3.01(g) and other than any rights to indemnity payments or other amounts owed to the retiring or removed Administrative Agent as of the Resignation Effective Date or the Removal Effective Date, as applicable), and the retiring or removed Administrative Agent shall be discharged from all of its duties and obligations hereunder or under the other Loan Documents (if not already discharged therefrom as provided above). The fees payable by Borrower to a successor Administrative Agent shall be the same as those payable to its predecessor unless otherwise agreed between Borrower and such successor. After the retiring or removed Administrative Agent’s resignation or removal hereunder and under the other Loan Documents, the provisions of this Article and Section 11.04 shall continue in effect for the benefit of such retiring or removed Administrative Agent, its sub agents and their respective Related Parties in respect of any actions taken or omitted to be taken by any of them while the retiring or removed Administrative Agent was acting as Administrative Agent.

(d) Any resignation by MUFG Union Bank, N.A. as Administrative Agent pursuant to this Section shall also constitute its resignation as L/C Issuer. If Union Bank resigns as an L/C Issuer, it shall retain all the rights, powers, privileges and duties of the L/C Issuer hereunder with respect to all Letters of Credit outstanding as of the effective date of its

resignation as L/C Issuer and all L/C Obligations with respect thereto, including the right to require the Lenders to make Base Rate Loans or fund risk participations in Unreimbursed Amounts pursuant to Section 2.03(c). Upon the appointment by Borrower of a successor L/C Issuer hereunder (which successor shall in all cases be a Lender other than a Defaulting Lender), (a) such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring L/C Issuer, (b) the retiring L/C Issuer shall be discharged from all of their respective duties and obligations hereunder or under the other Loan Documents, and (c) the successor L/C Issuer shall issue letters of credit in substitution for the Letters of Credit, if any, outstanding at the time of such succession or make other arrangements satisfactory to the retiring L/C Issuer to effectively assume the obligations of the retiring L/C Issuer with respect to such Letters of Credit.

10.07 **Non-Reliance on Administrative Agent and Other Lenders.** Each Lender and the L/C Issuer acknowledges that it has, independently and without reliance upon Administrative Agent or any other Lender or any of their Related Parties and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Lender and the L/C Issuer also acknowledges that it will, independently and without reliance upon Administrative Agent or any other Lender or any of their Related Parties and based on such documents and information as it shall from time to time deem appropriate, continue to make its own decisions in taking or not taking action under or based upon this Agreement, any other Loan Document or any related agreement or any document furnished hereunder or thereunder.

10.08 **No Other Duties, Etc.** Anything herein to the contrary notwithstanding, none of the bookrunners, arrangers, syndication agents, documentation agents, co-agents or other Persons holding a title listed on the cover page hereof shall have any powers, duties or responsibilities under this Agreement or any of the other Loan Documents, except in its capacity, as applicable, as Administrative Agent, a Lender or the L/C Issuer hereunder.

10.09 **Administrative Agent May File Proofs of Claim; Credit Bidding.** In case of the pendency of any proceeding under any Debtor Relief Law or any other judicial proceeding relative to any Loan Party, Administrative Agent (irrespective of whether the principal of any Loan or L/C Obligation shall then be due and payable as herein expressed or by declaration or otherwise and irrespective of whether Administrative Agent shall have made any demand on Borrower) shall be entitled and empowered (but not obligated), by intervention in such proceeding or otherwise:

(a) to file and prove a claim for the whole amount of the principal and interest owing and unpaid in respect of the Loans, L/C Obligations and all other Secured Obligations (other than obligations under Swap Contracts or Treasury Management Agreements to which Administrative Agent is not a party) that are owing and unpaid and to file such other documents as may be necessary or advisable in order to have the claims of Lenders, the L/C Issuer and Administrative Agent (including any claim for the reasonable compensation, expenses, disbursements and advances of Lenders, the L/C Issuer and Administrative Agent and their respective agents and counsel and all other amounts due Lenders, the L/C Issuer and Administrative Agent under Sections 2.03(i) and (j), 2.09 and 11.04) allowed in such judicial proceeding; and

(b) to collect and receive any monies or other property payable or deliverable on any such claims and to distribute the same;

and any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceeding is hereby authorized by each Lender and the L/C Issuer to make such payments to Administrative Agent and, in the event that Administrative Agent shall consent to the making of such payments directly to Lenders and the L/C Issuer, to pay to Administrative Agent any amount due for the reasonable compensation, expenses, disbursements and advances of Administrative Agent and its agents and counsel, and any other amounts due Administrative Agent under Sections 2.09 and 11.04.

Nothing contained herein shall be deemed to authorize Administrative Agent to authorize or consent to or accept or adopt on behalf of any Lender or L/C Issuer any plan of reorganization, arrangement, adjustment or composition affecting the Secured Obligations or the rights of any Lender or L/C Issuer to authorize Administrative Agent to vote in respect of the claim of any Lender or L/C Issuer in any such proceeding.

The Secured Parties hereby irrevocably authorize Administrative Agent, at the direction of the Required Lenders, to credit bid all or any portion of the Secured Obligations (including accepting some or all of the Collateral in satisfaction of some or all of the Secured Obligations pursuant to a deed in lieu of foreclosure or otherwise) and in such manner purchase (either directly or through one or more acquisition vehicles) all or any portion of the Collateral (a) at any sale thereof conducted under the provisions of the Bankruptcy Code of the United States, including under Sections 363, 1123 or 1129 of the Bankruptcy Code of the United States, or any similar Laws in any other jurisdictions to which a Loan Party is subject, (b) at any other sale or foreclosure or acceptance of collateral in lieu of debt conducted by (or with the consent or at the direction of) Administrative Agent (whether by judicial action or otherwise) in accordance with any applicable Law. In connection with any such credit bid and purchase, the Secured Obligations owed to the Secured Parties shall be entitled to be, and shall be, credit bid on a ratable basis (with Obligations with respect to contingent or unliquidated claims receiving contingent interests in the acquired assets on a ratable basis that would vest upon the liquidation of such claims in an amount proportional to the liquidated portion of the contingent claim amount used in allocating the contingent interests) in the asset or assets so purchased (or in the Equity Interests or debt instruments of the acquisition vehicle or vehicles that are used to consummate such purchase). In connection with any such bid (i) Administrative Agent shall be authorized to form one or more acquisition vehicles to make a bid, (ii) to adopt documents providing for the governance of the acquisition vehicle or vehicles (provided that any actions by Administrative Agent with respect to such acquisition vehicle or vehicles, including any disposition of the assets or Equity Interests thereof shall be governed, directly or indirectly, by the vote of the Required Lenders, irrespective of the termination of this Agreement and without giving effect to the limitations on actions by the Required Lenders contained in Section 11.01 of this Agreement, (iii) Administrative Agent shall be authorized to assign the relevant Obligations to any such acquisition vehicle pro rata by the Lenders, as a result of which each of the Lenders shall be deemed to have received a pro rata portion of any Equity Interests and/or debt instruments issued by such an acquisition vehicle on account of the assignment of the Obligations to be credit bid, all without the need for any Secured Party or acquisition vehicle to take any further action, and (iv) to the extent that Obligations that are assigned to an acquisition

vehicle are not used to acquire Collateral for any reason (as a result of another bid being higher or better, because the amount of Obligations assigned to the acquisition vehicle exceeds the amount of debt credit bid by the acquisition vehicle or otherwise), such Obligations shall automatically be reassigned to the Lenders pro rata and the Equity Interests and/or debt instruments issued by any acquisition vehicle on account of the Obligations that had been assigned to the acquisition vehicle shall automatically be cancelled, without the need for any Secured Party or any acquisition vehicle to take any further action.

10.10 **Guaranty Matters.** Without limiting the provisions of Section 10.09, each of the Lenders (including in its capacities as a potential Cash Management Bank and a potential Hedge Bank) and L/C Issuer hereby irrevocably authorize Administrative Agent, at its option and in its discretion, to release any Guarantor from its obligations under the Guaranty if such Person ceases to be a Subsidiary or a Material Subsidiary as a result of a transaction or event permitted hereunder. Upon request by Administrative Agent at any time, each Lender and L/C Issuer will confirm in writing Administrative Agent's authority to release any Guarantor from its obligations under the Guaranty pursuant to this Section 10.10.

10.11 **Collateral Matters.**

(a) Without limiting the provisions of Section 10.09, each of the Lenders (including in its capacities as a potential Cash Management Bank and a potential Hedge Bank) and L/C Issuer hereby irrevocably authorizes and directs Administrative Agent to enter into the Collateral Documents for the benefit of such Lender and the L/C Issuer. Each Lender and the L/C Issuer hereby agrees, and each holder of any Note by the acceptance thereof will be deemed to agree, that, except as otherwise set forth in Section 11.01, any action taken by the Required Lenders, in accordance with the provisions of this Agreement or the Collateral Documents, and the exercise by the Required Lenders of the powers set forth herein or therein, together with such other powers as are reasonably incidental thereto, shall be authorized and binding upon all of Lenders and the L/C Issuer. Administrative Agent is hereby authorized (but not obligated) on behalf of all of Lenders and the L/C Issuer, without the necessity of any notice to or further consent from any Lender or the L/C Issuer from time to time prior to, an Event of Default, to take any action with respect to any Collateral or Collateral Documents which may be necessary to perfect and maintain perfected the Liens upon the Collateral granted pursuant to the Collateral Documents.

(b) Each Lender and the L/C issuer hereby irrevocably authorize Administrative Agent, at its option and in its discretion,

(i) to release any Lien on any property granted to or held by Administrative Agent under any Loan Document (A) upon the occurrence of the Facility Termination Date, (B) that is sold or otherwise disposed of or to be sold or otherwise disposed of as part of or in connection with any transfer permitted hereunder or under any other Loan Document, (C) subject to Section 11.01, if approved, authorized or ratified in writing by the Required Lenders, (D) in connection with any foreclosure sale or other disposition of Collateral after the occurrence of an Event of Default; (E) that is subject to an Involuntary Disposition, or (F) as required under the Security Agreement; and

(ii) to subordinate any Lien on any property granted to or held by Administrative Agent under any Loan Document to the holder of any Lien on such property that is permitted by this Agreement or any other Loan Document.

Upon request by Administrative Agent at any time, each Lender and the L/C Issuer will confirm in writing Administrative Agent's authority to release or subordinate its interest in particular types or items of Collateral pursuant to this Section 10.11.

(c) Subject to (b) above, Administrative Agent shall (and is hereby irrevocably authorized by each Lender and the L/C Issuer), to execute such documents as may be necessary to evidence the release or subordination of the Liens granted to Administrative Agent for the benefit of Administrative Agent and Lenders and the L/C Issuer herein or pursuant hereto upon the applicable Collateral; provided that (i) Administrative Agent shall not be required to execute any such document on terms which, in Administrative Agent's opinion, would expose Administrative Agent to or create any liability or entail any consequence other than the release or subordination of such Liens without recourse or warranty and (ii) such release or subordination shall not in any manner discharge, affect or impair the Obligations or any Liens upon (or obligations of Borrower or any other Loan Party in respect of) all interests retained by Borrower or any other Loan Party, including the proceeds of the sale, all of which shall continue to constitute part of the Collateral. In the event of any sale or transfer of Collateral, or any foreclosure with respect to any of the Collateral, Administrative Agent shall be authorized to deduct all expenses reasonably incurred by Administrative Agent from the proceeds of any such sale, transfer or foreclosure.

(d) Administrative Agent shall have no obligation whatsoever to any Lender, the L/C Issuer or any other Person to assure that the Collateral exists or is owned by Borrower or any other Loan Party or is cared for, protected or insured or that the Liens granted to Administrative Agent herein or in any of the Collateral Documents or pursuant hereto or thereto have been properly or sufficiently or lawfully created, perfected, protected or enforced or are entitled to any particular priority, or to exercise or to continue exercising at all or in any manner or under any duty of care, disclosure or fidelity any of the rights, authorities and powers granted or available to Administrative Agent in this Section 10.11 or in any of the Collateral Documents, it being understood and agreed that in respect of the Collateral, or any act, omission or event related thereto, Administrative Agent may act in any manner it may deem appropriate, in its sole discretion, given Administrative Agent's own interest in the Collateral as one of Lenders and that Administrative Agent shall have no duty or liability whatsoever to Lenders or the L/C Issuer.

(e) Each Lender and the L/C Issuer hereby appoints each other Lender as agent for the purpose of perfecting Lenders' and the L/C Issuer's security interest in assets which, in accordance with Article 9 of the UCC can be perfected only by possession. Should any Lender or the L/C Issuer (other than Administrative Agent) obtain possession of any such Collateral, such Lender or the L/C Issuer shall notify Administrative Agent thereof, and, promptly upon Administrative Agent's request therefor shall deliver such Collateral to Administrative Agent or in accordance with Administrative Agent's instructions.

(f) Administrative Agent shall not be responsible for or have a duty to ascertain or inquire into any representation or warranty regarding the existence, value or



collectability of the Collateral, the existence, priority or perfection of Administrative Agent's Lien thereon, or any certificate prepared by any Loan Party in connection therewith, nor shall Administrative Agent be responsible or liable to the Lenders for any failure to monitor or maintain any portion of the Collateral.

10.12 **Secured Cash Management Agreements and Secured Hedge Agreements.** Except as otherwise expressly set forth herein, no Cash Management Bank or Hedge Bank that obtains the benefit of the provisions of Section 9.03, the Guaranty or any Collateral by virtue of the provisions hereof or of the Guaranty or any Collateral Document shall have any right to notice of any action or to consent to, direct or object to any action hereunder or under any other Loan Document or otherwise in respect of the Collateral (including the release or impairment of any Collateral) (or to notice of or to consent to any amendment, waiver or modification of the provisions hereof or of the Guaranty or any Collateral Document) other than in its capacity as a Lender, an L/C Issuer or Administrative Agent and, in such case, only to the extent expressly provided in the Loan Documents. Notwithstanding any other provision of this Article X to the contrary, Administrative Agent shall not be required to verify the payment of, or that other satisfactory arrangements have been made with respect to, Secured Obligations arising under Secured Cash Management Agreements and Secured Hedge Agreements unless Administrative Agent has received a Secured Party Designation Notice of such Secured Obligations, together with such supporting documentation as Administrative Agent may request, from the applicable Cash Management Bank or Hedge Bank, as the case may be. Administrative Agent shall not be required to verify the payment of, or that other satisfactory arrangements have been made with respect to, Secured Obligations arising under Secured Cash Management Agreements and Secured Hedge Agreements, in the case of a Facility Termination Date.

10.13 **Legal Representation of Administrative Agent.** In connection with the negotiation, drafting, and execution of this Agreement and the other Loan Documents, or in connection with future legal representation relating to loan administration, amendments, modifications, waivers, or enforcement of remedies, DLA Piper LLP (US) has only represented and shall only represent Bank in its capacity as Administrative Agent and as a Lender. Each other Lender hereby acknowledges that DLA Piper LLP (US) does not represent such Lender in connection with any such matters.

## **ARTICLE XI**

### **MISCELLANEOUS**

11.01 **Amendments, Etc.** No amendment or waiver of any provision of this Agreement or any other Loan Document, and no consent to any departure by Borrower or any other Loan Party therefrom, shall be effective unless in writing signed by the Required Lenders and Borrower or the applicable Loan Party, as the case may be, and acknowledged by Administrative Agent, and each such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given; provided, however, that (x) and Borrower and Administrative Agent may, with the consent of the other, amend, modify or supplement this Agreement and any other Loan Document to cure any ambiguity, typographical error, defect or inconsistency if such amendment, modification or supplement does not adversely affect the rights of any

Administrative Agent, any Lender or the L/C Issuer, and (y) no such amendment, waiver or consent shall:

(a) waive any condition set forth in Section 5.01(a) without the written consent of each Lender; provided, however, in the sole discretion of Administrative Agent, only a waiver by Administrative Agent shall be required with respect to immaterial matters or items specified in Section 5.01(a)(iii) or (iv) with respect to which Borrower has given assurances satisfactory to Administrative Agent that such items shall be delivered promptly following the Closing Date;

(b) extend or increase the Commitment of any Lender (or reinstate any Commitment terminated pursuant to Section 9.02) without the written consent of such Lender whose Commitment is being extended or increased (it being understood and agreed that a waiver of any condition precedent set forth in Section 5.02 or of any Default or a mandatory reduction in Commitments is not considered an extension or increase in Commitments of any Lender);

(c) postpone any date fixed by this Agreement or any other Loan Document for any payment of principal (excluding mandatory prepayments), interest, fees or other amounts due to Lenders (or any of them) or any scheduled or mandatory reduction of the Commitments hereunder or under any other Loan Document without the written consent of each Lender entitled to receive such payment or whose Commitments are to be reduced;

(d) reduce the principal of, or the rate of interest specified herein on, any Loan or L/C Borrowing, or (subject to clause (iv) of the second proviso to this Section 11.01) any fees or other amounts payable hereunder or under any other Loan Document, without the written consent of each Lender entitled to receive such payment; provided, however, that only the consent of the Required Lenders shall be necessary (i) to amend the definition of "Default Rate" or to waive any obligation of Borrower to pay interest or L/C Fees at the Default Rate or (ii) to amend any financial covenant hereunder (or any defined term used therein) even if the effect of such amendment would be to reduce the rate of interest on any Loan or L/C Borrowing or to reduce any fee payable hereunder;

(e) change Section 2.13 or Section 9.03 in a manner that would alter the pro rata sharing of payments required thereby without the written consent of each Lender;

(f) change any provision of this Section or the definition of "Required Lenders" or any other provision hereof specifying the number or percentage of Lenders required to amend, waive or otherwise modify any rights hereunder or make any determination or grant any consent hereunder, without the written consent of each Lender; or

(g) release any Guarantor from the Guaranty, except in accordance with the terms of any Loan Document, or release the Liens on all or substantially all of the Collateral in any transaction or series of related transactions (it being understood that releases of Collateral in connection with a Disposition permitted under Section 8.05 (or as otherwise permitted under the definition of "Disposition"), do not involve substantially all of the Collateral and shall not require the consent of any of the Lenders), except in accordance with the terms of any Loan Document, without the written consent of each Lender;

and, provided further, that (i) no amendment, waiver or consent shall, unless in writing and signed by the L/C Issuer in addition to the Lenders required above, affect the rights or duties of the L/C Issuer under this Agreement or any Issuer Document relating to any Letter of Credit issued or to be issued by it; (ii) no amendment, waiver or consent shall, unless in writing and signed by Administrative Agent in addition to the Lenders required above, affect the rights or duties of Administrative Agent under this Agreement or any other Loan Document and (iv) the Fee Letter may be amended, or rights or privileges thereunder waived, in a writing executed only by the parties thereto.

Notwithstanding anything to the contrary herein, (i) no Defaulting Lender shall have any right to approve or disapprove any amendment, waiver or consent hereunder (and any amendment, waiver or consent which by its terms requires the consent of all Lenders or each affected Lender may be effected with the consent of the applicable Lenders other than Defaulting Lenders), except that (x) the Commitment of any Defaulting Lender may not be increased or extended without the consent of such Lender, and (y) any waiver, amendment or modification requiring the consent of all Lenders or each affected Lender that by its terms affects any Defaulting Lender disproportionately adversely relative to other affected Lenders shall require the consent of such Defaulting Lender; (ii) each Lender is entitled to vote as such Lender sees fit on any bankruptcy reorganization plan that affects the Loans, and each Lender acknowledges that the provisions of Section 1126(c) of the Bankruptcy Code of the United States supersedes the unanimous consent provisions set forth herein and (iii) the Required Lenders shall determine whether or not to allow a Loan Party to use cash collateral in the context of a bankruptcy or insolvency proceeding and such determination shall be binding on all of the Lenders.

#### 11.02 **Notices; Effectiveness; Electronic Communications.**

(a) **Notices Generally.** Except in the case of notices and other communications expressly permitted to be given by telephone (and except as provided in subsection (b) below), all notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by facsimile as follows, and all notices and other communications expressly permitted hereunder to be given by telephone shall be made to the applicable telephone number, as follows:

(i) if to Borrower, Administrative Agent or an L/C Issuer, to the address, facsimile number, electronic mail address or telephone number specified for such Person on Schedule 11.02 ; and

(ii) if to any other Lender, to the address, facsimile number, electronic mail address or telephone number specified in its Administrative Questionnaire (including, as appropriate, notices delivered solely to the Person designated by a Lender on its Administrative Questionnaire then in effect for the delivery of notices that may contain material non-public information relating to Borrower).

Notices and other communications sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received; notices and other communications sent by facsimile shall be deemed to have been given when sent (except

that, if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next Business Day for the recipient). Notices and other communications delivered through electronic communications to the extent provided in subsection (b) below, shall be effective as provided in such subsection (b).

(b) **Electronic Communications.** Notices and other communications to Lenders and the L/C Issuer hereunder may be delivered or furnished by electronic communication (including e-mail and Internet or intranet websites) pursuant to procedures approved by Administrative Agent, provided that the foregoing shall not apply to notices to any Lender or the L/C Issuer pursuant to Article II if such Lender or the L/C Issuer, as applicable has notified Administrative Agent that it is incapable of receiving notices under such Article by electronic communication. Administrative Agent, L/C Issuer or Borrower may each, in its discretion, agree to accept notices and other communications to it hereunder by electronic communications pursuant to procedures approved by it, provided that approval of such procedures may be limited to particular notices or communications. Unless Administrative Agent otherwise prescribes, (i) notices and other communications sent to an e-mail address shall be deemed received upon the sender's receipt of an acknowledgement from the intended recipient (such as by the "return receipt requested" function, as available, return e-mail or other written acknowledgement) and (ii) notices or communications posted to an Internet or intranet website shall be deemed received upon the deemed receipt by the intended recipient at its e-mail address as described in the foregoing clause (i) of notification that such notice or communication is available and identifying the website address therefor, provided that, for both clauses (i) and (ii) above, if such notice or other communication is not sent during the normal business hours of the recipient, such notice or communication shall be deemed to have been sent at the opening of business on the next business day for the recipient.

(c) **The Platform.**

(i) Each Loan Party acknowledges and agrees that (A) Administrative Agent and/or the Arranger may, but shall not be obligated to, make materials and/or information provided by or on behalf of Borrower or any other Loan Party hereunder (collectively, "**Borrower Materials**") available to the L/C Issuer and the other Lenders by posting the Communications on Debt Domain, Debt Exchange (DebtX), Intralinks, Syndtrak, ClearPar, or a substantially similar electronic transmission system (the "**Platform**"), and (B) that certain of the Lenders (each, a "**Public Lender**") may have personnel who do not wish to receive material non-public information with respect to Borrower or its Affiliates or the respective securities of any of the foregoing, and who may be engaged in investment and other market-related activities with respect to such Persons' securities. Borrower hereby agrees that (w) all Borrower Materials that are to be made available to Public Lenders shall be clearly and conspicuously marked "PUBLIC" which, at a minimum, shall mean that the word "PUBLIC" shall appear prominently on the first page thereof; (x) by marking Borrower Materials "PUBLIC," Borrower shall be deemed to have authorized Administrative Agent, the Arranger, the L/C Issuer and the Lenders to treat such Borrower Materials as not containing any material non-public information with respect to Borrower or its securities for purposes of United States Federal and state securities laws

(provided, however, that to the extent such Borrower Materials constitute Information, they shall be treated as set forth in Section 11.07); (y) all Borrower Materials marked “PUBLIC” are permitted to be made available through a portion of the Platform that is designated “Public Side Information;” and (z) Administrative Agent and the Arranger shall be entitled to treat any Borrower Materials that are not marked “PUBLIC” as being suitable only for posting on a portion of the Platform not designated “Public Side Information..

(ii) THE PLATFORM IS PROVIDED “AS IS” AND “AS AVAILABLE.” THE ADMINISTRATIVE AGENT PARTIES (AS DEFINED BELOW) DO NOT WARRANT THE ACCURACY OR COMPLETENESS OF BORROWER MATERIALS OR THE ADEQUACY OF THE PLATFORM, AND EXPRESSLY DISCLAIM LIABILITY FOR ERRORS IN OR OMISSIONS FROM BORROWER MATERIALS. NO WARRANTY OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OF THIRD PARTY RIGHTS OR FREEDOM FROM VIRUSES OR OTHER CODE DEFECTS, IS MADE BY ANY ADMINISTRATIVE AGENT PARTY IN CONNECTION WITH BORROWER MATERIALS OR THE PLATFORM. In no event shall Administrative Agent or any of its Related Parties (collectively, the “**Administrative Agent Parties**”) have any liability to Borrower, any other Loan Party, any Lender, the L/C Issuer or any other Person for losses, claims, damages, liabilities or expenses of any kind, including, without limitation, direct or indirect, special, incidental or consequential damages, losses or expenses (whether in tort, contract or otherwise) arising out of Borrower’s, any Loan Party’s or Administrative Agent’s transmission of Borrower Materials or notices through the Internet, the Platform or any other electronic platform or electronic messaging service. “**Communications**” means, collectively, any notice, demand, communication, information, document or other material provided by or on behalf of any Loan Party pursuant to any Loan Document or the transactions contemplated therein which is distributed to Administrative Agent, any Lender or any L/C Issuer by means of electronic communications pursuant to this Section, including through the Platform.

(d) **Change of Address, Etc.** Each of Borrower, Administrative Agent and the L/C Issuer may change its address, facsimile or telephone number for notices and other communications hereunder by notice to the other parties hereto. Each other Lender may change its address, facsimile or telephone number for notices and other communications hereunder by notice to Borrower, Administrative Agent and the L/C Issuer. In addition, each Lender agrees to notify Administrative Agent from time to time to ensure that Administrative Agent has on record (i) an effective address, contact name, telephone number, facsimile number and electronic mail address to which notices and other communications may be sent and (ii) accurate wire instructions for such Lender. Furthermore, each Public Lender agrees to cause at least one individual at or on behalf of such Public Lender to at all times have selected the “Private Side Information” or similar designation on the content declaration screen of the Platform in order to enable such Public Lender or its delegate, in accordance with such Public Lender’s compliance

procedures and applicable Law, including United States Federal and state securities Laws, to make reference to Borrower Materials that are not made available through the “Public Side Information” portion of the Platform and that may contain material non-public information with respect to Borrower or its securities for purposes of United States Federal or state securities laws.

(e) **Reliance by Administrative Agent, L/C Issuer and Lenders.** Administrative Agent, the L/C Issuer and Lenders shall be entitled to rely and act upon any notices (including telephonic Loan Notices) purportedly given by or on behalf of Borrower even if (i) such notices were not made in a manner specified herein, were incomplete or were not preceded or followed by any other form of notice specified herein, or (ii) the terms thereof, as understood by the recipient, varied from any confirmation thereof. Borrower shall indemnify Administrative Agent, the L/C Issuer, each Lender and the Related Parties of each of them from all losses, costs, expenses and liabilities resulting from the reliance by such Person on each notice purportedly given by or on behalf of Borrower. All telephonic notices to and other telephonic communications with Administrative Agent may be recorded by Administrative Agent, and each of the parties hereto hereby consents to such recording.

11.03 **No Waiver; Cumulative Remedies; Enforcement.** No failure by any Lender, the L/C Issuer or Administrative Agent to exercise, and no delay by any such Person in exercising, any right, remedy, power or privilege hereunder or under any other Loan Document shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided, and provided under each other Loan Document, are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

Notwithstanding anything to the contrary contained herein or in any other Loan Document, the authority to enforce rights and remedies hereunder and under the other Loan Documents against the Loan Parties or any of them shall be vested exclusively in, and all actions and proceedings at law in connection with such enforcement shall be instituted and maintained exclusively by, Administrative Agent in accordance with Section 9.02 for the benefit of all Lenders and the L/C Issuer; provided, however, that the foregoing shall not prohibit (a) Administrative Agent from exercising on its own behalf the rights and remedies that inure to its benefit (solely in its capacity as Administrative Agent) hereunder and under the other Loan Documents, (b) the L/C Issuer from exercising the rights and remedies that inure to its benefit (solely in its capacity as L/C Issuer) hereunder and under the other Loan Documents, (c) any Lender from exercising setoff rights in accordance with Section 11.08 (subject to the terms of Section 2.13), or (d) any Lender from filing proofs of claim or appearing and filing pleadings on its own behalf during the pendency of a proceeding relative to any Loan Party under any Debtor Relief Law; and provided, further, that if at any time there is no Person acting as Administrative Agent hereunder and under the other Loan Documents, then (i) the Required Lenders shall have the rights otherwise ascribed to Administrative Agent pursuant to Section 9.02 and (ii) in addition to the matters set forth in clauses (b), (c) and (d) of the preceding proviso and subject to Section 2.13, any Lender may, with the consent of the Required Lenders, enforce any rights and remedies available to it and as authorized by the Required Lenders.

11.04 **Expenses; Indemnity; Damage Waiver.**

(a) **Costs and Expenses.** Borrower shall pay (i) all reasonable out of pocket expenses incurred by Administrative Agent and its Affiliates (including the reasonable fees, charges and disbursements of counsel for Administrative Agent) and shall pay all fees and time charges and disbursements for attorneys who may be employees of Administrative Agent, in connection with the syndication of the credit facilities provided for herein, the preparation, negotiation, execution, delivery and administration of this Agreement and the other Loan Documents or any amendments, modifications or waivers of the provisions hereof or thereof (whether or not the transactions contemplated hereby or thereby shall be consummated), (ii) all reasonable out of pocket expenses incurred by the L/C Issuer in connection with the issuance, amendment, renewal or extension of any Letter of Credit or any demand for payment thereunder and (iii) all reasonable out of pocket expenses incurred by Administrative Agent, any Lender or the L/C Issuer (including the fees, charges and disbursements of any counsel for Administrative Agent, any Lender or the L/C Issuer), and shall pay all fees and time charges for attorneys who may be employees of Administrative Agent, any Lender or the L/C Issuer, in connection with the enforcement or protection of its rights (A) in connection with this Agreement and the other Loan Documents, including its rights under this Section, or (B) in connection with the Loans made or Letters of Credit issued hereunder, including all such reasonable out of pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans or Letters of Credit.

(b) **Indemnification by Borrower.** Borrower shall indemnify Administrative Agent (and any sub-agent thereof), each Lender and the L/C Issuer, and each Related Party of any of the foregoing Persons (each such Person being called an “**Indemnitee**”) against, and hold each Indemnitee harmless from, any and all losses, claims, damages, liabilities, penalties and related expenses, including the reasonable fees, charges and disbursements of any counsel for any Indemnitee), and shall indemnify and hold harmless each Indemnitee from all fees and time charges and disbursements for attorneys who may be employees of any Indemnitee, incurred by any Indemnitee or asserted against any Indemnitee by any third party or by Borrower or any other Loan Party arising out of, in connection with, or as a result of (i) the execution or delivery of this Agreement, any other Loan Document or any agreement or instrument contemplated hereby or thereby, the performance by the parties hereto of their respective obligations hereunder or thereunder, or the consummation of the transactions contemplated hereby or thereby, or, in the case of Administrative Agent (or any sub-agent thereof) and its Related Parties only, the administration of this Agreement and the other Loan Documents (including in respect of any matters addressed in Section 3.01), (ii) any Loan or Letter of Credit or the use or proposed use of the proceeds therefrom (including any refusal by the L/C Issuer to honor a demand for payment under a Letter of Credit if the documents presented in connection with such demand do not strictly comply with the terms of such Letter of Credit), (iii) any actual or alleged presence or release of Hazardous Materials on or from any property owned or operated by Borrower or any of its Subsidiaries, or any Environmental Liability related in any way to Borrower or any of its Subsidiaries, or (iv) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by Borrower or any other Loan Party, and regardless of whether any Indemnitee is a party thereto in all cases, whether or not caused by or arising, in whole or in part, out of the comparative, contributory or sole negligence of the indemnitee; provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims,

damages, liabilities or related expenses (x) are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Indemnitee or (y) result from a claim brought by Borrower or any other Loan Party against an Indemnitee for breach in bad faith of such Indemnitee's obligations hereunder or under any other Loan Document, if Borrower or such other Loan Party has obtained a final and nonappealable judgment in its favor on such claim as determined by a court of competent jurisdiction. This Section 11.04(b) shall not apply with respect to Taxes other than any Taxes that represent losses, claims, damages, etc. arising from any non-Tax claim.

(c) **Reimbursement by Lenders.** To the extent that Borrower for any reason fails to indefeasibly pay any amount required under subsection (a) or (b) of this Section to be paid by it to Administrative Agent (or any sub-agent thereof), the L/C Issuer or any Related Party of any of the foregoing, each Lender severally agrees to pay to Administrative Agent (or any sub-agent thereof), the L/C Issuer or such Related Party, as the case may be, such Lender's pro rata share (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought based on each Lender's share of the aggregate Credit Exposure at such time) of such unpaid amount (including any such unpaid amount in respect of a claim asserted by such Lender); provided that with respect to such unpaid amounts owed to the L/C Issuer solely in its capacity as such, only the Lenders shall be required to pay such unpaid amounts, such payment to be made severally among them based on such Lenders' Applicable Percentage (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought) of such unpaid amount, provided that the unreimbursed expense or indemnified loss, claim, damage, liability or related expense, as the case may be, was incurred by or asserted against Administrative Agent (or any sub-agent thereof) or the L/C Issuer in its capacity as such, or against any Related Party of any of the foregoing acting for Administrative Agent (or any sub-agent thereof) or L/C Issuer in connection with such capacity. The obligations of the Lenders under this subsection (c) are subject to the provisions of Section 2.12(d).

(d) **Waiver of Consequential Damages, Etc.** To the fullest extent permitted by applicable law, Borrower shall not assert, and hereby waives, any claim against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any other Loan Document or any agreement or instrument contemplated hereby, the transactions contemplated hereby or thereby, any Loan or Letter of Credit or the use of the proceeds thereof. No Indemnitee referred to in subsection (b) above shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed to such unintended recipients by such Indemnitee through telecommunications, electronic or other information transmission systems in connection with this Agreement or the other Loan Documents or the transactions contemplated hereby or thereby other than for direct or actual damages resulting from the gross negligence or willful misconduct of such Indemnitee as determined by a final and nonappealable judgment of a court of competent jurisdiction.

(e) **Payments.** All amounts due under this Section shall be payable not later than ten (10) Business Days after demand therefor.

(f) **Survival.** The agreements in this Section and the indemnity provisions of Section 11.02(e) shall survive the termination of the Loan Documents, the resignation of



Administrative Agent and the L/C Issuer, the replacement of any Lender, the termination of the Aggregate Commitments and the repayment, satisfaction or discharge of all the other Obligations.

11.05 **Payments Set Aside.** To the extent that any payment by or on behalf of Borrower is made to Administrative Agent, the L/C Issuer or any Lender, or to the extent Administrative Agent, the L/C Issuer or any Lender exercises its right of setoff, and such payment or the proceeds of such setoff or any part thereof is subsequently invalidated, declared to be fraudulent or preferential, set aside or required (including pursuant to any settlement entered into by Administrative Agent, the L/C Issuer or such Lender in its discretion) to be repaid to a trustee, receiver or any other party, in connection with any proceeding under any Debtor Relief Law or otherwise, then (a) to the extent of such recovery, the obligation or part thereof originally intended to be satisfied shall be revived and continued in full force and effect as if such payment had not been made or such setoff had not occurred, and (b) each Lender and the L/C Issuer severally agrees to pay to Administrative Agent upon demand its applicable share (without duplication) of any amount so recovered from or repaid by Administrative Agent, plus interest thereon from the date of such demand to the date such payment is made at a rate per annum equal to the Federal Funds Rate from time to time in effect. The obligations of the Lenders and the L/C Issuer under clause (b) of the preceding sentence shall survive the payment in full of the Obligations and the termination of this Agreement.

11.06 **Successors and Assigns.**

(a) **Successors and Assigns Generally.** The provisions of this Agreement and the other Loan Documents shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that neither Borrower nor any other Loan Party may assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of Administrative Agent, the L/C Issuer and each Lender and no Lender may assign or otherwise transfer any of its rights or obligations hereunder except (i) to an assignee in accordance with the provisions of subsection (b) of this Section, (ii) by way of participation in accordance with the provisions of subsection (d) of this Section, or (iii) by way of pledge or assignment of a security interest subject to the restrictions of subsection (f) of this Section (and any other attempted assignment or transfer by any party hereto shall be null and void). Nothing in this Agreement, expressed or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby, Participants to the extent provided in subsection (d) of this Section and, to the extent expressly contemplated hereby, the Related Parties of each of Administrative Agent, the L/C Issuer and the Lenders) any legal or equitable right, remedy or claim under or by reason of this Agreement.

(b) **Assignments by Lenders.** Any Lender may at any time assign to one or more assignees all or a portion of its rights and obligations under this Agreement and the other Loan Documents (including all or a portion of its Commitment and the Loans (including for purposes of this subsection (b), participations in L/C Obligations) at the time owing to it); provided that any such assignment shall be subject to the following conditions:

(i) **Minimum Amounts.**

(A) in the case of an assignment of the entire remaining amount of the assigning Lender's Commitment and the Loans at the time owing to it or contemporaneous assignments to related Approved Funds that equal at least the amount specified in paragraph (b)(i)(B) of this Section in the aggregate or in the case of an assignment to a Lender or an Affiliate of a Lender or an Approved Fund no minimum amount need be assigned; and

(B) in any case not described in subsection (b)(i)(A) of this Section, the aggregate amount of the Commitment (which for this purpose includes Loans outstanding thereunder) or, if the Commitment is not then in effect, the principal outstanding balance of the Loans of the assigning Lender subject to each such assignment, determined as of the date the Assignment and Assumption with respect to such assignment is delivered to Administrative Agent or, if "Trade Date" is specified in the Assignment and Assumption, as of the Trade Date, shall not be less than Five Million Dollars (\$5,000,000) unless each of Administrative Agent and, so long as no Event of Default has occurred and is continuing, Borrower otherwise consents (each such consent not to be unreasonably withheld or delayed); provided, however, that concurrent assignments to members of an Assignee Group and concurrent assignments from members of an Assignee Group to a single Eligible Assignee (or to an Eligible Assignee and members of its Assignee Group) will be treated as a single assignment for purposes of determining whether such minimum amount has been met;

(ii) **Proportionate Amounts.** Each partial assignment shall be made as an assignment of a proportionate part of all the assigning Lender's rights and obligations under this Agreement with respect to the Loans or the Commitment assigned;

(iii) **Required Consents.** No consent shall be required for any assignment except to the extent required by subsection (b)(i)(B) of this Section and, in addition:

(A) the consent of Borrower (such consent not to be unreasonably withheld or delayed) shall be required unless (1) an Event of Default has occurred and is continuing at the time of such assignment or (2) such assignment is to a Lender or an Affiliate of a Lender or an Approved Fund, provided that Borrower shall be deemed to have consented to any such assignment unless it shall object thereto by written notice to Administrative Agent within five (5) Business Days after having received notice thereof and provided further, that Borrower's consent shall not be required during the primary syndication of the facilities provided hereunder;

(B) the consent of Administrative Agent (such consent not to be unreasonably withheld or delayed) shall be required for assignments in respect of any Commitment if such assignment is to a Person that is not a Lender, or an Affiliate of such Lender or an Approved Fund with respect to such Lender; and

(C) the consent of the L/C Issuer shall be required for any assignment that increases the obligation of the assignee to participate in exposure under one or more Letters of Credit (whether or not then outstanding).

(iv) **Assignment and Assumption.** The parties to each assignment shall execute and deliver to Administrative Agent an Assignment and Assumption, together with a processing and recordation fee in the amount of Three Thousand Five Hundred Dollars (\$3,500); provided, however, that Administrative Agent may, in its sole discretion, elect to waive such processing and recordation fee in the case of any assignment. The assignee, if it is not a Lender, shall deliver to Administrative Agent an Administrative Questionnaire and such information regarding such assignee as Administrative Agent may reasonably request.

(v) **No Assignment to Certain Persons.** No such assignment shall be made to (A) Borrower or any of Borrower's Affiliates or Subsidiaries, (B) any Defaulting Lender or any of its Subsidiaries, or any Person who, upon becoming a Lender hereunder, would constitute any of the foregoing Persons described in this clause (B), or (C) a natural Person (or a holding company, investment vehicle or trust for, or owned and operated for the primary benefit of a natural Person).

(vi) **Certain Additional Payments.** In connection with any assignment of rights and obligations of any Defaulting Lender hereunder, no such assignment shall be effective unless and until, in addition to the other conditions thereto set forth herein, the parties to the assignment shall make such additional payments to Administrative Agent in an aggregate amount sufficient, upon distribution thereof as appropriate (which may be outright payment, purchases by the assignee of participations or sub-participations, or other compensating actions, including funding, with the consent of Borrower and Administrative Agent, the applicable pro rata share of Loans previously requested but not funded by the Defaulting Lender, to each of which the applicable assignee and assignor hereby irrevocably consent), to (x) pay and satisfy in full all payment liabilities then owed by such Defaulting Lender to Administrative Agent, the L/C Issuer and each other Lender hereunder (and interest accrued thereon), and (y) acquire (and fund as appropriate) its full pro rata share of all Loans and participations in Letters of Credit in accordance with its Applicable Percentage. Notwithstanding the foregoing, in the event that any assignment of rights and obligations of any Defaulting Lender hereunder shall become effective under applicable law without compliance with the provisions of this paragraph, then the assignee of such

interest shall be deemed to be a Defaulting Lender for all purposes of this Agreement until such compliance occurs.

Subject to acceptance and recording thereof by Administrative Agent pursuant to subsection (c) of this Section, from and after the effective date specified in each Assignment and Assumption, the assignee thereunder shall be a party to this Agreement and, to the extent of the interest assigned by such Assignment and Assumption, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Assumption, be released from its obligations under this Agreement (and, in the case of an Assignment and Assumption covering all of the assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto) but shall continue to be entitled to the benefits of Sections 3.01, 3.04, 3.05, and 11.04 with respect to facts and circumstances occurring prior to the effective date of such assignment provided, that except to the extent otherwise expressly agreed by the affected parties, no assignment by a Defaulting Lender will constitute a waiver or release of any claim of any party hereunder arising from that Lender's having been a Defaulting Lender. Upon request, Borrower (at its expense) shall execute and deliver a Note to the assignee Lender. Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this subsection shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with subsection (d) of this Section.

(c) **Register.** Administrative Agent, acting solely for this purpose as an agent of Borrower (and such agency being solely for tax purposes), shall maintain at the Administrative Agent's Office a copy of each Assignment and Assumption delivered to it (or the equivalent thereof in electronic form) and a register for the recordation of the names and addresses of the Lenders, and the Commitments of, and principal amounts (and stated interest) of the Loans and L/C Obligations owing to, each Lender pursuant to the terms hereof from time to time (the "**Register**"). The entries in the Register shall be conclusive absent manifest error, and Borrower, Administrative Agent and the Lenders may treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. The Register shall be available for inspection by Borrower and any Lender, at any reasonable time and from time to time upon reasonable prior notice.

(d) **Participations.** Any Lender may at any time, without the consent of, or notice to, Borrower or Administrative Agent, sell participations to any Person (other than a natural Person, or a holding company, investment vehicle or trust for, or owned and operated for the primary benefit of a natural Person, a Defaulting Lender or Borrower or any of Borrower's Affiliates or Subsidiaries) (each, a "**Participant**") in all or a portion of such Lender's rights and/or obligations under this Agreement (including all or a portion of its Commitment and/or the Loans (including such Lender's participations in L/C Obligations) owing to it); provided that (i) such Lender's obligations under this Agreement shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations and (iii) Borrower, Administrative Agent, the L/C Issuer and the Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement. For the avoidance of doubt, each Lender shall be responsible for the indemnities hereunder with respect to any payments made by such Lender to its Participant(s).

Any agreement or instrument pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement; provided that such agreement or instrument may provide that such Lender will not, without the consent of the Participant, agree to any amendment, waiver or other modification described in the first proviso to Section 11.01 that affects such Participant. Subject to subsection (e) of this Section, Borrower agrees that each Participant shall be entitled to the benefits of Sections 3.01, 3.04 and 3.05 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to subsection (b) of this Section (it being understood that the documentation required under Section 3.01(e) shall be delivered to the Lender who sells the participation) to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to paragraph (b) of this Section; provided that such Participant (A) agrees to be subject to the provisions of Sections 3.06 and 11.13 as if it were an assignee under paragraph (b) of this Section and (B) shall not be entitled to receive any greater payment under Sections 3.01 or 3.04, with respect to any participation, than the Lender from whom it acquired the applicable participation would have been entitled to receive, except to the extent such entitlement to receive a greater payment results from a Change in Law that occurs after the Participant acquired the applicable participation. Each Lender that sells a participation agrees, at Borrower's request and expense, to use reasonable efforts to cooperate with Borrower to effectuate the provisions of Section 3.06 with respect to any Participant. To the extent permitted by law, each Participant also shall be entitled to the benefits of Section 11.08 as though it were a Lender, provided such Participant agrees to be subject to Section 2.13 as though it were a Lender. Each Lender that sells a participation shall, acting solely for this purpose as a non-fiduciary agent of Borrower, maintain a register on which it enters the name and address of each Participant and the principal amounts (and stated interest) of each Participant's interest in the Loans or other obligations under the Loan Documents (the "**Participant Register**"); provided that no Lender shall have any obligation to disclose all or any portion of the Participant Register (including the identity of any Participant or any information relating to a Participant's interest in any commitments, loans, letters of credit or its other obligations under any Loan Document) to any Person except to the extent that such disclosure is necessary to establish that such commitment, loan, letter of credit or other obligation is in registered form under Section 5f.103-1(c) of the United States Treasury Regulations. The entries in the Participant Register shall be conclusive absent manifest error, and such Lender shall treat each Person whose name is recorded in the Participant Register as the owner of such participation for all purposes of this Agreement notwithstanding any notice to the contrary. For the avoidance of doubt, Administrative Agent (in its capacity as Administrative Agent) shall have no responsibility for maintaining a Participant Register.

(e) **Limitation on Participant Rights.** A Participant shall not be entitled to receive any greater payment under Section 3.01 or 3.04 than the applicable Lender would have been entitled to receive with respect to the participation sold to such Participant, unless the sale of the participation to such Participant is made with Borrower's prior written consent. A Participant that would be a Foreign Lender if it were a Lender shall not be entitled to the benefits of Section 3.01 unless Borrower is notified of the participation sold to such Participant and such Participant agrees, for the benefit of Borrower, to comply with Section 3.01(e) as though it were a Lender.

(f) **Certain Pledges.** Any Lender may at any time pledge or assign a security interest in all or any portion of its rights under this Agreement (including under its Note, if any) to secure obligations of such Lender, including any pledge or assignment to secure obligations to a Federal Reserve Bank; provided that no such pledge or assignment shall release such Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto.

(g) **Lender Securitization.** In addition to any other assignment permitted pursuant to this Section 11.06, the Loan Parties hereby acknowledge that (x) the Lenders, their Affiliates and Approved Funds (the “**Lender Parties**”) may sell or securitize the Loans (a “**Lender Securitization**”) through the pledge of the Loans as collateral security for loans to a Lender Party or the assignment or issuance of direct or indirect interests in the Loans (such as, for instance, collateralized loan obligations), and (y) such Lender Securitization may be rated by a Rating Agency. The Loan Parties shall reasonably cooperate with the Lender Parties to effect the Lender Securitization including by providing such information as may be reasonably requested by the Lenders or Rating Agencies in connection with the rating of the Loans or the Lender Securitization.

(h) **Deemed Consent of Borrower.** If the consent of Borrower to an assignment to an assignee is required hereunder (including a consent to an assignment which does not meet the minimum assignment threshold specified in Section 11.06(b)(i)(B)), Borrower shall be deemed to have given its consent five (5) Business Days after the date notice thereof has been delivered to Borrower by the assigning Lender (through Administrative Agent) unless such consent is expressly refused by Borrower prior to such fifth Business Day.

(i) **Resignation as L/C Issuer.** Notwithstanding anything to the contrary contained herein, if at any time Union Bank assigns all of its Commitment and Loans pursuant to subsection (b) above, Union Bank may, upon thirty (30) days’ notice to Borrower and the Lenders, resign as L/C Issuer. In the event of any such resignation as L/C Issuer, Borrower shall be entitled to appoint from among Lenders a successor L/C Issuer hereunder; provided, however, that no failure by Borrower to appoint any such successor shall affect the resignation of Union Bank as L/C Issuer. If Union Bank resigns as L/C Issuer, it shall retain all the rights, powers, privileges and duties of the L/C Issuer hereunder with respect to all Letters of Credit outstanding as of the effective date of its resignation as L/C Issuer and all L/C Obligations with respect thereto (including the right to require the Lenders to make Base Rate Loans or fund risk participations in Unreimbursed Amounts pursuant to Section 2.03(c)). Upon the appointment of a successor L/C Issuer, (a) such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring L/C Issuer, and (b) the successor L/C Issuer shall issue letters of credit in substitution for the Letters of Credit, if any, outstanding at the time of such succession or make other arrangements satisfactory to Union Bank to effectively assume the obligations of Union Bank with respect to such Letters of Credit.

11.07 **Treatment of Certain Information; Confidentiality.** Each of Administrative Agent, the Lenders and the L/C Issuer agrees, severally as to itself only, to maintain the confidentiality of the Information (as defined below), except that Information may be disclosed (a) to its Affiliates and to its and its Affiliates’ respective partners, directors, officers, employees, agents, trustees, advisors and representatives (it being understood that the Persons to whom such

disclosure is made will be informed of the confidential nature of such Information and instructed to keep such Information confidential), (b) to the extent required or requested by any regulatory authority, purporting to have jurisdiction over such Person or its Related Parties (including any self-regulatory authority, such as the National Association of Insurance Commissioners), (c) to the extent required by applicable laws or regulations or by any subpoena or similar legal process, (d) to any other party hereto, (e) in connection with the exercise of any remedies hereunder or under any other Loan Document or any action or proceeding relating to this Agreement or any other Loan Document or the enforcement of rights hereunder or thereunder, (f) subject to an agreement containing provisions substantially the same as those of this Section, to (i) any assignee of or Participant in, or any prospective assignee of or Participant in, any of its rights or obligations under this Agreement or any Eligible Assignee invited to be a Lender pursuant to Section 2.15(c), or (ii) any actual or prospective party (or its Related Parties) to any swap, derivative or other transaction under which payments are to be made by reference to Borrower, its obligations this Agreement or payments hereunder, (g) on a confidential basis to (i) any rating agency in connection with rating Borrower or its Subsidiaries or the credit facilities provided hereunder or (ii) the CUSIP Service Bureau or any similar agency in connection with the issuance and monitoring of CUSIP numbers or other market identifiers with respect to the credit facilities provided hereunder, (h) with the consent of Borrower or (i) to the extent such Information (x) becomes publicly available other than as a result of a breach of this Section or (y) becomes available to Administrative Agent, any Lender, the L/C Issuer or any of their respective Affiliates on a nonconfidential basis from a source other than Borrower.

For purposes of this Section, “**Information**” means all information received from Borrower or any Subsidiary relating to Borrower or any Subsidiary or any of their respective businesses, other than any such information that is available to Administrative Agent, any Lender or the L/C Issuer on a nonconfidential basis prior to disclosure by Borrower or any Subsidiary, provided that, in the case of information received from Borrower or any Subsidiary after the date hereof, such information is clearly identified at the time of delivery as confidential. Any Person required to maintain the confidentiality of Information as provided in this Section shall be considered to have complied with its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information.

Each of Administrative Agent, the Lenders and the L/C Issuer acknowledges that (A) the Information may include material non-public information concerning Borrower or a Subsidiary, as the case may be, (B) it has developed compliance procedures regarding the use of material non-public information and (C) it will handle such material non-public information in accordance with applicable Law, including Federal and state securities Laws.

Notwithstanding anything to the contrary set forth herein or in any other Loan Document the Secured Parties are hereby authorized to release information concerning Borrower’s and the other Loan Parties’ credit record and financial condition to credit bureaus, credit reporting agencies, credit reporters, and guarantors hereunder, or pursuant to an order from a governmental agency or court, or among departments of such Secured Party and its respective Affiliates. Secured Parties are authorized to obtain credit reports, copies of tax returns and other information regarding Borrower or the other Loan Parties and to take such other steps as such Secured Party deems appropriate to verify the information provided in connection herewith.

11.08 **Right of Setoff.** If an Event of Default shall have occurred and be continuing, each Lender, the L/C Issuer and each of their respective Affiliates is hereby authorized at any time and from time to time, after obtaining the prior written consent of Administrative Agent, to the fullest extent permitted by applicable law, to set off and apply any and all deposits (general or special, time or demand, provisional or final, in whatever currency) at any time held and other obligations (in whatever currency) at any time owing by such Lender, the L/C Issuer or any such Affiliate to or for the credit or the account of Borrower or any other Loan Party against any and all of the obligations of Borrower or such Loan Party now or hereafter existing under this Agreement or any other Loan Document to such Lender or the L/C Issuer or any such Affiliate, irrespective of whether or not such Lender or the L/C Issuer shall have made any demand under this Agreement or any other Loan Document and although such obligations of Borrower or such Loan Party may be contingent or unmatured or are owed to a branch, office or Affiliate of such Lender or the L/C Issuer different from the branch or office holding such deposit or obligated on such indebtedness; provided that in the event that any Defaulting Lender shall exercise any such right of setoff, (x) all amounts so set off shall be paid over immediately to Administrative Agent for further application in accordance with the provisions of Sections 2.13 and 2.16 and, pending such payment, shall be segregated by such Defaulting Lender from its other funds and deemed held in trust for the benefit of Administrative Agent, the L/C Issuer, and the Lenders, and (y) the Defaulting Lender shall provide promptly to Administrative Agent a statement describing in reasonable detail the Obligations owing to such Defaulting Lender as to which it exercised such right of setoff. The rights of each Lender, the L/C Issuer and their respective Affiliates under this Section are in addition to other rights and remedies (including other rights of setoff) that such Lender, the L/C Issuer or their respective Affiliates may have. Each Lender and the L/C Issuer agrees to notify Borrower and Administrative Agent promptly after any such setoff and application, provided that the failure to give such notice shall not affect the validity of such setoff and application. Notwithstanding anything to the contrary set forth above, no setoff may be made against any Excluded Swap Obligation with respect to any Guarantor.

11.09 **Interest Rate Limitation.** Notwithstanding anything to the contrary contained in any Loan Document, the interest paid or agreed to be paid under the Loan Documents shall not exceed the maximum rate of non-usurious interest permitted by applicable Law (the “**Maximum Rate**”). If Administrative Agent or any Lender shall receive interest in an amount that exceeds the Maximum Rate, the excess interest shall be applied to the principal of the Loans or, if it exceeds such unpaid principal, refunded to Borrower. In determining whether the interest contracted for, charged, or received by Administrative Agent or a Lender exceeds the Maximum Rate, such Person may, to the extent permitted by applicable Law, (a) characterize any payment that is not principal as an expense, fee, or premium rather than interest, (b) exclude voluntary prepayments and the effects thereof, and (c) amortize, prorate, allocate, and spread in equal or unequal parts the total amount of interest throughout the contemplated term of the Obligations hereunder.

11.10 **Counterparts; Integration; Effectiveness.** This Agreement may be executed in counterparts (and by different parties hereto in different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. This Agreement, the other Loan Documents, and any separate letter agreements with respect to fees payable to Administrative Agent or the L/C Issuer, constitute the entire contract among the parties relating to the subject matter hereof and supersede any and all previous agreements and



understandings, oral or written, relating to the subject matter hereof. Except as provided in Section 5.01, this Agreement shall become effective when it shall have been executed by Administrative Agent and when Administrative Agent shall have received counterparts hereof that, when taken together, bear the signatures of each of the other parties hereto. Delivery of an executed counterpart of a signature page of this Agreement by facsimile or other electronic imaging means (e.g. "pdf" or "tif") shall be effective as delivery of a manually executed counterpart of this Agreement.

11.11 **Survival of Representations and Warranties.** All representations and warranties made hereunder and in any other Loan Document or other document delivered pursuant hereto or thereto or in connection herewith or therewith shall survive the execution and delivery hereof and thereof. Such representations and warranties have been or will be relied upon by Administrative Agent and each Lender, regardless of any investigation made by Administrative Agent or any Lender or on their behalf and notwithstanding that Administrative Agent or any Lender may have had notice or knowledge of any Default at the time of any Credit Extension, and shall continue in full force and effect as long as any Loan or any other Obligation hereunder shall remain unpaid or unsatisfied or any Letter of Credit shall remain outstanding.

11.12 **Severability.** If any provision of this Agreement or the other Loan Documents is held to be illegal, invalid or unenforceable, (a) the legality, validity and enforceability of the remaining provisions of this Agreement and the other Loan Documents shall not be affected or impaired thereby and (b) the parties shall endeavor in good faith negotiations to replace the illegal, invalid or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the illegal, invalid or unenforceable provisions. The invalidity of a provision in a particular jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. Without limiting the foregoing provisions of this Section 11.12, if and to the extent that the enforceability of any provisions in this Agreement relating to Defaulting Lenders shall be limited by Debtor Relief Laws, as determined in good faith by Administrative Agent, then such provisions shall be deemed to be in effect only to the extent not so limited.

11.13 **Governing Law; Jurisdiction; Etc.**

(a) **GOVERNING LAW.** THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS, UNLESS EXPRESSLY STATED OTHERWISE THEREIN, SHALL BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAW OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO THE PRINCIPLES THEREOF REGARDING CONFLICTS OF LAWS, AND ANY APPLICABLE LAWS OF THE UNITED STATES OF AMERICA.

(b) **SUBMISSION TO JURISDICTION.** BORROWER AND EACH OTHER LOAN PARTY IRREVOCABLY AND UNCONDITIONALLY SUBMITS, FOR ITSELF AND ITS PROPERTY, TO THE NONEXCLUSIVE JURISDICTION OF THE COURTS OF THE STATE OF CALIFORNIA SITTING IN SANTA CLARA COUNTY AND OF THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF CALIFORNIA, AND ANY APPELLATE COURT FROM ANY THEREOF, IN ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY

OTHER LOAN DOCUMENT, OR FOR RECOGNITION OR ENFORCEMENT OF ANY JUDGMENT, AND EACH OF THE PARTIES HERETO IRREVOCABLY AND UNCONDITIONALLY AGREES THAT ALL CLAIMS IN RESPECT OF ANY SUCH ACTION OR PROCEEDING MAY BE HEARD AND DETERMINED IN SUCH CALIFORNIA STATE COURT OR, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IN SUCH FEDERAL COURT. EACH OF THE PARTIES HERETO 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. NOTHING IN THIS AGREEMENT OR IN ANY OTHER LOAN DOCUMENT SHALL AFFECT ANY RIGHT THAT ADMINISTRATIVE AGENT, ANY LENDER OR THE L/C ISSUER MAY OTHERWISE HAVE TO BRING ANY ACTION OR PROCEEDING RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT AGAINST BORROWER OR ANY OTHER LOAN PARTY OR ITS PROPERTIES IN THE COURTS OF ANY JURISDICTION.

(c) **WAIVER OF VENUE.** BORROWER AND EACH OTHER LOAN PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT IN ANY COURT REFERRED TO IN PARAGRAPH (B) OF THIS SECTION. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF SUCH ACTION OR PROCEEDING IN ANY SUCH COURT.

(d) **SERVICE OF PROCESS.** EACH LOAN PARTY HEREBY IRREVOCABLY WAIVES PERSONAL SERVICE OF THE SUMMONS, COMPLAINTS AND OTHER PROCESS ISSUED IN ANY SUCH ACTION OR SUIT. EACH PARTY HERETO IRREVOCABLY CONSENTS TO SERVICE OF PROCESS IN THE MANNER PROVIDED FOR NOTICES IN SECTION 11.02. NOTHING IN THIS AGREEMENT WILL AFFECT THE RIGHT OF ANY PARTY HERETO TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY APPLICABLE LAW.

11.14 **Disputes; Waiver of Jury Trial.** TO THE EXTENT PERMITTED BY LAW, IN CONNECTION WITH ANY CLAIM, CAUSE OF ACTION, PROCEEDING OR OTHER DISPUTE CONCERNING THE LOAN DOCUMENTS (EACH A "CLAIM"), THE PARTIES TO THIS AGREEMENT EXPRESSLY, INTENTIONALLY, AND DELIBERATELY WAIVE ANY RIGHT EACH MAY OTHERWISE HAVE TO TRIAL BY JURY. IN THE EVENT THAT THE WAIVER OF JURY TRIAL SET FORTH IN THE PREVIOUS SENTENCE IS NOT ENFORCEABLE UNDER THE LAW APPLICABLE TO THIS AGREEMENT, THE PARTIES TO THIS AGREEMENT AGREE THAT ANY CLAIM, INCLUDING ANY QUESTION OF LAW OR FACT RELATING THERETO, SHALL, AT THE WRITTEN REQUEST OF ANY PARTY, BE DETERMINED BY JUDICIAL REFERENCE PURSUANT TO THE STATE LAW APPLICABLE TO THIS AGREEMENT. THE PARTIES SHALL SELECT A SINGLE NEUTRAL REFEREE, WHO SHALL BE A RETIRED STATE OR FEDERAL JUDGE. IN THE EVENT THAT THE PARTIES CANNOT AGREE UPON A

REFEREE, THE COURT SHALL APPOINT THE REFEREE. THE REFEREE SHALL REPORT A STATEMENT OF DECISION TO THE COURT. NOTHING IN THIS PARAGRAPH SHALL LIMIT THE RIGHT OF ANY PARTY AT ANY TIME TO EXERCISE SELF-HELP REMEDIES, FORECLOSE AGAINST COLLATERAL OR OBTAIN PROVISIONAL REMEDIES. THE PARTIES SHALL BEAR THE FEES AND EXPENSES OF THE REFEREE EQUALLY, UNLESS THE REFEREE ORDERS OTHERWISE. THE REFEREE SHALL ALSO DETERMINE ALL ISSUES RELATING TO THE APPLICABILITY, INTERPRETATION, AND ENFORCEABILITY OF THIS PARAGRAPH. THE PARTIES ACKNOWLEDGE THAT IF A REFEREE IS SELECTED TO DETERMINE THE CLAIMS, THEN THE CLAIMS WILL NOT BE DECIDED BY A JURY.

11.15 **No Advisory or Fiduciary Responsibility.** In connection with all aspects of each transaction contemplated hereby (including in connection with any amendment, waiver or other modification hereof or of any other Loan Document), Borrower and each other Loan Party acknowledges and agrees and acknowledges its Affiliates' understanding that that: (i) (A) the arranging and other services regarding this Agreement provided by Administrative Agent are arm's-length commercial transactions between Borrower, each other Loan Party and their respective Affiliates, on the one hand, and Administrative Agent, the Arranger and the Lenders, on the other hand, (B) each of Borrower and the other Loan Parties have consulted their own legal, accounting, regulatory and tax advisors to the extent they have deemed appropriate, and (C) Borrower and each other Loan Party is capable of evaluating and understanding, and understands and accepts, the terms, risks and conditions of the transactions contemplated hereby and by the other Loan Documents; (ii) (A) Administrative Agent, the Arranger and each Lender are and have been acting solely as a principal and, except as expressly agreed in writing by the relevant parties, have not been, are not, and will not be acting as an advisor, agent or fiduciary, for Borrower, any other Loan Party, or any of their respective Affiliates, or any other Person and (B) none of Administrative Agent, the Arranger or any Lender has any obligation to Borrower, any other Loan Party or any of their Affiliates with respect to the transactions contemplated hereby except those obligations expressly set forth herein and in the other Loan Documents; and (iii) Administrative Agent, the Arranger, the Lenders and their respective Affiliates may be engaged in a broad range of transactions that involve interests that differ from those of Borrower, the other Loan Parties and their respective Affiliates, and neither Administrative Agent, the Arranger nor any Lender has any obligation to disclose any of such interests to Borrower, any other Loan Party or any of their respective Affiliates. To the fullest extent permitted by law, each of Borrower and the other Loan Parties hereby waive and release, any claims that it may have against Administrative Agent, the Arranger or any Lender with respect to any breach or alleged breach of agency or fiduciary duty in connection with any aspect of any transaction contemplated hereby.

11.16 **Electronic Execution of Assignments and Certain Other Documents.** The words "execute," "execution," "signed," "signature," and words of like import in or related to any document to be signed in connection with this Agreement and the transactions contemplated hereby (including without limitation Assignment and Assumptions, amendments or other modifications, Loan Notices, waivers and consents) shall be deemed to include electronic signatures, the electronic matching of assignment terms and contract formations on electronic platforms approved by Administrative Agent, or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed

signature or the use of a paper-based recordkeeping system, as the case may be, to the extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any other similar state laws based on the Uniform Electronic Transactions Act; provided that notwithstanding anything contained herein to the contrary Administrative Agent is under no obligation to agree to accept electronic signatures in any form or in any format unless expressly agreed to by Administrative Agent pursuant to procedures approved by it.

11.17 **USA PATRIOT Act Notice.** Each Lender and L/C Issuer that is subject to the Act (as hereinafter defined) and Administrative Agent (for itself and not on behalf of any Lender or L/C Issuer) hereby notifies Borrower that pursuant to the requirements of the Patriot Act, it is required to obtain, verify and record information that identifies Borrower and/or other Loan Parties, which information includes the name and address of Borrower and/or other Loan Parties and other information that will allow such Lender, L/C Issuer or Administrative Agent, as applicable, to identify Borrower in accordance with the Patriot Act. Borrower shall, promptly following a request by Administrative Agent or any Lender or L/C Issuer, provide all documentation and other information that Administrative Agent or such Lender or L/C Issuer requests in order to comply with its ongoing obligations under applicable “**know your customer**” and anti-money laundering rules and regulations, including the Patriot Act.

11.18 **Time of the Essence.** Time is of the essence of the Loan Documents.

11.19 **Effect of Restatement; Release of Existing Guarantors.** This Agreement together with the other Loan Documents are intended to and do completely amend, restate, supercede and replace, without novation, the Existing Credit Agreement. The execution and delivery of this Agreement or the other Loan Documents shall not, in any manner or circumstance, be deemed to be a novation of or to have terminated, released, extinguished, or discharged any of Borrower’s or any other Loan Party’s obligations, indebtedness, duties or liabilities under the Existing Credit Agreement or any Liens granted to Union Bank in connection with the Existing Credit Agreement or any security agreement, financing statement or other document, instrument or agreement executed in connection therewith, all of which are hereby ratified and confirmed. Upon the effectiveness of this Agreement, each of the Lenders, Administrative Agent and L/C Issuer hereby agrees that each Existing Guarantor shall be released from all of its obligations under the Loan Documents other than those which by their terms would survive termination of the Loan Documents, including indemnification obligations and obligations with respect to expense reimbursement, and, as a result thereof, shall not be a party to this Agreement as of the date hereof and shall cease being a party to each other Loan Document (as defined in the Existing Credit Agreement).

*[Balance of Page Intentionally Left Blank]*

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

BORROWER:

**WAGeworks, INC.**

By:

Name:

Its:

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319678-000089

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**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

ADMINISTRATIVE AGENT:

**MUFG UNION BANK, N.A.**, as Administrative Agent

By:

Name:

Its:

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**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

LENDERS:

**MUFG UNION BANK, N.A.**,  
as a Lender and L/C Issuer

By:

Name: James B. Goudy

Its: Director

Lending Office:

99 Almaden Boulevard, Suite 200

San Jose, CA 95113

Attn: James B. Goudy, Director

Fax: (408) 280-7163

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**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

LENDERS:

**WELLS FARGO BANK, NATIONAL  
ASSOCIATION**, as a Lender

By:

Name:

Its:

Lending Office:

Attn:

Fax:

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**SUBSIDIARIES OF WAGeworks, INC.**

- MHM Resources, LLC (Delaware)
  - Planned Benefit Systems Incorporated (Colorado)
  - Benefit Concepts, Inc. of Rhode Island (Rhode Island)
-

**Consent of Independent Registered Public Accounting Firm**

The Board of Directors  
WageWorks, Inc.:

We consent to the incorporation by reference in the registration statement (No. 333-190567) on Form S-3 and the registration statements (Nos. 333-181300, 333-188658, 333-194863, and 333-204219) on Form S-8 of WageWorks, Inc. of our reports dated February 25, 2016, with respect to the consolidated balance sheets of WageWorks, Inc. as of December 31, 2015 and 2014, and the related consolidated statements of income, stockholders' equity, and cash flows for each of the years in the three-year period ended December 31, 2015, and the effectiveness of internal control over financial reporting as of December 31, 2015, which reports appear in the December 31, 2015 annual report on Form 10-K of WageWorks, Inc.

/s/ KPMG LLP  
San Francisco, California  
February 25, 2016

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**Certification of Principal Executive Officer  
pursuant to  
Exchange Act Rules 13a-14(a) and 15d-14(a),  
as adopted pursuant to  
Section 302 of Sarbanes-Oxley Act of 2002**

I, Joseph L. Jackson, certify that:

1. I have reviewed this Annual Report on Form 10-K of WageWorks, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report, based on such evaluation; and
  - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: February 25, 2016

/s/ Joseph L. Jackson

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Name: Joseph L. Jackson  
Title: Chief Executive Officer and Director  
(Principal Executive Officer)

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**Certification of Principal Financial Officer  
pursuant to  
Exchange Act Rules 13a-14(a) and 15d-14(a),  
as adopted pursuant to  
Section 302 of Sarbanes-Oxley Act of 2002**

I, Colm Callan, certify that:

1. I have reviewed this Annual Report on Form 10-K of WageWorks, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report, based on such evaluation; and
  - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: February 25, 2016

/s/ Colm Callan

Name: Colm Callan  
Title: Chief Financial Officer  
(Principal Financial Officer)

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**CERTIFICATIONS OF PRINCIPAL EXECUTIVE OFFICER AND PRINCIPAL FINANCIAL OFFICER  
PURSUANT TO 18 U.S.C. SECTION 1350,  
AS ADOPTED PURSUANT TO SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. 1350), Joseph L. Jackson, Chief Executive Officer and Director (Principal Executive Officer) of WageWorks, Inc. (the "Company"), and Colm Callan, Chief Financial Officer (Principal Financial Officer) of the Company, each hereby certifies that, to the best of his knowledge:

1. Our Annual Report on Form 10-K for the year ended December 31, 2015, to which this Certification is attached as Exhibit 32.1 (the "Report"), fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: February 25, 2016

/s/ Joseph L. Jackson

Name: Joseph L. Jackson

Title: *Chief Executive Officer and Director*  
*(Principal Executive Officer)*

/s/ Colm Callan

Name: Colm Callan

Title: *Chief Financial Officer*  
*(Principal Financial Officer)*

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