UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/MCALILEY

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to
09-23835-CIV-GOLD/McALILEY.

VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS SANDS POINT FUNDING LTD.; COPPER RIVER CLO LTD.; KENNECOTT FUNDING LTD.; NZC OPPORTUNITIES (FUNDING) II LIMITED; GREEN LANE CLO LTD.; 1888 FUND, LTD.; ORPHEUS FUNDING LLC; ORPHEUS HOLDINGS LLC; AND LFCQ LLC

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Sands Point Funding Ltd.; Copper River CLO Ltd.; Kennecott Funding Ltd.; NZC Opportunities (Funding) II Limited; Green Lane CLO Ltd.; 1888 Fund, Ltd.; Orpheus Funding LLC; Orpheus Holdings LLC; and LFCQ LLC ("Guggenheim Plaintiffs") hereby voluntarily dismiss this action without prejudice. The Second Amended Complaint was filed on January 15, 2010. At this time no defendant has answered or filed a summary judgment motion. This voluntary dismissal by the Guggenheim Plaintiffs in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

Dated: February 19, 2010.

Respectfully submitted,

By: /s David A. Rothstein
David A. Rothstein, Esq.
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Email: Hennigan@hbdlawyers.com
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS SANDS POINT FUNDING LTD.; COPPER RIVER CLO LTD.; KENNECOTT FUNDING LTD.; NZC OPPORTUNITIES (FUNDING) II LIMITED; GREEN LANE CLO LTD.; 1888 FUND, LTD.; ORPHEUS FUNDING LLC; ORPHEUS HOLDINGS LLC; AND LFCQ LLC** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: February 19, 2010.

By: /s David A. Rothstein
David A. Rothstein, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA
This document relates to Case No.: 09-23835-CIV-GOLD/McALILEY

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106
_____/

ORDER DISMISSING CERTAIN PARTIES WITHOUT PREJUDICE PURSUANT TO NOTICES [DE 32]; [DE 33]; [DE 34]; [DE 38]; DIRECTING CLERK TO TAKE ACTION

THIS CAUSE is before the Court upon various notices of dismissal and a notice of inadvertent inclusion of certain plaintiffs filed by certain Plaintiffs in Case Number 09-CV-23835 ("the Nevada action"). *See* **[DE 32]; [DE 33]; [DE 34]; [DE 38]**. Having considered the Notices, the record, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. The following parties are hereby DISMISSED WITHOUT PREJUDICE from the Nevada Action:

   a. Carlyle Loan Investment, Ltd.;

   b. Carlyle High Yield Partners 2008-1, Ltd.;

   c. Carlyle High Yield Partners VI, Ltd.;

   d. Carlyle High Yield Partners VII, Ltd.;

   e. Carlyle High Yield Partners VIII, Ltd.;

   f. Carlyle High Yield Partners IX, Ltd.;

   g. Carlyle High Yield Partners X, Ltd.;

   h. Primus CLO I, Ltd.

   i. Primus CLO II, Ltd.

   j. Emerald Orchard Limited;

k. Longhorn Credit Funding, LLC;

l. Centurion CDO VI, Ltd.;

m. Centurion CDO VII, Ltd.;

n. Centurion CDO 8, Limited;

o. Centurion CDO 9, Limited;

p. Cent CDO 10 Limited;

q. Cent CDO XI Limited;

r. Cent CDO 12 Limited;

s. Cent CDO 14 Limited;

t. Cent CDO 15 Limited;

u. Sands Point Funding Ltd.;

v. Copper River CLO Ltd.;

w. Kennecott Funding Ltd.;

x. NZC Opportunities (Funding) II Limited;

y. Green Lane CLO Ltd.;

z. 1888 Fund, Ltd.;

aa. Orpheus Funding LLC;

bb. Orpheus Holdings LLC; and

cc. LFCQ LLC

2. The clerk is directed to correct the docket so that the above-referenced parties are longer listed as plaintiffs in the Nevada Action.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 22nd day of February, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Bandstra
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 09-MD-02106-CIV-GOLD/MCALILEY

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions
_____/

MDL ORDER NUMBER NINE:[1] REQUIRING COURTESY COPIES

THIS CAUSE is before the Court *sua sponte*. In anticipation of the hearing on Defendants' Motions to Dismiss **[DE 35]; [DE 36]** that is currently set for Friday May 7, 2010, it is hereby

ORDERED AND ADJUDGED that:

1. The parties are ORDERED to deliver to the undersigned's Chambers a Joint Binder containing bound, tabbed, and indexed courtesy copies of all pleadings, motions, responses, memoranda, and exhibits related to the Motions by **Friday, April 9, 2010 at 5:00 p.m.** The courtesy copies shall include a table of contents and shall indicate the docket entry number of each document contained therein.

DONE AND ORDERED in Chambers, at Miami, Florida, this 24th day of February 2010.

HONORABLE ALAN S. GOLD
U.S. DISTRICT JUDGE

cc: U.S. Magistrate Judge Chris M. McAliley
All counsel of record in all three cases

[1]Although not expressly labeled as such, MDL Order Number Eight was a paperless order issued February 23, 2010 confirming the previously-set oral argument date for Defendants' Motions to Dismiss **[DE 35]**; **[DE 36]**.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to: All actions.
_____/

NOTICE OF REQUEST FOR TERMINATION OF APPEARANCE OF ATTORNEY

Pursuant to Local Rule 11.1(D)(3), JPMorgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, and The Royal Bank of Scotland PLC, by and through the undersigned counsel, hereby give notice of this request to the Clerk of Courts that Justin S. Stern, Esq. be terminated from the service list for the above-referenced actions. Mr. Stern is no longer associated with the law firm of Simpson Thacher & Bartlett LLP.

Respectfully submitted,

By: /s/ John B. Hutton

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-and-

SIMPSON THACHER & BARTLETT LLP
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Attorneys for Defendants JPMorgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, and The Royal Bank of Scotland plc

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Termination of Appearance of Attorney was furnished via e-mail (where an e-mail address is listed) and First Class U.S. Mail to those on the attached service list on February 26, 2010.

By: /s/ John B. Hutton
John B. Hutton

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:
FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION
MDL NO. 2106
This document relates to: All Actions
_____/

MOTION FOR LIMITED APPEARANCE, CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS

In accordance with Local Rule 4.B of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission of Steven S. Fitzgerald, an associate with the law firm of Simpson Thacher & Bartlett LLP, 425 Lexington Avenue, New York, New York 10017, 212-455-7993, for purposes of limited appearance as co-counsel on behalf of Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., and The Royal Bank of Scotland plc, in the above-styled case only, and pursuant to Rule 2B, Southern District of Florida, CM/ECF Administrative Procedures, to permit Steven S. Fitzgerald to receive electronic filings in this case, and in support thereof states as follows:

1. Steven S. Fitzgerald is not admitted to practice in the Southern District of Florida, is a member in good standing of the bar of the highest Court of the State of New York and is admitted to practice before the U.S. District Court for the Southern District of New York.

2. Movant John B. Hutton, Esquire, of the law firm of Greenberg Traurig, P.A., 1221 Brickell Ave., Miami, FL, 305-579-0500, is a member in good standing of The Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in

this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. See Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Steven S. Fitzgerald has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4B is attached hereto.

4. Steven S. Fitzgerald, by and through designated counsel and pursuant to Section 2B, Southern District of Florida, CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Steven S. Fitzgerald at the following e-mail address: sfitzgerald@stblaw.com.

[This space intentionally left blank.]

WHEREFORE, John B. Hutton moves this Court to enter an Order permitting Steven S. Fitzgerald to appear before this Court on behalf of Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., and The Royal Bank of Scotland plc for all purposes relating to the proceedings in the above-styled matter, and directing the Clerk to provide notice of electronic filings to Steven S. Fitzgerald.

Dated: February 24, 2010

Respectfully submitted,

John B. Hutton
Florida Bar No. 902160
huttonj@gtlaw.com
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1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0537
Facsimile: (305) 579-0717
Attorneys for Defendants Barclays Bank PLC, Deutsche Bank Trust Company Americas, JPMorgan Chase Bank, N.A., and The Royal Bank of Scotland plc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:
FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION
MDL NO. 2106
This document relates to: All Actions
_____/

CERTIFICATION OF STEVEN S. FITZGERALD

Steven S. Fitzgerald, Esquire, pursuant to Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys, hereby certifies that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the bar of the highest Court of the State of New York.

STEVEN S. FITZGERALD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Limited Appearance. Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by First Class U.S. Mail on February 24, 2010 on all counsel or parties of record on the service list.

JOHN B. HUTTON

SERVICE LIST

In re: Fontainebleau Las Vegas Holdings, LLC, et al.,
Fontainebleau Las Vegas LLC v. Bank of America, N.A., et al.,
Case No.: 09-mc-21879-ASG
United States District Court, Southern District of Florida

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:
FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION
MDL NO. 2106
This document relates to: All Actions
_____/

ORDER GRANTING MOTION FOR LIMITED APPEARANCE OF STEVEN S. FITZGERALD, CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS

THIS CAUSE having come before the Court on the Motion for Limited Appearance of Steven S. Fitzgerald and Consent to Designation, requesting, pursuant to Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida, permission for a limited appearance of Steven S. Fitzgerald in this matter and request to electronically receive notice of electronic filings. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED and ADJUDGED that:

The Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings is GRANTED. Steven S. Fitzgerald is granted leave to appear and participate in this action on behalf of Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., and The Royal Bank of Scotland plc. The Clerk shall provide electronic notification of all electronic filings to Steven S. Fitzgerald at sfitzgerald@stblaw.com.

DONE AND ORDERED in Chambers at Miami, Southern District of Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/MCALILEY

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to
09-23835-CIV-GOLD/McALILEY .

VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS AVENUE CLO FUND, LTD.; AVENUE CLO II, LTD.; AVENUE CLO III, LTD.; AND ARES ENHANCED LOAN INVESTMENT STRATEGY III, LTD.

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Avenue CLO Fund, Ltd.; Avenue CLO II, Ltd.; Avenue CLO III, Ltd. ("Avenue Plaintiffs") and ARES Enhanced Loan Investment Strategy III, Ltd. hereby voluntarily dismiss this action without prejudice. The Second Amended Complaint was filed on January 15, 2010. At this time no defendant has answered or filed a summary judgment motion. This voluntary dismissal by the Avenue Plaintiffs and ARES Enhanced Loan Investment Strategy III, Ltd. in no way modifies or affects the remaining plaintiffs' prosecution of their claims against defendants.

Dated: March 5, 2010.

Respectfully submitted,

By: /s David A. Rothstein
David A. Rothstein
DIMOND KAPLAN & ROTHSTEIN, P.A.
2665 South Bayshore Drive
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Miami, FL 331343
Telephone: (305) 374-1920
Facsimile: (305) 374-1961

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **VOLUNTARY DISMISSAL WITHOUT PREJUDICE BY PLAINTIFFS AVENUE CLO FUND, LTD.; AVENUE CLO II, LTD.; AVENUE CLO III, LTD.; AND ARES ENHANCED LOAN INVESTMENT STRATEGY III, LTD.** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: March 5, 2010.

By: / s David A. Rothstein
David A. Rothstein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 09-MD-2106-CIV-GOLD/MCALILEY

In re:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION,

MDL No. 2106

This document relates to all actions.
_____/

MDL ORDER NUMBER TEN: GRANTING MOTION FOR LIMITED APPEARANCE OF STEVEN S. FITZGERALD [DE 43]

THIS CAUSE having come before the Court upon the Motion for Limited Appearance of Steven S. Fitzgerald, Consent to Designation and Request to Electronically Receive Notices of Electronics Filings ("Motion") **[DE 43]**, requesting, pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida, permission for a limited appearance of Steven S. Fitzgerald in this matter and to electronically receive notice of electronic filings. Having considered the Motion and being otherwise fully advised in the Premises, it is hereby

ORDERED and ADJUDGED that:

1. The Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings **[DE 43]** is GRANTED.
2. Steven S. Fitzgerald is permitted to appear and participate in this action for purposes of limited appearances as co-counsel on behalf of Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., and The Royal Bank of Scotland PLC in the above-referenced actions.
3. The Clerk shall provide electronic notification of all electronic filings to Steven S.

Fitzgerald at sfitzgerald@stblaw.com

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of March, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
Magistrate Judge Chris McAliley
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA
This document relates to Case No.: 09-23835-CIV-GOLD/McALILEY

IN RE: FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL No. 2106
_____/

ORDER DISMISSING PARTIES WITHOUT PREJUDICE PURSUANT TO NOTICE OF VOLUNTARY DISMISSAL [DE 44]; DIRECTING CLERK TO TAKE ACTION

THIS CAUSE is before the Court upon a Notice of Voluntary Dismissal **[DE 44]** filed by certain Plaintiffs regarding their participation in Case Number 09-CV-23835 ("the Nevada action"). Having considered the Notice, the record, and being otherwise duly advised, it is hereby ORDERED AND ADJUDGED that:

1. The following parties are hereby DISMISSED WITHOUT PREJUDICE from the Nevada Action:

   a. Avenue CLO Fund, Ltd.;

   b. Avenue CLO II, Ltd.;

   c. Avenue CLO III, Ltd.; and

   d. ARES Enhanced Loan Investment Strategy III, Ltd.

2. The clerk is directed to correct the docket so that the above-referenced parties are no longer listed as plaintiffs in the Nevada Action.

DONE and ORDERED IN CHAMBERS at Miami, Florida this 9th day of March, 2010.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Bandstra
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MASTER CASE NO. 09-2106-MD-GOLD/BANDSTRA

In re:
FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION
MDL NO. 2106
This document relates to: All Actions
_____/

ORDER GRANTING MOTION FOR LIMITED APPEARANCE OF STEVEN S. FITZGERALD, CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILINGS

THIS CAUSE having come before the Court on the Motion for Limited Appearance of Steven S. Fitzgerald and Consent to Designation, requesting, pursuant to Rule 4B of the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida, permission for a limited appearance of Steven S. Fitzgerald in this matter and request to electronically receive notice of electronic filings. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED and ADJUDGED that:

The Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings is GRANTED. Steven S. Fitzgerald is granted leave to appear and participate in this action on behalf of Barclays Bank PLC, Deutsche Bank Trust Company Americas, JP Morgan Chase Bank, N.A., and The Royal Bank of Scotland plc. The Clerk shall provide electronic notification of all electronic filings to Steven S. Fitzgerald at sfitzgerald@stblaw.com.

DONE AND ORDERED in Chambers at Miami, Southern District of Florida, this 9th day of MARCH 2010.

United States ~~District~~ Judge

NAS

Copies furnished to:
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to Case Nos:

09-CV-23835-ASG

10-CV-20236-ASG.

JOINT OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE TERM LENDERS' CLAIMS AGAINST THE REVOLVING LENDERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

On February 18, 2010, Defendants in the above-captioned cases (the "Revolving Lenders") moved jointly to dismiss Plaintiffs' claims. Plaintiffs (the "Term Lenders") oppose the motion, because the Second Amended Complaint in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al*, No. 09-cv-23835-ASG (the "Avenue Complaint") and the Amended Complaint in *ACP Master, Ltd., et al v. Bank of America, N.A., et al*, No. 10-cv-20236-ASG (the "Aurelius Complaint" and, together with the Avenue Complaint, "the Complaints") state plausible claims for relief. The Term Lenders respond jointly as follows:

BACKGROUND

Plaintiffs are Term Lenders under a Credit Facility for the financing of the development and construction of the Fontainebleau Resort and Casino in Las Vegas (the "Project"). The facility was governed primarily by two agreements. The Credit Agreement established the circumstances under which the Lenders were required to deposit loan proceeds into a holding account known as the Bank Proceeds Account. The Disbursement Agreement established the conditions under which the Borrowers could access those proceeds. This motion involves the Term Lenders' claims against the Revolving Lenders for their wrongful refusal to remit loans to the Bank Proceeds Account when the Borrowers properly requested them to do so.

The Credit Agreement created three types of Lender commitment—a $700 million Initial Term Loan Facility, a $350 million Delay Draw Term Loan Facility, and an $800 million Revolving Loan Facility. (Aurelius Compl. ¶5; Avenue Compl. ¶115.) The Credit Agreement set out the obligations of the Revolving Lenders and Term Lenders to make loans. Some of those loans—the type at issue here—were known as "Disbursement Agreement Loans." C.A. §2.1.

Disbursement Agreement Loans involved a two-step borrowing procedure. In the first step, the Borrowers submitted a Notice of Borrowing to the Administrative Agent—Bank of America ("BofA"), which was also a Revolving Lender but not a Term Lender—and in response the Lenders were to remit pro rata shares of the requested loans to the Administrative Agent. The Administrative Agent deposited those funds in the Bank Proceeds Account, completing the first step. (Aurelius Compl. ¶36; Avenue Compl. ¶119); C.A. §§ 2.1, 2.4. In the second step, the Borrowers submitted an Advance Request to the Disbursement Agent (also BofA). D.A. §2.4.1. The Disbursement Agreement set out the requirements to be met before the Disbursement Agent could approve the Borrowers' Advance Request, including the requirement that there not be any Defaults or Events of Default. D.A. §3.3.3. Unless those requirements were met, the Borrowers could not access the funds in the Bank Proceeds Account.

The Disbursement Agreement, not the Credit Agreement, was the primary check on the Borrowers' access to funds. For Disbursement Agreement Loans, the Form of Notice of Borrowing under the Credit Agreement does *not* include a representation by the Borrower that, as of the date of the Notice and the Borrowing Date, no Default or Event of Default has occurred and is continuing. (Heaton Decl. Ex. C at 1–2.) For another type of loan—"Direct Loans" that went directly to the Borrower rather than to the Bank Proceeds Account—the Notice of Borrowing included the representation by the Borrower that, as of the date of the Notice and the Borrowing Date, "No Default or Event of Default has occurred and is continuing on the date

hereof or will occur immediately after giving effect to the proposed Loan." *Id*. For Disbursement Agreement Loans, the representation that no Default or Event of Default had occurred appeared in the Advance Request. D.A. Ex. C-1. The Credit Agreement and Disbursement Agreement are structured so that the existence of a Default or Event of Default stands in the way of disbursement to the Borrowers of cash *from* the Bank Proceeds Account, but does not stand in the way of remitting funds for a Disbursement Agreement Loan from the Lenders *to* the Bank Proceeds Account.

On March 2, 2009, the Borrowers submitted a Notice of Borrowing for $350 million in Delay Draw Term Loans and $670 million in Revolving Loans. (Aurelius Compl. ¶44; Avenue Compl. ¶141.) On March 3, 2009, the Borrowers revised the Notice of Borrowing to reduce the Revolving Loans request to $656.5 million. (Aurelius Compl. ¶56; Avenue Compl. ¶141.) BofA told the Borrowers by letter that Section 2.1(c)(iii) of the Credit Agreement did not permit them to borrow more than $150 million from the Revolving Lenders until all of the Delay Draw Lenders had funded all of their commitments. (Aurelius Compl. ¶¶ 50–51; Avenue Compl. ¶¶ 144–45.) Some Delay Draw Lenders funded the loans, but BofA sent back the funds to those Lenders instead of depositing them in the Bank Proceeds Account. (Aurelius Compl. ¶52.) None of the Revolving Lenders funded. The Borrowers responded to BofA by letter that the Lenders were breaching the Credit Agreement. (Aurelius Compl. ¶¶ 54–55.) The March 2 Notice, the Borrowers contended, had "fully drawn" the Delay Draw Term Loan Facility, because the Notice had demanded all available Delay Draw Term Loans. (*Id*.)

On March 9, the Borrowers submitted another Notice of Borrowing, this one seeking only $350 million in Delay Draw Term Loans, while reserving their rights under the March 2 and 3 Notices that the Revolving Lenders refused to fund. (Aurelius Compl. ¶¶ 65–66, 68; Avenue Compl. ¶¶ 151, 154.) The Term Lenders funded this request. BofA used $68 million of the Term Lenders' loans to pay $68 million of then outstanding Revolving Loans, including its own Revolving Loans.

On April 20, 2009, the Revolving Lenders sent the Borrowers a letter purporting to terminate commitments because of the occurrence and continuance of Events of Default. (Aurelius Compl. ¶¶ 71–73; Avenue Compl. ¶¶ 167–69.) But the Revolving Lenders' termination letter did not specify what Events of Default justified the termination. To this day, the Revolving Lenders have not identified the Events of Default that they claim gave them the right to terminate the Credit Facilities on April 20, 2009. The Borrowers sent another Notice of Borrowing on April 21, 2009. The Revolving Lenders refused to honor it. (*Id*.) The Project crumbled almost immediately. On June 9, 2009, the Borrowers filed a petition for bankruptcy.

ARGUMENT

The Term Lenders defeat the motion to dismiss by demonstrating that:

(i) the Term Lenders have standing to sue the Revolving Lenders for failure to fund;

(ii) it is reasonable to interpret "drawn" to mean "demanded;" and

(iii) it is reasonable to interpret the Credit Agreement to require the Revolving Lenders to remit loans to the Bank Proceeds Account even in the face of a Default or Event of Default.

In this memorandum, the Term Lenders make these demonstrations. The Term Lenders also show that their claim for breach of contract related to the April 21, 2009 Notice of Borrowing survives, as does the Nevada Term Lenders' claim for breach of the implied duty of good faith and fair dealing. Therefore, the Court should deny the Revolving Lenders' motion to dismiss.

I. THE TERM LENDERS HAVE STANDING TO SUE THE REVOLVING LENDERS FOR FAILURE TO MAKE THE REVOLVING LOANS.

The Revolving Lenders assert that "the Credit Agreement's unambiguous terms reflect *separate* promises between the various parties," Def. Mem. at 10 (emphasis added), as though the Credit Agreement is a series of individual Lender-Borrower agreements. But there are no promises "between" only two of the parties to the Credit Agreement. The Credit Agreement is "among" Borrowers, Lenders, and Administrative Agent. C.A. Preamble. The Term Lenders have standing to sue the Revolving Lenders to enforce the mutual obligations of the Credit Agreement that, when breached, injure the Term Lenders.

Arguing that the Term Lenders do not have standing, the Revolving Lenders attempt an analogy to a 113 year-old case, *Berry Harvester Co. v. Walter A. Wood Mowing & Reaping Mach. Co.*, 46 N.E. 952 (N.Y. 1897), involving the licensing of nineteenth-century farm machinery. Yet they stay silent about a case that the Second Circuit affirmed in May 2009, which permits a lender-on-lender claim related to a failure to fund. See *Deutsche Bank AG v. JPMorgan Chase Bank*, 2007 U.S. Dist. LEXIS 71933 (S.D.N.Y. Sept. 27, 2007) ("Deutsche Bank"), aff'd, *Deutsche Bank AG v. JPMorgan Chase Bank*, 2009 U.S. App. LEXIS 11479, at *2 (2d Cir. May 29, 2009).

In *Deutsche Bank*, nine banks were parties to a syndicated loan agreement. Eight of the nine banks funded the borrower's draw. Deutsche Bank, a Revolving Lender here, refused. 2007 U.S. Dist. LEXIS 71933 at *2–3. The borrower under the loan agreement sued Deutsche Bank, but later settled that lawsuit. Deutsche Bank then sued JPMorgan Chase, also a Revolving Lender here, for declaratory relief from its disputes with the funding lenders. JPMorgan Chase, as administrative agent, counterclaimed on behalf of itself and the other funding banks. By failing to make good on its obligation to fund, JPMorgan Chase alleged, "Deutsche Bank has breached the Restated Credit Agreement," and "[t]he Funding Banks have suffered and will continue to suffer damages[.]" (Heaton Decl. Ex. B at 24.); 2007 U.S. Dist. LEXIS 71933 at *4 ("In its answer and counterclaims, JPMorgan Chase alleges that Deutsche Bank breached the amended credit agreement by refusing to fund the July Advance[.]")

The *Deutsche Bank* court granted summary judgment to JPMorgan Chase to "achieve [] the purpose of the banks' original agreement to share the risks and rewards of the [] transaction ratably, in proportion to each bank's original commitment." 2007 U.S. Dist. LEXIS 71933 at

*72. To hold otherwise "would reward Deutsche Bank for failing to fund the July Advance, and it would do so at the expense of the other eight funding banks." *Id.* at *73.

The three-party licensing and employment contract at issue in *Berry Harvester* is far away and long ago. Even modern courts that cite *Berry Harvester* have rejected its outcome unless there is language that "evince[s] a manifest intention to exclude" a particular party from recovering. *See, e.g., CARs Receivables Corp. v. Bank One Trust Co., N.A.*, 2006 Ohio 6645, P11 (Ohio App. Dec. 14, 2006), *appeal not allowed* 864 N.E.2d 654 (Ohio 2007); *cf. Bykowsky v. Eskenazi*, 58 A.D.3d 405, 405 (N.Y. App. Div. 2009) (reversing trial court's decision that cited *Berry Harvester* favorably, and holding that the "[t]he various parties' obligations under the contract, which involved the creation of a chain of sports complexes, were interrelated"). The fact that one lender does not assume the obligations of another lender—that is, that the obligations are "several" and not "joint"—does not change this result. The obligations of the lenders in Deutsche Bank also were "several" and not "joint," (Heaton Decl. Ex. B at Cr. Agr. §2.01), but severability does not turn mutual obligations into non-obligations. To the contrary, severability makes it all the more important that each lender meets its obligations; no one else is meeting those obligations for it.

The Revolving Lenders also assert that the Term Lenders waived their right to enforce the Revolving Lenders' funding obligations when the Term Lenders agreed to make their own credit decisions. They cite *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 499 (S.D.N.Y. 2003), for the proposition that a "contract provision in which plaintiff lenders agreed to 'make their own credit decisions and would not rely on the Defendant banks' barred plaintiffs from arguing they relied on the banks." Def. Mem. at 11 n.45. But *UniCredito* had nothing to do with the enforcement of funding obligations. Rather, the *UniCredito* court granted defendant JPMorgan Chase's motion to dismiss fraudulent-concealment and negligent-misrepresentation claims arising from its failure to disclose fraudulent dealings with Enron. The court held that although the complaint adequately alleged that JPMorgan Chase aided and abetted Enron's massive financial statement fraud, the plaintiffs had agreed to rely only on Enron's disclosures, not on disclosures by JPMorgan Chase. 288 F. Supp. 2d at 497–502.

The section of the Credit Agreement at issue here, Section 2.1(c), is not a representation. Section 2.1(c)(iii) is an affirmative contractual undertaking by the Revolving Lenders to make Revolving Loans. The Revolving Lenders injured the Term Lenders when they refused to make those loans. The Term Lenders have standing to pursue remedies for their injuries.

II. IT IS REASONABLE TO INTERPRET "DRAWN" TO MEAN "DEMANDED."

A. Plaintiffs need only demonstrate that it is reasonable to interpret "drawn" as "demanded."

The Revolving Lenders cannot prevail on their motion to dismiss on the ground that "drawn" means "funded" unless they can demonstrate that the Term Lenders' interpretation—under which "drawn" means "demanded"—is unreasonable as a matter of law. *See, e.g., Novoneuron Inc. v. Addiction Research Institute, Inc.*, 326 Fed. Appx. 505, 2009 WL 1132344 at

*508 (11th Cir. April 28, 2009) (Florida law) ("These reasonable, conflicting interpretations render the Agreement ambiguous."); *Canpartners Invs. IV, LLC v. Alliance Gaming Corp.*, 981 F. Supp. 820, 823 (S.D.N.Y. 1997) (New York law) ("As there are two reasonable interpretations of the break-up provision, the Court finds that the Letter is ambiguous and its interpretation is a question of fact for the jury.").[1] New York law distinguishes an ambiguous contract provision such as Section 2.1(c)(iii) from one with a "definite and precise meaning, unattended by danger of misconception … and concerning which there is no reasonable basis for a difference of opinion." *Krystal Investigations & Sec. Bureau, Inc. v. United Parcel Serv., Inc.*, 35 A.D.3d 817, 826 (N.Y. App. Div. 2006).

The standard of judgment separates the present motion from the motion for partial summary judgment that the Borrowers filed in the related bankruptcy adversary proceeding on June 9, 2009, and which led to this Court's August 26 Decision. To prevail on that motion, the Borrowers needed to demonstrate both that the interpretation of "drawn" as "demanded" or "requested" was reasonable *and* that the Revolving Lenders' interpretation of "drawn" as "funded" was unreasonable.[2] Here, the Term Lenders have a much lower hurdle. The Term Lenders need only show that their interpretation is reasonable.

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[1] See also, *Am. Bldg. Maint. Co. v. ACME Prop. Servs.*, 515 F. Supp. 2d 298, 311 (N.D.N.Y 2007) ("The Henneseys and ABM have both presented reasonable interpretations. These conflicting interpretations mean that ABM is entitled to present evidence to the fact finder regarding the parties' intentions with respect to which restrictive covenant applies, and if that covenant is reasonable. As a consequence, the Henneseys' Motion to dismiss Count One is denied."). The Court acknowledged the possibility of an ambiguity in its August 26 Decision. 417 B.R. 651, 659 ("I next address why even if this legal conclusion is erroneous, I conclude that Plaintiff's interpretation is at best a reasonable, but not conclusive one, and that the resulting ambiguity requires denial of partial summary judgment.").

[2] The Term Lenders have tried to avoid repeating arguments that the Borrowers made in its earlier motion. However, for purposes of preserving issues for appeal, the Term Lenders incorporate all arguments not set forth here that Fontainebleau made, and which the Court rejected, regarding the interpretation of "fully drawn" and the requirement that the Revolving Lenders fund Revolving Loans notwithstanding the existence of Events of Default.

B. Plaintiffs' interpretation is reasonable because it is consistent with ordinary legal usage.

New York law governs the Credit Agreement. C.A. §10.11. Both the statutory and case law of New York use the term "draw" to refer to a demand for money by a drawer, rather than a drawee's decision to honor such a request. This usage supports the Term Lenders' claim that it is reasonable to interpret "drawn" to mean "demanded." *Cf. Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617–18 (2d Cir. 2001) ("When interpreting a state law contract an established definition provided by state law or industry usage will serve as a default rule, and that definition will control unless the parties explicitly indicate, on the face of their agreement, that the term is to have some other meaning.").

Consider the Uniform Commercial Code. Article 3 indicates that "to draw" means "to order payment," not "to receive payment upon an order." Article 3 defines a "drawee" to be "a person *ordered* in a draft to make a payment." UCC 3-103(4) (emphasis added). A "drawer" is "a person who signs or is identified in a draft as a person *ordering* payment." UCC 3-103(5) (emphasis added). "An instrument is a 'draft' if it is an *order*," UCC 3-104(e) (emphasis added), an "order" being "a written instruction to pay money signed by the person giving the instruction." UCC 3-103(8). These definitions support an interpretation of the Credit Agreement under which an amount is "drawn" when it is demanded.

New York judicial decisions use "draw" similarly. A draft, which by statute is a written instruction to pay money, is "drawn" by a bank depositor, and the bank then decides whether to "honor" the draw. *See, e.g., Exchange Bank v. Hubbard*, 62 F. 112 (2d Cir. 1894); *Nassar v. Florida Fleet Sales Inc.*, 79 F. Supp. 2d 284 (S.D.N.Y. 1999) (discussing a bank's decision to dishonor a "draw"); *Self International v. La Salle National Bank*, 2002 U.S. Dist. LEXIS 5631 (S.D.N.Y. March 29, 2002) (describing a decision to "dishonor the draws"); *Bank of China v. Chan*, 937 F.2d 780 (2d Cir. 1991) (a demander "draws down" a letter of credit).

These ordinary legal uses of "draw" and "drawn" establish that it is reasonable to interpret "drawn" as meaning "demanded."

C. The Credit Agreement's use of the word "draw" (and its other forms) shows that it is reasonable to interpret "drawn" to mean "demanded."

The Credit Agreement's use of "draw' and its related word-forms supports the Term Lenders' claim that it is reasonable to interpret "drawn" to mean "demanded." Consider an Issuing Lenders' covenant "to honor drawings under the Letters of Credit." C.A. §3.1(a). "[D]rawings" are demands. To pay the demand is "to honor" the drawing. Were the Issuing Lender to "dishonor" a drawing, there would be a demand but no payment.

Or consider Section 3.3(a), which obligates an Issuing Lender to notify the Borrowers and the Administrative Agent "[u]pon receipt from the beneficiary of any Letter of Credit of any notice of a drawing under [a] Letter of Credit." The "notice of a drawing" is a notice of demand that the Issuing Lender pay the Letter of Credit's beneficiary for costs incurred on the Borrowers' behalf. It is not a notice that the beneficiary has already been paid.

Or take the agreement that an Issuing Lender need not "ascertain or inquire as to the validity or accuracy" of documentation "in paying any drawing under a Letter of Credit." *Id*. at §3.6. Once again, the drawing is separated from payment and used to refer to a demand or request of the Lenders.

Finally, consider the In Balance Test, the satisfaction of which was a condition precedent to disbursement of any proceeds to the Borrowers. D.A. § 3.3.8. The Term Lenders agree with the Revolving Lenders that the parties' course of dealing is not an appropriate consideration in determining, on a motion to dismiss, whether it is reasonable to interpret "drawn" to mean "demanded." See Def. Mem. at 17. But it is telling that the Revolving Lenders do not dispute that the In Balance Test necessarily failed if "drawn" meant "funded." Instead, they argue that "available to be drawn on that date" did not mean the actual amount the Borrowers could demand under the Revolving Facility "on that date" but rather the maximum amount that the Borrowers might be able to demand someday. *Id*. at 18–19. But "on that date" is unambiguous. It means "*that* date"—the date of the Advance Request—not "some future date." The Revolving Lenders' interpretation cannot be reconciled with the clear language of the In Balance Test.

In light of these other usages in the Credit Agreement, it is reasonable to interpret Section 2.1(c)(iii) as meaning that the Revolving Lenders need not extend more than $150 million in loans until the Borrowers have demanded all of the Delay Draw commitment.[3]

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[3] The Revolving Lenders' interpretation of Section 2.1(c)(iii) also has the commercially unreasonable consequence of permitting even the *de minimis* default of a single Delay Draw Lender to derail the entire project. The financing agreements operate in numerous ways to cut off funding from the Borrowers in the case of major Lender defaults—i.e., those that could jeopardize the commercial viability of the project. Most notably, a majority of Lenders may vote to terminate their commitments. C.A. §8(j). That drastic remedial consequence is deliberately tailored as a response to a drastic default. The financing agreements also provide safeguards, in the event of a Default by a Lender, for the Disbursement Agent to issue a Stop Funding Notice. D.A. §§ 2.5.1 and 3.3.3. That mechanism enables the Lenders to assess whether the Default "could reasonably be expected to result in a Material Adverse Effect," C.A. §8(j), and whether the Borrowers are able to obtain substitute financing in a timely manner. The provisions of the Credit Agreement and Disbursement Agreement operate together to achieve the basic principle of business that no molehill shall become a mountain. The Term Lenders' interpretation of Section 2.1(c)(iii), unlike that of the Revolving Lenders, would allow the project to go forward in the face of a minor lender default, without giving each individual Revolving Lender the unilateral ability to pull the plug on the Project. *See Outlet Embroidery Co. v. Derwent Mills, Ltd.*, 172 N.E. 462, 463 (N.Y. 1930) (Cardozo, J.) (commenting that in business, "sanity of end and aim is at least a presumption"). Much can go wrong in a project as complicated as a hotel and casino construction. The protections in the Credit Agreement and Disbursement Agreement,

D. The Revolving Lenders' reasoning (adopted by this Court in the August 26 Decision) does not establish that "fully drawn" unambiguously means "fully funded."

1. The Revolving Lenders' reasoning.

The Court previously agreed with the Revolving Lenders that "'fully drawn' must mean 'fully funded[,]'" 417 B.R. 651, 660, because the alternative view—that "fully drawn" means "fully requested"—would render Section 2.1(b)(iii) of the Credit Agreement without force and effect. *See* July 1, 2009 Defendants' Opposition to Fontainebleau's Motion for Partial Summary Judgment at 31–32. Section 2.1(b)(iii) provides that "the proceeds of each Delay Draw Term Loan will be applied first to repay in full any then outstanding Revolving Loans and Swing Line Loans (but without reducing the Total Revolving Commitments), and second, to the extent of any excess, be credited to the Bank Proceeds Account[.]" Under the March 3 Notice, the outstanding amount of Revolving Loans would have been in excess of $700 million (the sum of the $656.5 million requested and the $68 million that was already outstanding). The Court concluded that "[i]n order for section 2.1(b)(iii) to be given effect, all of the proceeds from the Delay Draw facility must *first* be made available and used to repay outstanding Revolving Loans, which would be under $150 million, before the rest of the Revolving Loan facility could be made available." 417 B.R. at 660.

2. The Revolving Lenders' reasoning hinged on interpreting "Delay Draw Term Loan" to refer to the aggregate amount of Delay Draw Term Loans.

The Court interpreted "Delay Draw Term Loan" to refer to the *aggregate* of all loans funded by Delay Draw Term Loan Lenders. The Court then concluded that "a simultaneous request that seeks a Revolving Loan in excess of $150 million, such as the March 2 Notice, is therefore not valid because the Delay Drawn [sic] Term Loan could not repay in full the outstanding Revolving Loan [sic], which under the March 2 Notice would have been in excess of $700 million." 417 B.R. at 660.[4] But "Delay Draw Term Loan" does *not* refer to the aggregate of all loans funded by Delay Draw Term Lenders.

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including that Material Adverse Effect provisions, take account of the important principle that small problems should not be allowed to derail big enterprises; one Delay Draw Lender's failure to fund one dollar should not be allowed by itself to abort the project.

[4] Even under the Court's premises, including the interpretation of Delay Draw Term Loan as the aggregate of Delay Draw Term Loans, the Credit Agreement, contrary to the Court's conclusion, would have allowed the Borrowers to simultaneously borrow (i) the entire amount

A Delay Draw Term Loan is an *individual* loan by an *individual* Delay Draw Term Lender. C.A. §§ 1.1, 2.1(b). Under the Credit Agreement's definition of "Delay Draw Term Loan," Section 2.1(b)(iii) does not require repayment of the outstanding Revolver Loans in full from any borrowing under the Delay Draw Term Loan Facility, but only provides for the flow of funds from *each* Delay Draw Term Loan: the proceeds of "*each* Delay Draw Term Loan" (emphasis added) have to be first applied to the then outstanding Revolving Loans, and second, "to the extent of any excess," the money goes into the Bank Proceeds Account. Section 2.1(b)(iii) is a flow of funds requirement for each individual Delay Draw Term Loan, nothing more.

E. Revolving Lenders Deutsche Bank and JPMorgan Chase interpreted "drawn" to mean "demanded" in the *Deutsche Bank* case, and distinguished it from "fully funded" in precisely the same way that the Term Lenders do.

The Term Lenders interpret "drawn" to mean "demanded." The Revolving Lenders call this interpretation "strained," Def. Mem. at 2, and argue that it is so unreasonable as to warrant dismissal. But how have the Revolving Lenders used "drawn" and "fully funded" outside of this litigation? The Court need look no further than the *Deutsche Bank* case to answer that question.

In *Deutsche Bank*, discussed above, Revolving Lender Deutsche Bank made the following allegation against JPMorgan Chase in paragraph 27 of its complaint:

> 27. Subsequent to the improper amendment of the Credit Agreement (discussed in greater detail in subsection B), the Letter of Credit was *drawn* and, *as a result, each of the Lenders*, including Deutsche Bank, *was obligated to make and made a Letter of Credit Advance*. Deutsche Bank's Letter of Credit Advance was in the amount of $172,500,000, which Deutsche Bank *fully funded* on or about December 4, 2002, despite the improper amendment to the Credit Agreement.
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> (Heaton Decl. Ex. A at 5) (emphasis added).

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available under the Delay Draw Loan Facility and (ii) more than $150 million under the Revolving Loan Facility. Consider the situation on March 2, 2009. Taking the Court's premises as given, the Borrowers could have demanded $350 million under the Delay Draw Term Loan and simultaneously demanded $282 million under the Revolving Loans. The Borrowers could have used $68 million of the Delay Draw Term Loan to "repay in full" the Revolving Loans outstanding prior to the draw and could have used the balance of the Delay Draw Term Loan, $282 million, to "repay in full" the amount of Revolving Loans just borrowed. But $282 million is more than $150 million.

In paragraph 27 of Revolving Lender JPMorgan Chase's Answer and Counterclaims, JPMorgan Chase wrote:

> 27. Denies the allegations in paragraph 27 of the Complaint, except admits that the Letter of Credit was *drawn* and, *as a result, each of the Lenders*, including Deutsche Bank, *was obligated to make and made a Letter of Credit Advance*, and Deutsche Bank's Letter of Credit Advance was in the amount of $172,500,000, which Deutsche Bank *fully funded* on or about December 4, 2002.

(Heaton Decl. Ex. B at 5) (emphasis added).

That two of the Revolving Lenders, in a similar context, used "drawn" and "fully funded" to have the same distinct meanings that the Term Lenders urge here is consistent with the reasonableness of the Term Lenders' interpretation.

III. IT IS REASONABLE TO INTERPRET THE CREDIT AGREEMENT TO REQUIRE THAT THE REVOLVING LENDERS REMIT LOANS TO THE BANK PROCEEDS ACCOUNT EVEN IN THE CIRCUMSTANCE OF A DEFAULT OR EVENT OF DEFAULT.

The Term Lenders need only demonstrate that it is reasonable to interpret the Credit Agreement to require the Revolving Lenders to make Revolving Loans to the Bank Proceeds Account even if there had been the occurrence of a Default or Event of Default.

F. The Complaints do not plead that the Borrowers breached the Credit Agreement.

The Revolving Lenders assert, citing this Court's August 26 Decision, that they had no obligation to fund Revolving Loans "if Fontainebleau materially breached the Credit Agreement prior to the March 2 and 3 Notices of Borrowing." Def. Mem. at 20. Even taking that assertion as true arguendo, the Complaints do not allege that "Fontainebleau materially breached the Credit Agreement prior to the March 2 and 3 Notices of Borrowing." Rather, the Complaints allege Defaults (not breaches) by Lehman Brothers and the First National Bank of Nevada (not the Borrowers or the Term Lenders). Defaults and Events of Default are not necessarily breaches of the Credit Agreement. Even if the Defaults and Events of Default were breaches, they are not necessarily breaches by the Borrowers. Nor are they breaches by the Term Lenders.

Therefore, to the extent the Revolving Lenders seek to rely on case law (including this Court's August 26 Decision) excusing performance on the basis of a material breach by the party seeking to enforce an agreement, that case law simply has no application here.[5]

G. The Credit Agreement requires the Revolving Lenders to fund even if a Default or Event of Default has occurred.

To the extent that the Revolving Lenders try to rely on common law understandings without reference to this Credit Agreement, it is clear that the Credit Agreement's provisions govern. *See, e.g., Citicorp Leasing, Inc. v. Kusher Family LP*, 2006 U.S. Dist. LEXIS 50682, at *13 (S.D.N.Y. July 14, 2006) (parties may exclude or modify warranties implied by law); *cf. Boulevard Associates v. Sovereign Hotels, Inc.*, 72 F.3d 1029, 1035 (2d Cir. 1995) ("Since these are no more than default rules, the parties will in general be free to contract around them … ."). The Credit Agreement's provisions require the Revolving Lenders to fund even if there had occurred Defaults or Events of Default. It is the Disbursement Agreement, *not* the Credit Agreement, which protects the Revolving Lenders from having their funds disbursed to the Borrowers if Defaults or Events of Default were continuing at the time of an Advance Request.

We start with Section 2.4, move to Section 2.1(c), then to Section 5.2, and, finally, back to Section 2.1(c). Section 2.4 sets forth "Procedures for Borrowing; Where Disbursed." Section 2.4(b) states: "Upon receipt of each Notice of Borrowing which requests the making of Loans hereunder, the Administrative Agent shall promptly notify each Delay Draw Lender and/or

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[5] The Revolving Lenders half-heartedly assert that "[b]oth sets of Plaintiffs are precluded by their failure to perform their own obligations from seeking to pursue a contract claim for the same alleged breach against the Revolving Lenders." Def. Mem. at 22 n.89. But, as alleged in the Complaints, the Term Lenders cured their own default by funding the March 9, 2009 Notice. *See, e.g., Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 2009 WL 2163483 at *14 (N.Y. Sup. Ct., Onondaga County July 17, 2009) (concluding that plaintiff borrower showed, for purposes of preliminary injunction, probability of success on the merits of claim that defendant breached parties' construction loan agreement by refusing to fund draw requests, where plaintiff tendered to defendant outstanding unpaid interest, prior failure to pay which had excused its obligation to pay plaintiff's draw request), *aff'd as modified on other grounds by Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 889 N.Y.S.2d 793 (N.Y. App. Div., 4th Dep't Nov. 13, 2009). The Revolving Lenders, on the other hand, never cured their default, yet elected to continue the contractual relationship in order to take repayment of $68 million from the proceeds of the Term Lenders' funding on March 10. (Aurelius Compl. ¶¶ 67–68; Avenue Compl. ¶¶ 152–56.)

Revolving Lender, as appropriate, thereof. Each such Lender will make the amount of its pro rata share of each borrowing available to the Administrative Agent at the Administrative Agent's Office prior to 10:00 A.M., on the Borrowing Date requested by Borrowers in funds immediately available to the Administrative Agent."[6] Section 2.4(b) requires the Administrative Agent to notify the Revolving Lenders of the borrowing request, and tells each Revolving Lender when its funds are due to the Administrative Agent.

Section 2.1(c) states: "The making of Revolving Loans which are Disbursement Agreement Loans to the Bank Proceeds Account shall be subject **only** to the fulfillment of the applicable conditions set forth in Section 5.2, and shall thereafter be disbursed from the Bank Proceeds Account subject only to the conditions set forth in Section 3.3 of the Disbursement Agreement" (emphasis in original). It is important to compare the bolding of "only" in Section 2.1(c) with the bolding of "both" in Section 2.1(a).[7] Under Section 2.1(a), "[t]he making of the Initial Term Loans on the Closing Date shall be subject to the fulfillment of **both** the applicable conditions precedent set forth in Section 5 and the applicable conditions set forth in Section 3 of the Disbursement Agreement." There is only one reasonable interpretation of Section 2.1(c)'s use of the bolded "only" in light of 2.1(a)'s use of the bolded "both": the making of Revolving

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[6] In a footnote, Defendants assert that the March 3 Notice of Borrowing was technically deficient because, while Section 2.4(d) says that requests from the Revolving Lenders should be in multiples of $5 million, the March 3 Notice sought $656.5 million. Def. Mem. at 13 n.51. Defendants do not suggest, however, that the deficiency is a basis on which this Court may grant judgment. A party cannot refuse to perform on one ground and then, in litigation, trot out a second and separate ground to defend its nonperformance—at least if the counterparty, had it known, could have cured the deficiency. *See, e.g., Daiwa Special Asset Corp. v. Desnick*, 2002 U.S. Dist. LEXIS 16164, at *14 (S.D.N.Y. Aug. 29, 2002) (explaining that New York law "precludes the assertion of added reasons for the termination of a contract if a party relied on the reasons articulated or could have cured its performance had the additional grounds been disclosed earlier"); *Cawley v. Weiner*, 140 N.E. 724, 725 (N.Y. 1923) (quoting Williston for the proposition that it is a question of fact whether "the specification of a single reason operated as a deception which being relied upon prevented the promisee from performing fully, as he would otherwise have done"). The Borrowers could have cured the technical noncompliance that Defendants mention by submitting, say, a March 4 Notice seeking $655 million. In addition, for the reasons discussed here, the technical noncompliance is not a reason that would have allowed the Revolving Lenders to refuse to fund in any event.

[7] Contrary to the Borrowers' suggestion during oral argument in the related adversary proceeding, there are two bolded words in Section 2.1, not one.

Loans is *not* subject to the applicable conditions set forth in Section 3 of the Disbursement Agreement. Rather, Section 2.1(c) requires the Revolving Lenders to make Revolving Loans so long as the "applicable conditions" set forth in Section 5.2 are fulfilled.

Section 5.2 is titled "Conditions to Extensions of Credit controlled by Disbursement Agreement." It states: "The agreement of each Lender to make Disbursement Agreement Loans and to issue Letters of Credit for the payment of Project Costs pursuant to Section 3.4 of the Disbursement Agreement, is subject only to the satisfaction of the following conditions precedent[.]" Relevant here is Section 5.2(a): "Notice of Borrowing. Borrowers shall have submitted a Notice of Borrowing specifying the amount and Type of the Loans requested, and the making thereof shall be in compliance with the *applicable* provisions of Section 2 of this Agreement" (emphasis added). Thus, the conditions precedent that must be satisfied are (i) that the "Borrowers shall have submitted a Notice of Borrowing specifying the amount and Type of the Loans requested" and (ii) that "the making [of the Loans] shall be in compliance with the applicable provisions of Section 2 of this Agreement."

What are the "applicable provisions of Section 2 of this Agreement"? For a Revolving Loan, the "applicable *provisions* of Section 2" are those requirements in Section 2.1(c) following the "*provided* that" (emphasis added) of the opening paragraph. In particular, the "applicable provisions" are that:

> (i) the aggregate outstanding principal amount of the Revolving Loans of each Lender, when added to such Lender's Revolving Credit Percentage of the sum of (i) the L/C Obligations then outstanding and (ii) the aggregate principal amount of the Swing Line Loans then outstanding, shall not exceed the amount of such Lender's Revolving Commitment;
>
> (ii) the Total Revolving Extensions of Credit shall not exceed the Total Revolving Commitments at any time; and
>
> (iii) unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000.

C.A. §2.1(c).

So long as the making of the Revolving Loan is in compliance with these provisions, the Revolving Loan Lender, according to the opening sentence of Section 2.1, "shall make the Loans

… for remittance to the Bank Proceeds Account under the Disbursement Agreement for disbursement in accordance with the Disbursement Agreement ….” Nowhere in the Credit Agreement does the occurrence of a Default or Event of Default relieve the Revolving Lenders of their obligation to “remit[] [the Loan] to the Bank Proceeds Account under the Disbursement Agreement for disbursement in accordance with the Disbursement Agreement ….” If the parties had intended for the occurrence of a Default or Event of Default to excuse the obligation to remit Revolving Loans to the Bank Proceeds Account, they (a) would have said so, and (b) would not have included language so specifically limiting the provisions that must be satisfied to trigger that obligation.

This establishes that it is reasonable to interpret the Credit Agreement as requiring the Revolving Lenders to remit loans to the Bank Proceeds Account even if there is a Default or Event of Default.

H. This Court’s prior reasoning does not establish that it is unreasonable to interpret the Credit Agreement to require the Revolving Lenders to remit loans to the Bank Proceeds Account even when there is a Default or Event of Default.

Section 5.2(a) of the Credit Agreement requires that “the making [of Revolving Loans] shall be in compliance with the applicable provisions of Section 2 of [the Credit Agreement].” In its August 26 Decision, the Court concluded that the “applicable provisions of Section 2” implicitly embrace fulfillment of all of the representations and warranties in the financing agreements. Section 2.1’s plain statement that the making of Revolving Loans is subject *only* to Section 5.2 could not, as the Court saw it, “be read to disregard the requirement that the terms and conditions set forth in the Credit Agreement and representations and warranties under the Credit Agreement and Disbursement Agreement be satisfied.” 417 B.R. at 664. “In short,” the Court concluded, “each Revolver Bank had the specified right to ascertain if there was such compliance before making a Revolving Loan, including the representation that Fontainebleau was not in default.” *Id*. (citing D.A. §§ 3.3.3, 4.9). “Defendants were therefore free to terminate their loan commitments if representations and warranties were determined to be false.” *Id*. (citing D.A. §2.5.1(ii); C.A. §§ 2.4(e), 8(b)).

But the Court’s prior interpretation is not sufficient to demonstrate that the Term Lenders’ alternative explanation is unreasonable as a matter of law, because the Court’s interpretation would render superfluous at least three parts of the Credit Agreement.

- <u>The difference in the form of a Notice of Borrowing between Disbursement Agreement Loans and Direct Loans</u>. For Disbursement Agreement Loans (the kind at issue here), the form of Notice of Borrowing does not include a representation by the Borrower that no Default or Event of Default has occurred and is continuing as of the

date of the Notice and the Borrowing Date. (Heaton Decl. Ex. C at 1–2.) For "Direct Loans" that went directly to the Borrowers rather than to the Bank Proceeds Account, the Notice of Borrowing does include the representation by the Borrower that "No Default or Event of Default has occurred and is continuing on the date hereof or will occur immediately after giving effect to the proposed Loan." *Id*. Under the Court's reasoning, the additional language applicable to a Notice of Borrowing for a Direct Loan would be superfluous.

- Section 5.2 versus Section 5.3. As mentioned, the Credit Agreement distinguishes Disbursement Agreement Loans, which are the kind of loans at issue in this case, from Direct Loans. The conditions precedent to Disbursement Agreement Loans are stated in Section 5.2. The conditions precedent to Direct Loans are specified in Section 5.3. Unlike Section 5.2, which says nothing about Defaults or Events of Default excusing performance, Section 5.3 expressly conditions the obligation to make Direct Loans on conditions precedent that include "(b) Representations and Warranties. … (c) No Default ...." Under the Court's reasoning, Section 5.3's language relieving the Lenders of the obligation to fund when the Borrower cannot make representations and warranties or where there are Defaults would be superfluous.
- Stop Funding Notices. The Disbursement Agreement requires the Disbursement Agent to issue a Stop Funding Notice if the conditions precedent to an Advance from the Bank Proceeds Account have not been satisfied, or if a Default or Event of

> Default has occurred and is continuing. D.A. §2.5.1. Section 2.4(e) of the Credit Agreement states: "In the event that the Administrative Agent receives a Stop Funding Notice from the Disbursement Agent, none of the Administrative Agent and the Lenders shall, or shall have any obligation to, make Loans until the circumstances associated with such Stop Funding Notice have been resolved …." Under the Court's reasoning, Section 2.4(s)'s language relieving the Lenders of the obligation to fund in the presence of a Stop Funding Notice would be superfluous.

The Court also cited Section 3.3 of the Disbursement Agreement in support of its conclusion that each Lender "had the specified right to ascertain if there was such compliance [with the representations and warranties in the Credit Agreement and Disbursement Agreement] before making a Revolving Loan, including the representation that Fontainebleau was not in default." 417 B.R. at 664. But Section 3.3 of the Disbursement Agreement outlines the conditions precedent to an Advance of funds to the Borrower from the Bank Proceeds Account, not conditions precedent to the obligations of the Lenders to make Revolving Loans. A Notice of Borrowing and the associated obligation to make loans are distinct in these agreements from an Advance Request and the associated obligation to approve of such a request. The Court's reasoning ignores this distinction and does not account for Section 3.3's placement in the Disbursement Agreement rather than the Credit Agreement. It also ignores the difference between Section 2.1(a) (where the making of Initial Term Loans is subject to Section 3 of the Disbursement Agreement) and 2.1(c) (where the making of Revolving Loans is not subject to Section 3 of the Disbursement Agreement).

IV. THE COMPLAINTS ALLEGE A WRONGFUL REFUSAL TO FUND THE APRIL 21, 2009 NOTICE.

Under a reasonable interpretation of Section 8 of the Credit Agreement, the requirement that Revolving Lenders terminate their Revolving Commitments "by notice to Borrowers" is a requirement that the Revolving Lenders specify the Event(s) of Default that support the termination. The Term Lenders allege that the Revolving Lenders "did not identify or set forth the Events of Default upon which they were relying to terminate their commitment." (Aurelius Compl. ¶73.) Therefore, the Revolving Lenders' purported termination on April 20, 2009 was invalid, and their failure to fund the April 21, 2009 Notice of Borrowing was a breach.

The Revolving Lenders not only failed on April 20, 2009 to specify the Event(s) of Default justifying termination; they still fail to do so. On reply, at minimum, the Revolving Lenders should specify what were the "numerous Events of Default" that allegedly justified their

termination on April 20, 2009. In any case, it is reasonable to interpret the Credit Agreement to require that they have done so on April 20, 2009.

V. THE NEVADA TERM LENDERS HAVE PROPERLY ALLEGED A CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

In New York, the covenant of good faith and fair dealing is implied in every contract and encompasses a pledge by each party not to "do anything which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *JPMorgan Chase Bank, N.A. v. IDW Group, LLC*, 2009 U.S. Dist. LEXIS 9207, at *11–12 (S.D.N.Y. Feb. 9, 2009); *see also EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 22 (2005) (same). The implied covenant is intended to fill gaps in the express terms of a contract to ensure that the "parties' intent and reasonable expectations in entering the contract" are not frustrated. *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 502 (2d Cir. 1989); *see also* Restatement 2d of Contracts, §205, Comment a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party…."). The parties' "reasonable expectations" are shaped by what a "'reasonable person in the position of the promisee would be justified in understanding were included,'" *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002) (quoting *Roe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566 (N.Y. 1978)), and are informed by principles of sound commercial practice, *Components Direct, Inc. v. European American Bank & Trust Co.*, 175 A.D.2d 227, 229–230 (N.Y. App. Div. 1991) (finding breach of covenant of good faith and fair dealing because sound commercial practice would require party to give notice prior to terminating contract despite the fact there was no express contract provision requiring such notice; court inferred notice requirement because "any other construction would make the contract unreasonable").

The Nevada Term Lenders reasonably expected that each Lender to the Credit Agreement would fund its pro rata share of loans requested pursuant to Notices of Borrowing in order to ensure that the risks of the transaction were shared ratably. The Revolving Lenders breached this obligation by refusing to fund the March 2 and 3 Notices of Borrowing under the pretext that the Notices were not properly issued. To the extent the Revolving Lenders contend that the Credit Agreement does not expressly require them to fund under these circumstances, the implied covenant of good faith does.

The Revolving Lenders argue that the Nevada Term Lenders' claim for breach of the implied covenant of good faith and fair dealing must be dismissed because it is duplicative of the (purportedly deficient) express contract claim. Def. Mem. at 26–27. The Revolving Lenders cannot have it both ways. If the express contract claim fails, there is no duplication of claims. Until that determination is made, however, the Nevada Term Lenders are entitled to pursue claims in the alternative. Fed. R. Civ. P. 8(d); *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1273 (11th Cir. 2009) ("*Rule 8(d) of the Federal Rules of Civil Procedure* expressly permits the pleading of both alternative and inconsistent claims") (emphasis in original). The Revolving Lenders have cited no authority to the contrary.

The Revolving Lenders further argue that they "simply exercised their contractual rights under the Credit Agreement when they declined to fund the March 2 and 3 Notices of Borrowing," and thus that an implied good faith obligation to fund would be inconsistent with the express terms of the Credit Agreement. Def. Mem. at 27–28. As set forth in Sections II and III above, however, the Revolving Lenders were not contractually permitted to decline to fund these Notices. Accordingly, there is no inconsistency. The cases the Revolving Lenders cite do not hold otherwise. *M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134 (2d Cir. N.Y. 1990) (implied covenant did not preclude defendants from seeking to advance legitimate business interests in an unrelated transaction); *Bank of N.Y. v. Sasson*, 786 F.Supp. 349, 353 (S.D.N.Y. 1992) (implied covenant did not require Bank to agree to extend maturity date of personal loan after it became past due).

The motion to dismiss the Nevada Term Lenders' claim for breach of the implied covenant of good faith and fair dealing should be denied.

CONCLUSION

In this memorandum, the Term Lenders have demonstrated that (i) they have standing to sue the Revolving Lenders for failure to fund; (ii) it is reasonable to interpret "drawn" to mean "demanded;" and (iii) it is reasonable to interpret the Credit Agreement to require the Revolving Lenders to remit loans to the Bank Proceeds Account even in the face of a Default or Event of Default. The Term Lenders also have shown that their claim for breach of contract related to the April 21, 2009 Notice of Borrowing survives, as does the Nevada Term Lenders' claim for breach of the implied duty of good faith and fair dealing. Therefore, the Court should deny the Revolving Lenders' motion to dismiss.

DATED: March 22, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2010, I served a true and correct copy of Plaintiffs' Joint Memorandum of Law Opposing Defendants' Joint Motion to Dismiss, by first-class mail, upon the following:

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/s/ Vincent S. J. Buccola
Vincent S. J. Buccola

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to Case Nos:

09-CV-23835-ASG

10-CV-20236-ASG.

DECLARATION OF JAMES B. HEATON, III OPPOSING DEFENDANTS' JOINT MOTION TO DISMISS THE TERM LENDER COMPLAINTS

Pursuant to 28 U.S.C. §1746, James B. Heaton, III declares as follows:

1. I am a partner at Bartlit Beck Herman Palenchar & Scott LLP, and represent ACP Master, Ltd. and Aurelius Capital Master, Ltd. in the above-captioned cases.

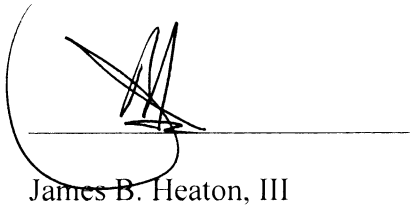
2. Attached as Exhibit A is a true and correct copy of the complaint of Deutsche Bank AG in the Southern District of New York, case no. 04-cv-7192-PKL.

3. Attached as Exhibit B is a true and correct copy of answer and counterclaims of JPMorgan Chase Bank in the Southern District of New York, case no. 04-cv-7192-PKL.

4. Attached as Exhibit C is a true and correct copy of Exhibit E to the Credit Agreement (the "Form of Notice of Borrowing").

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 22, 2010



James B. Heaton, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2010, I served a true and correct copy of the Declaration of James B. Heaton, III by first-class mail upon the following:

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Vincent S. J. Buccola

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEUTSCHE BANK AG, Plaintiff, v. JPMORGAN CHASE BANK (f/k/a The Chase Manhattan Bank), Defendant.	04 Civ. 7192 (PKL) ECF Case **COMPLAINT FOR DECLARATORY RELIEF**

Plaintiff Deutsche Bank AG ("Deutsche Bank"), by and through its attorneys, Kobre & Kim LLP, as and for its Complaint against Defendant JPMorgan Chase Bank f/k/a/ The Chase Manhattan Bank ("JPMorgan") alleges as follows:

1. JPMorgan is the Administrative Agent (the "Agent") under an Amended and Restated Credit Agreement, dated September 24, 2001 (the "Credit Agreement"), executed between Genuity Inc. as borrower (the "Borrower") and nine banks, including Deutsche Bank, as the lenders (collectively the "Lenders"). The Credit Agreement is attached hereto as Exhibit A.

2. This action arises out of the Agent's unlawful amendment of the Credit Agreement to the detriment of Deutsche Bank.

3. On or about November 12, 2002, the Agent purported to amend the Credit Agreement (the "Amendment") to cause Deutsche Bank to receive less than its share of repayments of advances by eliminating the obligation of the Agent to disburse to the Lenders,

including Deutsche Bank, such repayments in accordance with the terms of the Credit Agreement and by eliminating the obligation of the Lenders to share payments received from the Agent ratably with Deutsche Bank. The Amendment is attached hereto as Exhibit B.

4. By its express terms, the Credit Agreement prohibits the Amendment, in the absence of Deutsche Bank's consent.

5. Deutsche Bank did not consent to the Amendment.

6. Despite the execution of the illegal Amendment, Deutsche Bank continued to perform its obligations under the Credit Agreement, including by funding a Letter of Credit Advance pursuant to the Credit Agreement.

7. By this Complaint, Deutsche Bank seeks a declaratory ruling that the Amendment is void *ab initio*, and that, therefore, Deutsche Bank is entitled to receive its ratable share of payments under the Credit Agreement without giving effect to the Amendment.

Jurisdiction and Venue

8. Deutsche Bank is a bank organized under the laws of the Federal Republic of Germany with a branch at 60 Wall Street, New York, New York 10005.

9. JPMorgan is a bank organized under the laws of New York, located at 270 Park Avenue, New York, New York 10017.

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).

11. There is complete diversity of citizenship between Deutsche Bank and JPMorgan and as more fully explained herein, more than $75,000 is in dispute.

12. Personal jurisdiction over the defendant is proper in this Court because JPMorgan conducts business in New York and has agreed in Section 8.10(a) of the Credit Agreement to irrevocably and unconditionally submit itself to the jurisdiction of this Court.

13. Venue is proper in this Court under 28 U.S.C. § 1391 and because pursuant to Section 8.10(b) of the Credit Agreement, JPMorgan has irrevocably and unconditionally waived any objection it may have to venue in this Court.

Background

A. Advances and Repayments under the Credit Agreement

14. On or about September 24, 2001, the Borrower entered into the Credit Agreement with the Lenders, including Deutsche Bank and JPMorgan, with JPMorgan acting as the Administrative Agent.

15. Pursuant to the terms of the Credit Agreement and subject to the conditions therein, each Lender agreed to make available to the Borrower Revolving Credit Advances and Letter of Credit Advances (each as defined in the Credit Agreement, and together, and without distinction ("Advances")) up to, in the aggregate, $2 billion.

16. Pursuant to Section 2.14 of the Credit Agreement, repayments of Advances received by the Agent are to be disbursed by the Agent to the Lenders ratably.

17. Pursuant to Section 2.16 of the Credit Agreement, upon obtaining a repayment of an Advance in excess of its ratable share of payments on account of the Advances, each Lender is obligated to share the excess payment ratably with each other Lender.

18. As of September 28, 2001, the Borrower had utilized some of its availability under the Credit Agreement by causing the issuance of a letter of credit in its favor in the amount of approximately $1.15 billion (the "Letter of Credit"), leaving a remaining potential availability under the Credit Agreement of approximately $850 million.

19. Pursuant to the terms of the Credit Agreement, the issuance of a Letter of Credit obligates each Lender to pay to the issuing bank its pro rata share promptly upon a drawing thereon, such payment constituting a Letter of Credit Advance.

20. On or about July 22, 2002, the Borrower sent a purported Notice of Borrowing to the Agent, seeking to utilize its remaining availability under the Credit Agreement in the amount of $850 million in the form of a Revolving Credit Advance (the "July Advance Request").

21. On or about the time of the July Advance Request, Deutsche Bank knew that (i) the Borrower had sufficient cash on hand to support current operations; (ii) the Borrower was acting contrary to prior representations that it would not request additional Advances until the last quarter of 2002; (iii) the Board of Directors of the Borrower authorized the July Advance Request at a meeting convened late on a Sunday night – July 21, 2002; (iv) the Borrower sought a base rate advance which shortened from three business days to one business day the time for the advance to be funded, but at a higher cost of borrowing to the Borrower; and (v) market conditions significantly increased the prospect of an imminent event of default, as defined in the Credit Agreement ("Event of Default").

22. Under the circumstances, including those identified in paragraph 21, Deutsche Bank requested additional information from which it could determine whether the Borrower was entitled to receive the Revolving Credit Advance and whether the July Advance Request was made in good faith. Deutsche Bank offered to hold in escrow its pro rata share of the July Advance Request until the Borrower provided such additional information.

23. The Borrower refused to provide such additional information and declined Deutsche Bank's offer to hold in escrow its pro rata share of the July Advance Request, whereupon Deutsche Bank did not fund its pro rata share thereof.

24. Upon information and belief, upon the advice of Agent's counsel, each other Lender funded the July Advance Request in the amount of $722,500,000 (the "July Advance").

25. On or about July 24, 2002, Verizon Communications Inc. ("Verizon") delivered notice to the Borrower that it would not reintegrate the Borrower into the company and would forego the right to have a controlling position in the Borrower. On that same day, the Borrower initiated an action in the United States District Court for the District of Massachusetts (the "Massachusetts Lawsuit") against Deutsche Bank alleging breach of the Credit Agreement for not funding the portion of the July Advance requested from Deutsche Bank.

26. On July 25, 2002, Verizon publicly admitted that it no longer had the right to convert to a controlling position in the Borrower. By on or about July 29, 2002, the Borrower admitted in writing that an Event of Default had occurred, the existence of which constituted a failure of the conditions precedent which were required to be satisfied to allow the Borrower to receive Advances under the Credit Agreement.

27. Subsequent to the improper amendment of the Credit Agreement (discussed in greater detail in subsection B), the Letter of Credit was drawn and, as a result, each of the Lenders, including Deutsche Bank, was obligated to make and made a Letter of Credit Advance. Deutsche Bank's Letter of Credit Advance was in the amount of $172,500,000, which Deutsche Bank fully funded on or about December 4, 2002, despite the improper amendment to the Credit Agreement.

28. On or about November 27, 2002, the Borrower filed a voluntary petition for relief under Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq*. in the United States Bankruptcy Court for the Southern District of New York ("the Petition Date").

29. On or about February 10, 2003, the Borrower withdrew with prejudice the Massachusetts Lawsuit without liability of any kind to Deutsche Bank as a result of its not funding the portion of the July Advance requested from Deutsche Bank. At or about the same time, the Borrower acknowledged that Deutsche Bank had an Allowed Claim in the Borrower's bankruptcy in the amount of $172,500,000 representing the amount of Deutsche Bank's Letter of Credit Advance. Taking into consideration certain repayments of Advances made by the Borrower to the other Lenders subsequent to the date of the July Advance, as of the Petition Date, the Borrower owed the Lenders a total principal amount of approximately $1.66 billion in the aggregate, of which approximately $514.2 million was the result of the July Credit Advance.

30. On or about November 14, 2003, a confirmed plan of liquidation (the "Plan") was filed in Genuity's bankruptcy. The procedure for distributing proceeds from Genuity's bankruptcy to the Agent provided for in the Plan was objected to by Deutsche Bank. The Bankruptcy Court overruled Deutsche Bank's procedural objection, but ordered that a portion of Deutsche Bank's pro rata share of the distribution be held in escrow. On August 4, 2004, the decision of the Bankruptcy Court was affirmed on appeal. While affirming the Bankruptcy Court, the United States District Court did not express an opinion on the validity of the Amendment.

31. Since Genuity's emergence from bankruptcy, the Agent has received five distributions pursuant to the Plan for application toward the repayment of Advances. To date, over $934 million remains outstanding. The Agent has distributed, and intends to continue to disburse funds in a manner giving effect to the Amendment. To date, the Agent has distributed approximately $466.6 million to be applied to the July Advance and $216 million to be applied to the Letter of Credit Advance.

32. Deutsche Bank is entitled to its pro rata share of the pre-petition and post-petition distribution without giving effect to the Amendment, that is, without giving priority to Lenders who funded the July Advance. Deutsche Bank's pro rata share includes the approximately $47.6 million being held in escrow by the Agent pending the outcome of this litigation.

B. The Unlawful Amendment to the Credit Agreement

33. On or about November 12, 2002, the Agent executed the Amendment which in effect prevents Deutsche Bank from receiving its pro rata share of any repayments of Advances until the July Advance is paid in full to the other Lenders.

34. Pursuant to Section 2.14 of the Credit Agreement, once the Borrower makes a payment to the Agent's account, the Agent must promptly cause the funds to be distributed ratably to the respective Lenders:

> SECTION 2.14. Payments and Computations. (a) The Borrower shall make each payment hereunder and under the Notes not later than 11:00 A.M. (New York City time) on the day when due in U.S. dollars to the Agent at the Agent's Account in same day funds. The Agent will promptly thereafter cause to be distributed like funds relating to the payment of principal or interest or facility fees ***ratably*** (other than amounts payable pursuant to Section 2.03, 2.12, 2.15 or 8.04(c)) to the Lender Parties for the account of their respective Applicable Lending Offices, and like funds relating to the payment of any other amount payable to any Lender Party to such Lender Party for the account of its Applicable Lending Office, in each case to be applied in accordance with the terms of this Agreement . . . (emphasis added)

35. The foregoing implements the provision of Section 2.16, which governs how repayments of Advances shall be received between the Lenders. Specifically, Section 2.16 does not permit a Lender to retain distributions in amounts in excess of its ratable share of Advances. Each Lender's ratable share is based on the amounts that each Lender advanced, in the aggregate, and without distinction under a Letter of Credit Advance and a Revolving Credit Advance:

> SECTION 2.16. Sharing of Payments, Etc. If any Lender Party shall obtain any payment (whether voluntary, involuntary, through the exercise of any right of set-off, or otherwise) on account of the Revolving Credit Advances or Letter of Credit Advances owing to it (other than pursuant to Section 2.12, 2.15, 8.01(b), 8.04(c) or 8.07) in excess of its ratable share of payments on account of the Revolving Credit Advances and Letter of Credit Advances obtained by all the Lender Parties, such Lender Party shall forthwith purchase from the other Lender Parties such participations in the Revolving Credit Advances and Letter of Credit Advances owing to them as shall be necessary to cause such purchasing Lender Party to share the excess payment ratably with each of them . . . .

36. Under the Credit Agreement, most provisions can be amended with the consent of just the Required Lenders, as defined in the Credit Agreement. Certain provisions, however, require additional consent before they can be amended. Section 2.16 of the Credit Agreement is one of those provisions, and Section 8.01 of the Credit Agreement clearly states that no amendment shall, unless in writing and signed by each Lender that has or is owed obligations under the Credit Agreement that are modified by such amendment, waive the application of Section 2.16 of the Credit Agreement:

> SECTION 8.01. Amendments, Etc (a) . . . . (ii) no amendment, waiver or consent shall, unless in writing and signed by the Required Lenders and each Lender that ***has*** or is ***owed*** obligations under this Agreement or the Notes that are modified by such amendment, waiver or consent, (A) increase the Commitment of such Lender or subject such Lender to any additional obligations, (B) reduce the principal of, or interest on, the Advances (other than Competitive Bid Advances) held by such Lender or any fees or other amounts payable hereunder to such Lender, (C) postpone any date fixed for any payment of principal of, or interest on, the Advances (other than Competitive Bid Advances) held by such Lender or any fees or other amounts payable hereunder to such Lender or (D) ***waive the application of Section 2.16***; . . . (emphases added)

37. Contrary to the express terms of the Credit Agreement, under the Amendment, Lenders other than Deutsche Bank receive a priority over their payments under the Credit Agreement, i.e., they receive an amount in excess of their ratable share of Advances, to the

detriment of Deutsche Bank and may retain such payments notwithstanding the express provisions of Section 2.16 of the Credit Agreement. The Amendment provides:

> (d) Section 2.14 is further amended by adding to the end thereof the following new subsection "(e)" to read as follows:
>
> "(e) Notwithstanding anything to the contrary contained in this Agreement, in the event that, at any time or from time to time, . . . (1) any payment is made by or on behalf of the Borrower or any of its Subsidiaries to the Agent or any Lender in respect of the July Advance (including, without limitation, amounts paid to the Agent pursuant to Section 4(a) of each Standstill Agreement, or similarly designated amounts paid pursuant to the comparable section of any comparable agreement) or (2) the Agent or any Lender shall receive any other payments, proceeds, property or other amounts, whether in cash or other property, or by way of setoff, purchase of participation or in any other manner, in each case by or on behalf of the Borrower or any of its Subsidiaries in payment of or in respect of any Advance, the Notes or the Guaranty, including, without limitation, whether made in the ordinary course, in connection with any Bankruptcy Proceeding, pursuant to an out of court restructuring or otherwise, then, in each case, such payments, proceeds, property or other amounts (other than amounts payable pursuant to Section 2.03, 2.05, 2.12, 2.15, 7.05, 8.04 or 8.07(a)) shall be applied in the following order of priority:
>
> *first*, ratably to each Lender . . . in accordance with the respective aggregate outstanding principal amount of the July Advance then owing to such Lenders, until all amounts owing to such Lenders with respect to the July Advance (including principal of, all accrued and unpaid interest on, and fees in respect thereof) are paid in full in cash;
>
> *second*, ratably to all Lenders in accordance with the respective aggregate outstanding principal amount of the Letter of Credit Advances then owing to such Lenders, until all amounts owing to such Lenders with respect to all Letter of Credit Advances (including principal of, all accrued and unpaid interest on, and fees in respect thereof) are paid in full in cash; and
>
> *third*, ratably to all Lenders until all obligations of the Borrower and Guarantors then owing hereunder and under the Guaranty are paid in full in cash . . ."
>
> (e) Section 2.16 is amended by adding at the beginning of such Section the clause "Subject to Section 2.14(e),".

38. The Amendment thus strips Deutsche Bank of its rights under the Credit Agreement to receive its share of repayments of Advances ratably.

39. By eliminating the obligation of the Agent to disburse ratably and by eliminating the obligation of the Lenders to retain only their ratable share of Advances, the Amendment purports to amend the Credit Agreement in a manner which waives the application of Section 2.16 of the Credit Agreement.

40. Section 8.01(a)(ii)(D) of the Credit Agreement mandates that the Agent cannot waive the application of Section 2.16 ***unless*** the Agent obtains the written consent of "each Lender that ***has*** or is ***owed*** obligations" under the Credit Agreement "***that are modified***" by such amendment. (emphases added). Deutsche Bank is and was at the time of the Amendment a Lender that "has" and "is owed obligations" under the Credit Agreement including, but not limited to, obligations under and relating to Section 2.16 of the Credit Agreement. Accordingly, Deutsche Bank's written consent was required for the Amendment.

41. Because, *inter alia*, the Agent did not obtain the written consent of Deutsche Bank before amending the Credit Agreement to waive the application of Section 2.16, the Amendment is unlawful and void *ab initio*.

42. Presently, the Agent is holding in escrow, in an interest bearing account, the approximate amount of $47.6 million which has not been disbursed to the Lenders. The Agent has made, and has indicated its intent to make further distributions in accordance with the Amendment and in derogation of Deutsche Bank's rights under the Credit Agreement.

43. Therefore, a declaration from the Court providing that Deutsche Bank is entitled to its pro rata share of all repayments, including pre-petition and post-petition payments, is necessary to enable Deutsche Bank to recover indefeasibly said sum under the Credit Agreement.

First Count
Declaratory Judgment

44. Deutsche Bank incorporates by reference the foregoing paragraphs as if fully set forth herein.

45. As set forth above, without the required consent of Deutsche Bank, the Agent amended the Credit Agreement to strip Deutsche Bank of its right to receive its ratable share of repayments of Advances by expressly precluding Deutsche Bank from receiving any repayments until after the other Lenders have been repaid the amount outstanding on the July Credit Advance, including the principal of, all accrued and unpaid interest on, and fees in respect thereof.

46. The Amendment waives the application of Section 2.16 of the Credit Agreement, which contemplates that the Agent will disburse ratably and that the Lenders will be repaid only their ratable shares of Advances without distinction between Letter of Credit Advances and Revolving Credit Advances.

47. Because, *inter alia*, the Agent did not obtain the written consent of Deutsche Bank to amend the Credit Agreement to waive the application of Section 2.16 of the Credit Agreement, as mandated by Section 8.01(a)(ii)(D) of the Credit Agreement, the Amendment is void *ab initio*.

48. A substantial and actual justiciable controversy exists sufficient for this Court to declare the rights and remedies of the parties because: (a) Deutsche Bank is presently harmed by the unlawful Amendment which abrogates Deutsche Bank's right to receive payments of Advances in ratable amounts; and (b) it is the Agent's stated position that the Amendment did not require Deutsche Bank's written consent, and that it will not discharge its responsibility to

disburse repayments in accordance with the terms of the Credit Agreement without regard to the Amendment.

49. Deutsche Bank respectfully submits that it is entitled to a declaration that: (1) the Amendment is void *ab initio*: (2) the Amendment waives the application of Section 2.16 of the Credit Agreement; (3) the Agent did not receive the consent, as required by Section 8.01(a)(ii)(D) of the Credit Agreement, of each Lender who was owed, or who owed, obligations under the Credit Agreement that were modified by the Amendment; (4) any payments to be made on account of the Advances must be applied without distinction ratably to each Lender without regard to the Amendment; and (5) Deutsche Bank is entitled to its ratable share of all funds repaid relating to the Credit Agreement, i.e., the approximately $47.6 million held in escrow in addition to other amounts disbursed pursuant to the Amendment, which represents Deutsche Bank's ratable share of Advances without distinction between Letter of Credit Advances and Revolving Credit Advances.

<u>Prayer for Relief</u>

WHEREFORE, Deutsche Bank prays:

(a) On the First Count, a declaration that: (1) the Amendment is void *ab initio*; (2) the Amendment waives the application of Section 2.16 of the Credit Agreement; (3) the Agent did not receive the consent, as required by Section 8.01(a)(ii)(D) of the Credit Agreement, of each Lender who was owed, or who owed, obligations under the Credit Agreement that were modified by the Amendment; (4) any repayments of Advances should be applied ratably to each Lender without regard to the Amendment; and (5) Deutsche Bank is entitled to its ratable share of the total funds repaid relating to the Credit Agreement, i.e., the approximately $47.6 million held in escrow plus additional funds disbursed pursuant to the Amendment, which represents

Deutsche Bank's ratable share of Advances without distinction between Letter of Credit Advances and Revolving Credit Advances;

(b) That Deutsche Bank be awarded its costs and expenses incurred in this litigation;

(c) That Deutsche Bank be awarded its attorneys' fees incurred in connection with this litigation; and

(d) That Deutsche Bank be awarded such other and further relief as this Court deems just and proper.

Dated: September 9, 2004
New York, New York

Respectfully submitted,

DEUTSCHE BANK AG

By its attorneys,

KOBRE & KIM LLP

By: _____

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Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEUTSCHE BANK AG, Plaintiff, v. JPMORGAN CHASE BANK (f/k/a The Chase Manhattan Bank), Defendant.	04 CV 7192 (PKL) ANSWER AND COUNTERCLAIMS

PRELIMINARY STATEMENT

This litigation arises out of a credit facility under which nine banks agreed to extend $2 billion in credit to Genuity, Inc. ("Genuity"). When Genuity issued a notice of its borrowing of $850,000,000 under the facility, eight of the lending banks satisfied their obligations by advancing to Genuity an aggregate amount of $722,500,000, as they had committed to do under the credit facility. Inexplicably and incredibly, however, Plaintiff-Counterclaim-Defendant Deutsche Bank failed and refused to fund its commitment, even though it made no showing that Genuity was then in default under the credit facility. By its default on its funding obligation, Plaintiff-Counterclaim-Defendant Deutsche Bank not only failed to fund its ratable share of the requested advance; its actions also had the effect of increasing the other eight lenders' shares of the credit. In addition, by defaulting, Plaintiff-Counterclaim-Defendant Deutsche Bank took advantage of the fact

that the eight funding lenders fulfilled their commitments, thereby limiting Plaintiff-Counterclaim-Defendant Deutsche Bank's potential liability as a defaulting lender.

Faced with Plaintiff-Counterclaim-Defendant Deutsche Bank's extraordinary and unprecedented behavior, the required lenders, representing a majority of the credit, agreed with Genuity to amend the credit facility agreement to provide that amounts received from Genuity would be applied to repay the eight funding lenders' advances, on which Plaintiff-Counterclaim-Defendant Deutsche Bank had defaulted, prior to repayment of any other advances that Plaintiff-Counterclaim-Defendant Deutsche Bank might make under the credit facility. In making this amendment, the funding lenders effectuated a result required not only by the credit facility agreement, but also by applicable doctrines of law and equity.

By this suit Plaintiff-Counterclaim-Defendant Deutsche Bank seeks to capitalize on its own default in order to obtain an advantage over the eight other lenders. By not funding the advance, Plaintiff-Counterclaim-Defendant Deutsche Bank, in effect, obtained an instant and riskless 100% recovery on its share of the advance. It now seeks an order that would prevent the eight funding lenders from obtaining the same 100% recovery on their advances. Further, in perhaps the supreme irony, Plaintiff-Counterclaim-Defendant Deutsche Bank seeks by this action to recover for itself funds that would not have been available for recovery at all, had the eight other lenders defaulted on their commitments as Plaintiff-Counterclaim-Defendant Deutsche Bank did. In effect, the funds Plaintiff-Counterclaim-Defendant Deutsche Bank seeks to recover are the funds advanced by its eight co-lenders when it defaulted.

Accordingly, Defendant-Counterclaim-Plaintiff JPMorgan Chase Bank ("JPMorgan Chase") seeks dismissal of Plaintiff-Counterclaim-Defendant Deutsche Bank's claim. Further, JPMorgan Chase, as one of the eight funding lenders and as agent for the funding banks, seeks an order allowing it to distribute to the eight funding lenders, amounts necessary to bring them into parity with Plaintiff-Counterclaim-Defendant

Deutsche Bank by allowing them a 100% recovery of the advance on which Plaintiff-Counterclaim-Defendant Deutsche Bank defaulted.

ANSWER

Defendant-Counterclaim-Plaintiff JPMorgan Chase Bank, ("JPMorgan Chase"), by its attorneys, Lankler Siffert & Wohl LLP, answers the Complaint of Plaintiff-Counterclaim-Defendant Deutsche Bank AG ("Deutsche Bank") as follows:

1. Admits the allegations in paragraph 1 of the Complaint.

2. Denies the allegations in paragraph 2 of the Complaint.

3. Denies the allegations in paragraph 3 of the Complaint, except admits that the Amended and Restated Credit Agreement, Dated as of September 24, 2001, ("Restated Credit Agreement") was amended on or about November 12, 2002 ("Amendment No. 1"). Amendment No. 1 is a written document that speaks for itself.

4. Denies the allegations in paragraph 4 of the Complaint.

5. Admits the allegations in paragraph 5 of the Complaint.

6. Denies the allegations in paragraph 6 of the Complaint.

7. Denies the allegations in paragraph 7 of the Complaint, except admits that Deutsche Bank seeks a declaratory ruling.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Complaint.

9. Admits the allegations in paragraph 9 of the Complaint.

10. Admits the allegations in paragraph 10 of the Complaint.

11. The allegations in paragraph 11 of the Complaint are legal conclusions to which no response is required, except admits that more than $75,000 is in dispute.

12. Admits the allegations in paragraph 12 of the Complaint.

13. Admits the allegations in paragraph 13 of the Complaint.

14. Admits the allegations in paragraph 14 of the Complaint.

15. Denies the allegations in paragraph 15 of the Complaint, except admits that the Restated Credit Agreement is a written document that speaks for itself, and refers to the document for the terms contained therein.

16. Denies the allegations in paragraph 16 of the Complaint, except admits that the Restated Credit Agreement is a written document that speaks for itself, and refers to the document for the terms contained therein.

17. Denies the allegations in paragraph 17 of the Complaint, except admits that the Restated Credit Agreement is a written document that speaks for itself, and refers to the document for the terms contained therein.

18. Admits the allegations in paragraph 18 of the Complaint.

19. Denies the allegations in paragraph 19 of the Complaint, except admits that the Restated Credit Agreement is a written document that speaks for itself, and refers to the document for the terms contained therein.

20. Denies the allegations in paragraph 20 of the Complaint, except admits that on or about July 22, 2002, the Borrower sent a Notice of Borrowing to the Agent, seeking to utilize its remaining availability under the Restated Credit Agreement in the amount of $850 million in the form of a Revolving Credit Advance (the "July Advance Request").

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21 of the Complaint.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the Complaint, except admits that Deutsche Bank requested additional information.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23 of the Complaint, except admits that Deutsche

Bank did not fund its pro rata share of the July Advance Request.

24. Denies the allegations in paragraph 24 of the Complaint, except admits that each other Lender funded the July Advance Request in the amount of $722,500,000 (the "July Advance").

25. Admits the allegations in paragraph 25 of the Complaint.

26. Denies the allegations in paragraph 26 of the Complaint, except admits the first sentence in paragraph 26 of the Complaint.

27. Denies the allegations in paragraph 27 of the Complaint, except admits that the Letter of Credit was drawn and, as a result, each of the Lenders, including Deutsche Bank, was obligated to make and made a Letter of Credit Advance, and Deutsche Bank's Letter of Credit Advance was in the amount of $172,500,000, which Deutsche Bank fully funded on or about December 4, 2002.

28. Admits the allegations in paragraph 28 of the Complaint.

29. Admits the allegations in paragraph 29 of the Complaint.

30. Denies the allegations in paragraph 30 of the Complaint, except admits the first, second, and fourth sentences in paragraph 30 of the Complaint, and admits that the order of the bankruptcy court overruling Deutsche Bank's objection to the Bankruptcy Plan and the opinion of the United States District Court are written documents that speak for themselves, and refers to the documents for the terms contained therein.

31. Denies the allegations in paragraph 31 of the Complaint, except admits the third sentence in paragraph 31 of the Complaint.

32. Denies the allegations in paragraph 32 of the Complaint.

33. Denies the allegations in paragraph 33 of the Complaint, except admits that on or about November 12, 2002, the Agent executed Amendment No. 1, and admits that Amendment No. 1 is a written document that speaks for itself, and refers to the document for the terms contained therein.

34. Denies the allegations in paragraph 34 of the Complaint, except admits that the Restated Credit Agreement is a written document that speaks for itself, and refers to the document for the terms contained therein.

35. Denies the allegations in paragraph 35 of the Complaint, except admits that the Restated Credit Agreement is a written document that speaks for itself, and refers to the document for the terms contained therein.

36. Denies the allegations in paragraph 36 of the Complaint, except admits that the Restated Credit Agreement is a written document that speaks for itself, and refers to the document for the terms contained therein.

37. Denies the allegations in paragraph 37 of the Complaint, except admits that the Restated Credit Agreement and Amendment No. 1 are written documents that speak for themselves, and refers to the documents for the terms contained therein.

38. Denies the allegations in paragraph 38 of the Complaint, except admits that Amendment No. 1 is a written document that speaks for itself, and refers to the document for the terms contained therein.

39. Denies the allegations in paragraph 39 of the Complaint, except admits that Amendment No. 1 is a written document that speaks for itself, and refers to the document for the terms contained therein.

40. Denies the allegations in paragraph 40 of the Complaint, except admits that the Restated Credit Agreement is a written document that speaks for itself, and refers to the document for the terms contained therein.

41. Denies the allegations in paragraph 41 of the Complaint.

42. Denies the allegations in paragraph 42 of the Complaint, except admits the first sentence in paragraph 42 and that the Agent has made, and has indicated its intent to make, further distributions in accordance with Amendment No. 1.

43. Denies the allegations in paragraph 43 of the Complaint.

44. Repeats, realleges and incorporates by reference herein its answers to

paragraphs 1 through 43 of the Complaint.

45. Denies the allegations in paragraph 45 of the Complaint.

46. Denies the allegations in paragraph 46 of the Complaint, except admits that Amendment No. 1 and the Restated Credit Agreement are written documents that speak for themselves, and refers to the documents for the terms contained therein.

47. Denies the allegations in paragraph 47 of the Complaint.

48. Denies the allegations in paragraph 48 of the Complaint, except admits that a substantial and actual justiciable controversy exists sufficient for this court to declare the rights and remedies of the parties.

49. Denies the allegations in paragraph 49 of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense
(Failure to state a claim)

50. The Complaint, and each cause and part thereof, fails to state a claim for relief.

Second Affirmative Defense
(Breach of Contract)

51. As of September 24, 2001, Defendant-Counterclaim-Plaintiff JPMorgan Chase, as Administrative Agent ("Administrative Agent") and lender, Citicorp USA, Inc., Credit Suisse First Boston, BNP Paribas, The Bank of New York, Mizuho Corporate Bank, Ltd. (f/k/a The Industrial Bank of Japan), Toronto Dominion (Texas) Inc., and Wachovia Bank, N.A. (the "Funding Banks") and Plaintiff-Counterclaim-Defendant Deutsche Bank and Genuity executed the Restated Credit Agreement.

52. By the Restated Credit Agreement, the Funding Banks and Deutsche Bank extended credit to Genuity under a revolving credit facility and a letter of credit for

an aggregate of $2 billion in committed and unsecured credit.

53. Under the terms of the Restated Credit Agreement, Defendant-Counterclaim-Plaintiff JPMorgan Chase committed to lend Genuity $500,000,000 or 25% of the total $2 billion under the Restated Credit Agreement.

54. Under the terms of the Restated Credit Agreement, Citicorp USA, Inc. committed to lend Genuity $300,000,000 or 15% of the total $2 billion under the Restated Credit Agreement.

55. Under the terms of the Restated Credit Agreement, Credit Suisse First Boston committed to lend Genuity $300,000,000 or 15% of the total $2 billion under the Restated Credit Agreement.

56. Under the terms of the Restated Credit Agreement, BNP Paribas committed to lend Genuity $200,000,000 or 10% of the total $2 billion under the Restated Credit Agreement.

57. Under the terms of the Restated Credit Agreement, The Bank of New York committed to lend Genuity $100,000,000 or 5% of the total $2 billion under the Restated Credit Agreement.

58. Under the terms of the Restated Credit Agreement, Mizuho Corporate Bank, Ltd. committed to lend Genuity $100,000,000 or 5% of the total $2 billion under the Restated Credit Agreement.

59. Under the terms of the Restated Credit Agreement, Toronto Dominion (Texas) Inc. committed to lend Genuity $100,000,000 or 5% of the total $2 billion under the Restated Credit Agreement.

60. Under the terms of the Restated Credit Agreement, Wachovia Bank, N.A. committed to lend Genuity $100,000,000 or 5% of the total $2 billion under the Restated Credit Agreement.

61. Under the terms of the Restated Credit Agreement, Plaintiff-Counterclaim-Defendant Deutsche Bank's committed to lend Genuity $300,000,000 or

15% of the total $2 billion under the Restated Credit Agreement.

62. Under the terms of the Restated Credit Agreement, Defendant-Counterclaim-Plaintiff JPMorgan Chase, Citicorp USA, Inc., Credit Suisse First Boston, BNP Paribas, The Bank of New York, Mizuho Corporate Bank, Ltd., Toronto Dominion (Texas) Inc., Wachovia Bank, N.A. and Plaintiff-Counterclaim-Defendant Deutsche Bank ("Lenders") agreed to make advances ratably according to each of the Lenders' commitments set forth in the Restated Credit Agreement and as set forth below in the following table. Restated Credit Agreement, Exh. A §§ 2.01(a), 2.02.

Ratable Commitments		
Lender	**$**	**%**
JPMorgan Chase	$500,000,000	25%
Citicorp USA, Inc.	$300,000,000	15%
Credit Suisse First Boston	$300,000,000	15%
BNP Paribas	$200,000,000	10%
The Bank of New York	$100,000,000	5%
Mizuho Corporate Bank, Ltd.	$100,000,000	5%
Toronto Dominion (Texas), Inc.	$100,000,000	5%
Wachovia Bank, N.A.	$100,000,000	5%
Deutsche Bank	$300,000,000	15%
Total	**$2,000,000,000**	**100%**

63. Under the terms of the Restated Credit Agreement, each of the Lenders, including Plaintiff-Counterclaim-Defendant Deutsche Bank, agreed to advance funds to Genuity in response to telephone and written notice from Genuity to the Administrative Agent setting forth the date of the borrowing, the aggregate amount of borrowing, and the interest rate applicable to the borrowing and certifying as true that on the date of the borrowing:

a) the representations and warranties contained in Section 4.01 of the Credit Agreement and in each Guaranty are correct, before and after giving effect to the Proposed Revolving Credit Borrowing and to the application of the proceeds therefrom, as though made on and as of

such date (except to the extent that any such representation or warranty relates to a specific earlier date); and

b) no event has occurred and is continuing, or would result from such Proposed Revolving Credit Borrowing or from the application of the proceeds therefrom, that constitutes a Default.

Restated Credit Agreement, Exh. A. §§ 2.02(a) (referencing Exhibit B-1 Form of Notice of Revolving Credit Borrowing), 3.02.

64. Under the terms of the Restated Credit Agreement, the Funding Banks and Plaintiff-Counterclaim-Defendant Deutsche Bank agreed to make such advances ratably according to each of the Funding Banks and Plaintiff-Counterclaim-Defendant Deutsche Bank's respective commitments as set forth in the Restated Credit Agreement, and as listed in the table in Paragraph 62 herein. Restated Credit Agreement, Exh. A. §§ 2.01(a), 2.02.

65. On or about July 22, 2002, Genuity gave telephone and written notice ("Notice of Borrowing") to Defendant-Counterclaim-Plaintiff JPMorgan Chase as Administrative Agent under the Restated Credit Agreement that it was requesting a revolving credit advance ("Revolving Credit Advance") in the amount of $850,000,000.

66. Genuity's Notice of Borrowing set forth the date of the borrowing, the aggregate amount of borrowing, and the interest rate applicable to the borrowing, and certified as true that on the date of the borrowing:

a) the representations and warranties contained in Section 4.01 of the Credit Agreement and in each Guaranty are correct, before and after giving effect to the Proposed Revolving Credit Borrowing and to the application of the proceeds therefrom, as though made on and as of such date (except to the extent that any such representation or warranty relates to a specific earlier date); and

b) no event has occurred and is continuing, or would result from such

Proposed Revolving Credit Borrowing or from the application of the proceeds therefrom, that constitutes a Default.

Notice of Borrowing, Exh. B.

67. The Notice of Borrowing satisfied the notice requirements for borrowing funds under the Restated Credit Agreement. Restated Credit Agreement, Exh. A. § 2.02.

68. On information and belief, on the date of the Revolving Credit Borrowing as defined in the Restated Credit Agreement, the certified statements in the Notice of Borrowing were true.

69. On information and belief, on the date of the Revolving Credit Borrowing as defined in the Restated Credit Agreement, no event that constituted a Default as defined in the Restated Credit Agreement had occurred and was continuing.

70. On information and belief, on the date of the Revolving Credit Borrowing as defined in the Restated Credit Agreement, no event that constituted a Default as defined in the Restated Credit Agreement would result from the Revolving Credit Borrowing.

71. On information and belief, on the date of the Revolving Credit Borrowing as defined in the Restated Credit Agreement, no event that constituted a Default as defined in the Restated Credit Agreement would result from the application of the proceeds from the Revolving Credit Borrowing.

72. Defendant-Counterclaim-Plaintiff JPMorgan Chase as Administrative Agent promptly notified each of the Lenders of the Notice of Borrowing according to the terms of the Restated Credit Agreement. Restated Credit Agreement, Exh. A. § 2.02.

73. By reason of the Notice of Borrowing, each of the Lenders became obligated to fund its ratable share of the Revolving Credit Advance. Restated Credit Agreement, Exh. A. §§ 2.02, 3.02.

74. On or about July 22, 2002, each of the Funding Banks funded its share of the Revolving Credit Advance totaling $722,500,000, as set forth in paragraphs 75

through 82.

75. On or about July 22, 2002, Defendant-Counterclaim-Plaintiff JPMorgan Chase funded its share of the Revolving Credit Advance by advancing to Genuity $212,500,000.

76. On or about July 22, 2002, Citicorp USA, Inc. funded its share of the Revolving Credit Advance by advancing to Genuity $127,500,000.

77. On or about July 22, 2002, Credit Suisse First Boston funded its share of the Revolving Credit Advance by advancing to Genuity $127,500,000.

78. On or about July 22, 2002, BNP Paribas funded its share of the Revolving Credit Advance by advancing to Genuity $85,000,000.

79. On or about July 22, 2002, The Bank of New York funded its share of the Revolving Credit Advance by advancing to Genuity $42,500,000.

80. On or about July 22, 2002, Mizuho Corporate Bank, Ltd. funded its share of the Revolving Credit Advance by advancing to Genuity $42,500,000.

81. On or about July 22, 2002, Toronto Dominion (Texas) Inc. funded its share of the Revolving Credit Advance by advancing to Genuity $42,500,000.

82. On or about July 22, 2002, Wachovia Bank, N.A. funded its share of the Revolving Credit Advance by advancing to Genuity $42,500,000.

83. Plaintiff-Counterclaim-Defendant Deutsche Bank's ratable share of the Revolving Credit Advance was $127,500,000.

84. On or about July 22, 2002, Plaintiff-Counterclaim-Defendant Deutsche Bank was obligated under the Restated Credit Agreement to advance to Genuity its ratable share of the Revolving Credit Advance in the amount of $127,500,000.

85. Plaintiff-Counterclaim-Defendant Deutsche Bank failed to fund its share of the Revolving Credit Advance.

86. The respective amounts funded by each of the Lenders with respect to the Revolving Credit Advance are set forth in the following table.

Revolving Credit Advance Actually Funded	
Lender	**$**
JPMorgan Chase	$212,500,000
Citicorp USA, Inc.	$127,500,000
Credit Suisse First Boston	$127,500,000
BNP Paribas	$85,000,000
The Bank of New York	$42,500,000
Mizuho Corporate Bank, Ltd.	$42,500,000
Toronto Dominion (Texas) Inc.	$42,500,000
Wachovia Bank, N.A.	$42,500,000
Deutsche Bank	$0
Total	**$722,500,000**

87. Plaintiff-Counterclaim-Defendant Deutsche Bank's failure to fund its ratable share of the Revolving Credit Advance constituted a breach of the Restated Credit Agreement. Restated Credit Agreement, Exh. A. §§ 2.01, 2.02.

88. Under the terms of the Restated Credit Agreement, the Lenders agreed to make advances ratably according to each of the Lenders' commitments set forth in the Restated Credit Agreement. Restated Credit Agreement, Exh. A §§ 2.01(a), 2.02.

89. Under the terms of the Restated Credit Agreement, no Lender could unilaterally increase the ratable share of any of the other Lenders. See, e.g., Restated Credit Agreement, Exh. A. §§ 2.01, 2.06.

90. Under the terms of the Restated Credit Agreement, Plaintiff-Counterclaim-Defendant Deutsche Bank's ratable share of the credit was 15%.

91. By not funding its ratable share of the Revolving Credit Advance, Plaintiff-Counterclaim-Defendant Deutsche Bank unilaterally increased the other Lenders' ratable shares of the Revolving Credit Advance as follows:

Revolving Credit Advance Ratable Shares		
Bank	**Agreement**	**Changed**
JPMorgan Chase	25%	29.41%
Citicorp USA, Inc.	15%	17.65%
Credit Suisse First Boston	15%	17.65%
BNP Paribas	10%	11.76%
The Bank of New York	5%	5.88%
Mizuho Corporate Bank, Ltd.	5%	5.88%
Toronto Dominion (Texas), Inc.	5%	5.88%
Wachovia Bank, N.A.	5%	5.88%
Deutsche Bank	15%	0%

92. By not funding its ratable share of the Revolving Credit Advance, Plaintiff-Counterclaim-Defendant Deutsche Bank unilaterally increased the other Lenders' ratable shares of the aggregate credit and decreased its own ratable share of the aggregate credit as follows:

Aggregate Credit Ratable Shares		
Bank	**Agreement**	**Changed**
JPMorgan Chase	25%	26.70%
Citicorp USA, Inc.	15%	16.02%
Credit Suisse First Boston	15%	16.02%
BNP Paribas	10%	10.68%
The Bank of New York	5%	5.34%
Mizuho Corporate Bank, Ltd.	5%	5.34%
Toronto Dominion (Texas) Inc.	5%	5.34%
Wachovia Bank, N.A.	5%	5.34%
Deutsche Bank	15%	9.21%

93. Plaintiff-Counterclaim-Defendant Deutsche Bank's unilateral change to each Lender's ratable share constituted a breach of the Restated Credit Agreement.

94. By not funding its ratable share of the Revolving Credit Advance and unilaterally changing each Lender's ratable share, Plaintiff-Counterclaim-Defendant Deutsche Bank breached its implied covenant of good faith and fair dealing.

95. Plaintiff-Counterclaim-Defendant Deutsche Bank's breaches of the Restated Credit Agreement constituted material breaches of the Restated Credit

Agreement.

96. Plaintiff-Counterclaim-Defendant Deutsche Bank's breaches of the Restated Credit Agreement excused and discharged Defendant-Counterclaim-Plaintiff JPMorgan Chase from any obligation to distribute to Plaintiff-Counterclaim-Defendant Deutsche Bank any repayments, restitutions, recoupments or other funds received or obtained from or on behalf of Genuity in respect of the Revolving Credit Advance.

Third Affirmative Defense
(Unclean Hands)

97. Defendant-Counterclaim-Plaintiff JPMorgan Chase repeats and realleges each and every allegation contained in paragraphs 1 through 96 hereof, as if fully set forth herein.

98. On information and belief, on or about July 22, 2002, Plaintiff-Counterclaim-Defendant Deutsche Bank knew that each of the Funding Banks intended to fund its share of the Revolving Credit Advance.

99. On or about July 22, 2002, Plaintiff-Counterclaim-Defendant Deutsche Bank knew that its failure to fund its share of the Revolving Credit Advance would constitute a breach of the Restated Credit Agreement, subjecting Plaintiff-Counterclaim-Defendant Deutsche Bank to potential liability.

100. On information and belief, on or about July 22, 2002, in failing and refusing to fund its share of the Revolving Credit Advance, Plaintiff-Counterclaim-Defendant Deutsche Bank relied on the Funding Banks funding their shares of the Revolving Credit Advance to limit Plaintiff-Counterclaim-Defendant Deutsche Bank's potential liability for its failure to fund its share of the Revolving Credit Advance.

101. Plaintiff-Counterclaim-Defendant Deutsche Bank's claim is barred by the doctrine of unclean hands.

Fourth Affirmative Defense
(Equitable Subordination)

102. Defendant-Counterclaim-Plaintiff JPMorgan Chase repeats and realleges each and every allegation contained in paragraphs 1 through 101 hereof, as if fully set forth herein.

103. Plaintiff-Counterclaim-Defendant Deutsche Bank's claims are barred by the doctrine of equitable subordination.

Fifth Affirmative Defense
(Set Off)

104. Defendant-Counterclaim-Plaintiff JPMorgan Chase repeats and realleges each and every allegation contained in paragraphs 1 through 103 hereof, as if fully set forth herein.

105. Under the terms of the Restated Credit Agreement, Plaintiff-Counterclaim-Defendant Deutsche Bank was obligated to fund its share of the Revolving Credit Advance in the amount of $127,500,000.

106. As a consequence of its failure to fund its share of the Revolving Credit Advance, Plaintiff-Counterclaim-Defendant Deutsche Bank effected a distribution to itself from Genuity in the amount of $127,500,000.

107. The distribution that Plaintiff-Counterclaim-Defendant Deutsche Bank obtained was greater than its ratable share.

108. On or by July 23, 2002, Plaintiff-Counterclaim-Defendant Deutsche Bank was obligated under Section 2.16 of the Restated Credit Agreement to distribute the excess of its distribution over and above its ratable share to the Funding Banks by purchasing participations in the Funding Banks' Revolving Credit Advances, in the aggregate amount of $108,375,000.

109. Plaintiff-Counterclaim-Defendant Deutsche Bank failed and refused to

distribute its excess recovery or any portion of it to the Funding Banks.

110. The Funding Banks have received an aggregate amount of approximately $47,600,000 less than 100% recovery of the Revolving Credit Advance.

111. If Plaintiff-Counterclaim-Defendant Deutsche Bank recovers any sum in this action it will be obligated to distribute that amount to the Funding Banks.

112. Defendant-Counterclaim-Plaintiff JPMorgan Chase has a right of set off against Plaintiff-Counterclaim-Defendant Deutsche Bank in an amount equal to whatever recovery Plaintiff-Counterclaim-Defendant Deutsche Bank may obtain in this action.

Sixth Affirmative Defense
(Recoupment)

113. Defendant-Counterclaim-Plaintiff JPMorgan Chase repeats and realleges each and every allegation contained in paragraphs 1 through 112 hereof, as if fully set forth herein.

114. Defendant-Counterclaim-Plaintiff JPMorgan Chase has a right of recoupment against Plaintiff-Counterclaim-Defendant Deutsche Bank in an amount equal to whatever recovery Plaintiff-Counterclaim-Defendant Deutsche Bank may obtain in this action.

COUNTERCLAIMS

Defendant-Counterclaim-Plaintiff JPMorgan Chase, for its Counterclaims against Plaintiff-Counterclaim-Defendant Deutsche Bank, alleges as follows:

The Parties

115. Defendant-Counterclaim-Plaintiff JPMorgan Chase is a Delaware corporation headquartered in New York, New York.

116. Defendant-Counterclaim-Plaintiff JPMorgan Chase brings its Counterclaims as Administrative Agent on behalf of the Funding Banks.

Background

117. On or about September 24, 2001, under the terms of the Restated Credit Agreement, the Funding Banks and Plaintiff-Counterclaim-Defendant Deutsche Bank extended credit to Genuity through a revolving credit facility and a letter of credit for an aggregate of $2 billion in committed and unsecured credit.

118. Under the terms of the Restated Credit Agreement, the Lenders agreed to make advances ratably according to each of the Lenders' commitments set forth in the Restated Credit Agreement. Restated Credit Agreement, Exh. A. §§ 2.01(a), 2.02.

119. Under the terms of the Restated Credit Agreement, each of the Lenders also agreed to acquire pro rata participations in letters of credit issued from time to time by the Issuing Bank (as defined in the Restated Credit Agreement) to Genuity ("Letter of Credit Advances"). Restated Credit Agreement, Exh. A §§ 2.01(b), 2.04.

120. On or about September 27, 2001, Defendant-Counterclaim-Plaintiff JPMorgan Chase, as Issuing Bank under the Restated Credit Agreement, issued a $1.15 billion letter of credit ("Letter of Credit") supporting bonds issued by Genuity.

121. On or about July 22, 2002, Genuity gave notice to Defendant-Counterclaim-Plaintiff JPMorgan Chase, as Administrative Agent under the Restated Credit Agreement, that it was borrowing a Revolving Credit Advance in the amount of $850,000,000.

122. On or about July 22, 2002, all Lenders, except Plaintiff-Counterclaim-Defendant Deutsche Bank, advanced funds as required.

123. On or about July 22, 2002, each of the Funding Banks funded its share of the Revolving Credit Advance totaling $722,500,000.

124. Plaintiff-Counterclaim-Defendant Deutsche Bank failed to fund its share

of the Revolving Credit Advance.

125. On or about November 12, 2002, Defendant-Counterclaim-Plaintiff JPMorgan Chase Bank, Citicorp USA, Inc., Credit Suisse First Boston, The Bank of New York, Mizuho Corporate Bank, Ltd., Toronto Dominion (Texas) Inc., and Wachovia Bank, N.A., and Genuity amended the Restated Credit Agreement. Amendment No. 1, Exh. C.

126. On or about November 12, 2002, Plaintiff-Counterclaim-Defendant Deutsche Bank was given notice of the signing of Amendment No. 1.

127. Amendment No. 1 provides, among other things, that in the circumstance of a Defaulting Lender as defined in Amendment No. 1, payments made under the Restated Credit Agreement, by or on behalf of Genuity and its subsidiaries, will be applied first to repay the Revolving Credit Advance amount then outstanding, and then be applied to repay any principal amount owing in respect of the Letters of Credit, if any.

128. Under the terms of Amendment No. 1, Plaintiff-Counterclaim-Defendant Deutsche Bank is a Defaulting Lender.

129. On or about November 27, 2002, Genuity and certain of its subsidiaries filed petitions for relief under Chapter 11 of the Bankruptcy Code.

130. On or about October 1, 2003, Genuity and its subsidiaries filed the Debtors' Joint Consolidated Plan of Liquidation, as Modified ("Bankruptcy Plan") with the U.S. Bankruptcy Court for the Southern District of New York.

131. The Bankruptcy Plan provided that Defendant-Counterclaim-Plaintiff JPMorgan Chase, as the Administrative Agent under the Restated Credit Agreement, would receive distribution of $514,200,000 on behalf of the Lenders as a condition of the effective date of the Bankruptcy Plan.

132. On or about October 1, 2003, $514,200,000 was the aggregate amount of the then outstanding principal owed the Funding Banks on the Revolving Credit Advance.

133. Upon information and belief, from July 23, 2002 to October 1, 2003, Genuity and its subsidiaries retained the $514,200,000 owed to the Funding Banks for the Revolving Credit Advance.

First Counterclaim
(Declaratory Judgment – Contract)

134. Defendant-Counterclaim-Plaintiff JPMorgan Chase repeats and realleges each and every allegation contained in paragraphs 1 through 133 hereof, as if fully set forth herein.

135. By not funding the Revolving Credit Advance, Plaintiff-Counterclaim-Defendant Deutsche Bank has retained 100% of its share of the Revolving Credit Advance.

136. The Funding Banks have recovered less than 100% of the amounts they advanced under the Revolving Credit Advance.

137. In order for the Funding Banks to recover 100% of their Revolving Credit Advances, they must receive an additional amount of approximately $47,600,000.

138. All Lenders including Plaintiff-Counterclaim-Defendant Deutsche Bank have received approximately 21.12% recovery on their shares of the Letter of Credit Advance.

139. Under the terms of the Restated Credit Agreement, Plaintiff-Counterclaim-Defendant Deutsche Bank is not entitled to a greater proportionate recovery of its share of the Revolving Credit Advance or the Letter of Credit Advances than any other Lender. Restated Credit Agreement, Exh. A. §§ 2.07, 2.14, 2.16.

140. Amendment No. 1 implemented the provisions of the Restated Credit Agreement and applicable equitable principles in the circumstances created by Plaintiff-Counterclaim-Defendant Deutsche Bank's conduct.

141. The signatures of the seven lenders that signed Amendment No. 1

satisfied the condition that the Required Lenders sign the amendment. Restated Credit Agreement, Exh. A. § 8.01.

142. Plaintiff-Counterclaim-Defendant Deutsche Bank was not required to sign Amendment No. 1 because Amendment No. 1 does not waive the application of Section 2.16 of the Restated Credit Agreement.

143. Plaintiff-Counterclaim-Defendant Deutsche Bank was not required to sign Amendment No. 1 because no obligation of or owed to Deutsche Bank was changed by Amendment No. 1. Restated Credit Agreement, Exh. A. § 8.01.

144. The payment provisions of the Restated Credit Agreement permitted Genuity to direct that payments be applied to either the Revolving Credit Advances or the Letter of Credit Advances. Restated Credit Agreement, Exh. A §§ 2.01, 2.07, 2.11, 2.14.

145. Genuity's execution of Amendment No. 1 constituted Genuity's direction, that in the circumstance of a defaulting lender, repayments first be applied to repay fully the Revolving Credit Advance and then to repay any outstanding Letter of Credit Advances.

146. Under the terms of the Restated Credit Agreement, Plaintiff-Counterclaim-Defendant Deutsche Bank was not entitled to any distributions until when and if the Funding Banks had been fully repaid the Revolving Credit Advance.

147. Under the terms of the Restated Credit Agreement, Plaintiff-Counterclaim-Defendant Deutsche Bank is not entitled to an amount in excess of its ratable share on account of the Letter of Credit Advances. Restated Credit Agreement, Exh. A §§ 2.01, 2.07, 2.14, 2.16.

148. Defendant-Counterclaim-Plaintiff JPMorgan Chase is entitled to a declaration that it is obligated to distribute $47,600,000, now held by it in escrow, to the Funding Banks and not to Plaintiff-Counterclaim-Defendant Deutsche Bank.

Second Counterclaim
(Declaratory Judgment – Restitution)

149. Defendant repeats and realleges each and every allegation contained in paragraphs 1 through 148 hereof, as if fully set forth herein.

150. Plaintiff-Counterclaim-Defendant Deutsche Bank had the same obligation to fund its ratable share of the Revolving Credit Advance as each of the Funding Banks.

151. If Plaintiff-Counterclaim-Defendant Deutsche Bank was not obligated to fund its ratable share of the Revolving Credit Advance, the Funding Banks were not obligated to fund their ratable shares of the Revolving Credit Advance.

152. If the Funding Banks were not obligated to fund the Revolving Credit Advance, they are entitled to restitution of the amounts they funded as part of the Revolving Credit Advance.

153. The Funding Banks' claims for restitution of their Revolving Credit Advance have priority over any claims by Plaintiff-Counterclaim-Defendant Deutsche Bank.

154. Defendant-Counterclaim-Plaintiff JPMorgan Chase is entitled to a declaration that the fund in amount of $47,600,000, now held in escrow by the JPMorgan Chase as Administrative Agent, is held is in constructive trust for the Funding Banks.

155. Defendant-Counterclaim-Plaintiff JPMorgan Chase is entitled to a declaration that the fund in the amount of $47,600,000 should be distributed to the Funding Banks.

Third Counterclaim
(Equitable Subordination)

156. Defendant-Counterclaim-Plaintiff JPMorgan Chase repeats and realleges each and every allegation contained in paragraphs 1 through 155 hereof, as if fully set forth herein.

157. Plaintiff-Counterclaim-Defendant Deutsche Bank's claims are equitably subordinated to the claims of the Funding Banks.

158. Defendant-Counterclaim-Plaintiff JPMorgan Chase is entitled to a declaration that the fund in the amount of $47,600,000 should be distributed to the Funding Banks.

Fourth Counterclaim
(Breach of Contract)

159. Defendant-Counterclaim-Plaintiff JPMorgan Chase repeats and realleges each and every allegation contained in paragraphs 1 through 158 hereof, as if fully set forth herein.

160. Under the terms of the Restated Credit Agreement, Plaintiff-Counterclaim-Defendant Deutsche Bank was obligated to fund its share of the Revolving Credit Advance in the amount of $127,500,000.

161. As a consequence of its failure to fund its share of the Revolving Credit Advance, Plaintiff-Counterclaim-Defendant Deutsche Bank has kept the amount of $127,500,000 for its own benefit, which is 100% of Plaintiff-Counterclaim-Defendant Deutsche Bank's ratable share of the Revolving Credit Advance.

162. On or by July 23, 2002, Plaintiff-Counterclaim-Defendant Deutsche Bank was obligated under Section 2.16 of the Restated Credit Agreement to distribute its recovery in excess of its ratable share of the Revolving Credit Advance by purchasing participations in the Funding Banks' Revolving Credit Advances, in the aggregate amount of $108,375,000.

163. Plaintiff-Counterclaim-Defendant Deutsche Bank failed and refused to distribute its excess recovery or any portion of it to the Funding Banks.

164. By reason of its failure to distribute its excess recovery or any portion of it to the Funding Banks, Plaintiff-Counterclaim-Defendant Deutsche Bank has breached

the Restated Credit Agreement.

165. The Funding Banks have suffered and will continue to suffer damages in the approximate amount of $47,600,000 as a result of Plaintiff-Counterclaim-Defendant Deutsche Bank's breach.

WHEREFORE, Defendant-Counterclaim-Plaintiff JPMorgan Chase prays for judgment as follows:

1. Dismissing Plaintiff's claims with prejudice.

2. Declaring that pursuant to the Restated Credit Agreement the Defendant-Counterclaim-Plaintiff JPMorgan Chase is obligated to distribute the $47,600,000 now held in escrow to the Funding Banks.

3. Declaring that the fund in the amount of $47,600,000 is held in constructive trust for the benefit of the Funding Banks and should be distributed to the Funding Banks.

4. Costs and fees; and

5. Any and all such other and further relief as the Court deems just and proper.

Dated: New York, N.Y.
October 13, 2004

LANKLER SIFFERT & WOHL LLP
500 Fifth Avenue – 33rd Floor
New York, N.Y. 10110
(212) 921-8399
Attorneys for Defendant-Counterclaim-Plaintiff JPMorgan Chase

By: _____
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Ilizabeth G. Hempstead (IH-1361)

EXECUTION COPY

U.S. $2,000,000,000

AMENDED AND RESTATED CREDIT AGREEMENT

Dated as of September 24, 2001

Among

GENUITY INC.

as Borrower,

THE INITIAL LENDERS AND INITIAL ISSUING BANK NAMED HEREIN

as Initial Lenders,

THE CHASE MANHATTAN BANK

as Administrative Agent,

J.P. MORGAN SECURITIES INC.

as Arranger, and Book Manager

CITIBANK, N.A.

as Syndication Agent,

and

CREDIT SUISSE FIRST BOSTON

and

DEUTSCHE BANK AG NEW YORK BRANCH

as Co-Documentation Agents

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AMENDED AND RESTATED CREDIT AGREEMENT

Dated as of September 24, 2001

Genuity Inc., a Delaware corporation (the "Borrower"), the banks, financial institutions and other institutional lenders (the "Initial Lenders") listed on the signature pages hereof as lenders, the bank (the "Initial Issuing Bank" and together with the Initial Lenders, the "Initial Lender Parties") listed on the signature pages hereof as the Initial Issuing Bank, The Chase Manhattan Bank ("Chase"), as administrative agent (in such capacity, the "Agent") for the Lender Parties (as hereinafter defined), J.P. Morgan Securities Inc., as arranger (the "Arranger"), Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents, agree as follows:

PRELIMINARY STATEMENTS.

1. The Borrower is party to the Five Year Credit Agreement dated as of September 5, 2000 (the "Existing Credit Agreement") with the lenders parties thereto, the Agent, Chase Securities, Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents.

2. The Borrower has requested that the Lenders enter into this Amended and Restated Credit Agreement (the "Agreement") to amend and restate the Existing Credit Agreement and the Lenders have indicated their willingness to so amend and restate the Existing Credit Agreement upon the terms and conditions stated herein.

NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreement contained herein, the parties hereto hereby agree as follows:

ARTICLE I
DEFINITIONS AND ACCOUNTING TERMS

SECTION 1.01. Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings (such meanings to be equally applicable to both the singular and plural forms of the terms defined):

"Advance" means a Revolving Credit Advance, a Competitive Bid Advance or a Letter of Credit Advance.

"Affiliate" means, as to any Person, any other Person that, directly or indirectly, controls, is controlled by or is under common control with such Person or is a director or officer of such Person. For purposes of this definition, the term "control" (including the terms "controlling", "controlled by" and "under common control with") of a Person means the possession, direct or indirect, of the power to vote 5% or more of the Voting Stock of such Person or to direct or cause the direction of the management and policies of such Person, whether through the ownership of Voting Stock, by contract or otherwise.

"Agent's Account" means the account of the Agent maintained by the Agent at Chase with its office at 270 Park Avenue, New York, New York 10017, Account No. _____, Attention: _____.

"Applicable Lending Office" means, with respect to each Lender, such Lender's Domestic Lending Office in the case of a Base Rate Advance and such Lender's Eurodollar Lending Office in the case of a Eurodollar Rate Advance and, in the case of a Competitive Bid Advance, the office of such Lender notified by such Lender to the Agent as its Applicable Lending Office with respect to such Competitive Bid Advance.

"Applicable Margin" means, as of any date, a percentage per annum determined by reference to the Performance Level in effect on such date as set forth below:

Performance Level	Applicable Margin for Base Rate Advances	Applicable Margin for Eurodollar Rate Advances
Level 1	0.000%	0.220%
Level 2	0.000%	0.285%
Level 3	0.000%	0.300%
Level 4	0.000%	0.375%
Level 5	0.000%	0.475%
Level 6	0.000%	0.550%
Level 7	0.000%	1.000%
Level 8	0.000%	1.355%
Level 9	0.000%	1.750%
Level 10	0.000%	2.250%
Level 11	0.000%	2.750%
Level 12	0.000%	3.250%

"Applicable Percentage" means, as of any date, a percentage per annum determined by reference to the Performance Level in effect on such date as set forth below:

Performance Level	Applicable Percentage
Level 1	0.080%
Level 2	0.090%
Level 3	0.100%
Level 4	0.125%
Level 5	0.150%
Level 6	0.200%
Level 7	0.250%
Level 8	0.375%
Level 9	0.50%
Level 10	0.50%

Level 11	0.50%
Level 12	0.50%

"Assignment and Acceptance" means an assignment and acceptance entered into by a Lender and an Eligible Assignee, and accepted by the Agent, in substantially the form of Exhibit C hereto.

"Assuming Lender" means an Eligible Assignee not previously a Lender that becomes a Lender hereunder pursuant to Section 2.06(b).

"Assumption Agreement" means an agreement in substantially the form of Exhibit D hereto by which an Eligible Assignee agrees to become a Lender hereunder pursuant to Section 2.06(b), in each case agreeing to be bound by all obligations of a Lender hereunder.

"Available Amount" of any Letter of Credit means, at any time, the maximum amount available to be drawn under such Letter of Credit at such time as set forth in Section 2.01(b) (assuming compliance at such time with all conditions to drawing).

"Base Rate" means a fluctuating interest rate per annum in effect from time to time, which rate per annum shall at all times be equal to the higher of:

(a) the rate of interest announced publicly by Chase in New York, New York, from time to time, as Chase's prime rate that is offered to its customers generally (before giving effect to any applicable margin); and

(b) 1/2 of 1% per annum above the Federal Funds Rate.

"Base Rate Advance" means a Revolving Credit Advance or a Letter of Credit Advance that bears interest as provided in Section 2.08(a)(i).

"Borrowing" means a Revolving Credit Borrowing or a Competitive Bid Borrowing.

"Business Day" means a day of the year on which banks are not required or authorized by law to close in New York City, provided that, if the applicable Business Day relates to any Eurodollar Rate Advances, "Business Day" means a day of the year on which banks are not required or authorized by law to close in New York City and on which dealings are carried on in the London interbank market.

"Commitment" means a Revolving Commitment or a Letter of Credit Commitment.

"Commitment Date" has the meaning specified in Section 2.06(b)(i).

"Commitment Increase" has the meaning specified in Section 2.06(b)(i).

"Competitive Bid Advance" means an advance by a Lender to the Borrower as part of a Competitive Bid Borrowing resulting from the competitive bidding procedure described in Section 2.03 and refers to a Fixed Rate Advance or a LIBO Rate Advance.

"Competitive Bid Borrowing" means a borrowing consisting of simultaneous Competitive Bid Advances from each of the Lenders whose offer to make one or more Competitive Bid Advances as part of such borrowing has been accepted under the competitive bidding procedure described in Section 2.03.

"Competitive Bid Note" means a promissory note of the Borrower payable to the order of any Lender, in substantially the form of Exhibit A-2 hereto, evidencing the indebtedness of the Borrower to such Lender resulting from a Competitive Bid Advance made by such Lender.

"Consolidated" refers to the consolidation of accounts in accordance with GAAP.

"Contributed Capital" as of any date means the sum, without duplication, of (a) capital attributed to the Borrower's Class A Common Stock, (b) capital attributed to the Borrower's Class B Common Stock, (c) additional paid-in capital and (d) all other equity issued by the Borrower and retained for use in its operations, in each case as presented on the most recent Consolidated balance sheet of the Borrower delivered in accordance with Section 5.01(i), provided, that with respect to any equity issued in connection with an acquisition, such equity shall be deemed to be in an amount equal to the fair market value of such equity at the date of such acquisition.

"Conversion", "Convert" and "Converted" each refers to a conversion of Revolving Credit Advances of one Type into Revolving Credit Advances of the other Type pursuant to Section 2.09 or 2.10.

"Debt" of any Person means, without duplication, (a) all indebtedness of such Person for borrowed money, (b) all obligations of such Person for the deferred purchase price of property or services (other than trade payables incurred in the ordinary course of such Person's business for which collection proceedings have not been commenced, provided that trade payables for which collection proceedings have commenced shall not be included in the term "Debt" so long as the payment of such trade payables is being contested in good faith and by proper proceedings and for which appropriate reserves are being maintained), (c) all obligations of such Person evidenced by notes, bonds, debentures or other similar instruments, (d) all obligations of such Person created or arising under any conditional sale or other similar title retention agreement with respect to property acquired by such Person (even though the rights and remedies of the seller or lender under such agreement in the event of default are limited to repossession or sale of such property), (e) all obligations of such Person as lessee under leases that have been, in accordance with GAAP, recorded as capital leases, (f) all obligations of such Person in respect of acceptances, letters of credit or similar extensions of credit, (g) all net obligations of such Person in respect of Hedge Agreements, (h) all Debt of others referred to in clauses (a) through (g) above or clause (i) below guaranteed directly, or indirectly through a Subsidiary, by such Person, or in effect guaranteed directly, or

indirectly through a Subsidiary, by such Person through a written agreement either (1) to pay or purchase such Debt or to advance or supply funds for the payment or purchase of such Debt or (2) to purchase, sell or lease (as lessee or lessor) property, or to purchase or sell services, primarily for the purpose of enabling the debtor to make payment of such Debt or to assure the holder of such Debt against loss, and (i) all Debt referred to in clauses (a) through (h) above secured by (or for which the holder of such Debt has an existing right, contingent or otherwise, to be secured by) any Lien on property (including, without limitation, accounts and contract rights) owned by such Person, even though such Person has not assumed or become liable for the payment of such Debt.

"Default" means any Event of Default or any event that would constitute an Event of Default but for the requirement that notice be given or time elapse or both.

"Domestic Lending Office" means, with respect to any Lender, the office of such Lender specified as its "Domestic Lending Office" opposite its name on Schedule I hereto or in the Assumption Agreement or the Assignment and Acceptance pursuant to which it became a Lender, or such other office of such Lender as such Lender may from time to time specify to the Borrower and the Agent.

"Domestic Subsidiary" means a Subsidiary that is organized under the laws of any political subdivision of the United States.

"Eligible Assignee" means (a) a Lender; (b) an Affiliate of a Lender; (c) a commercial bank organized under the laws of the United States, or any State thereof, and having total assets in excess of $5,000,000,000; (d) a savings and loan association or savings bank organized under the laws of the United States, or any State thereof, and having total assets in excess of $5,000,000,000; (e) a commercial bank organized under the laws of any other country that is a member of the Organization for Economic Cooperation and Development or has concluded special lending arrangements with the International Monetary Fund associated with its General Arrangements to Borrow or of the Cayman Islands, or a political subdivision of any such country, and having total assets in excess of $5,000,000,000 so long as such bank is acting through a branch or agency located in the United States or in the country in which it is organized or another country that is described in this clause (e); (f) the central bank of any country that is a member of the Organization for Economic Cooperation and Development; or (g) any other Person approved by the Agent and the Borrower, such approval not to be unreasonably withheld; provided, however, that neither the Borrower nor any Affiliate of any of the Borrower shall qualify as an Eligible Assignee.

"Environmental Action" means any action, suit, demand, demand letter, claim, notice of non-compliance or violation, notice of liability or potential liability, investigation, proceeding, consent order or consent agreement relating in any way to any Environmental Law, Environmental Permit or Hazardous Materials or arising from alleged injury or threat of injury to health, safety or the environment, including, without limitation, (a) by any governmental or regulatory authority for enforcement, cleanup, removal, response, remedial or other actions or damages and (b) by any governmental or

regulatory authority or any third party for damages, contribution, indemnification, cost recovery, compensation or injunctive relief.

"Environmental Law" means any federal, state, local or foreign statute, law, ordinance, rule, regulation, code, order, judgment, decree or judicial or agency interpretation, policy or guidance relating to pollution or protection of the environment, health, safety or natural resources, including, without limitation, those relating to the use, handling, transportation, treatment, storage, disposal, release or discharge of Hazardous Materials.

"Environmental Permit" means any permit, approval, identification number, license or other authorization required under any Environmental Law.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time, and the regulations promulgated and rulings issued thereunder.

"ERISA Affiliate" means any Person that for purposes of Title IV of ERISA is a member of the Borrower's controlled group, or under common control with the Borrower, within the meaning of Section 414 of the Internal Revenue Code.

"ERISA Event" means (a) the occurrence of a reportable event, within the meaning of Section 4043 of ERISA, with respect to any Plan unless the 30-day notice requirement with respect to such event has been waived by the PBGC; (b) the application for a minimum funding waiver with respect to a Plan; (c) the provision by the administrator of any Plan of a notice of intent to terminate such Plan pursuant to Section 4041(a)(2) of ERISA (including any such notice with respect to a plan amendment referred to in Section 4041(e) of ERISA); (d) the cessation of operations at a facility of the Borrower or any ERISA Affiliate in the circumstances described in Section 4062(e) of ERISA; (e) the withdrawal by the Borrower or any ERISA Affiliate from a Multiple Employer Plan during a plan year for which it was a substantial employer, as defined in Section 4001(a)(2) of ERISA; (f) the imposition of a lien under Section 302(f) of ERISA with respect to any Plan; (g) the adoption of an amendment to a Plan requiring the provision of security to such Plan pursuant to Section 307 of ERISA; or (h) the institution by the PBGC of proceedings to terminate a Plan pursuant to Section 4042 of ERISA, or the occurrence of any event or condition described in Section 4042 of ERISA that is reasonably expected to result in the termination of, or the appointment of a trustee to administer, a Plan.

"Eurocurrency Liabilities" has the meaning assigned to that term in Regulation D of the Board of Governors of the Federal Reserve System, as in effect from time to time.

"Eurodollar Lending Office" means, with respect to any Lender, the office of such Lender specified as its "Eurodollar Lending Office" opposite its name on Schedule I hereto or in the Assumption Agreement or the Assignment and Acceptance pursuant to which it became a Lender (or, if no such office is specified, its Domestic Lending

Office), or such other office of such Lender as such Lender may from time to time specify to the Borrower and the Agent.

"Eurodollar Rate" means, for any Interest Period for each Eurodollar Rate Advance comprising part of the same Revolving Credit Borrowing, an interest rate per annum equal to the rate per annum obtained by dividing (a) the average (rounded upward to the nearest whole multiple of 1/16 of 1% per annum, if such average is not such a multiple) of the rate per annum at which deposits in U.S. dollars are offered by the principal office of each of the Reference Banks in London, England to prime banks in the London interbank market at 11:00 A.M. (London time) two Business Days before the first day of such Interest Period in an amount approximately equal to such Reference Bank's pro rata share of the contemplated Eurodollar Rate Advance comprising part of such Revolving Credit Borrowing to be outstanding during such Interest Period and for a period equal to such Interest Period by (b) a percentage equal to 100% minus the Eurodollar Rate Reserve Percentage for such Interest Period. The Eurodollar Rate for any Interest Period for each Eurodollar Rate Advance comprising part of the same Revolving Credit Borrowing shall be determined by the Agent on the basis of applicable rates furnished to and received by the Agent from the Reference Banks two Business Days before the first day of such Interest Period, subject, however, to the provisions of Section 2.09.

"Eurodollar Rate Advance" means a Revolving Credit Advance that bears interest as provided in Section 2.08(a)(ii).

"Eurodollar Rate Reserve Percentage" for any Interest Period for all Eurodollar Rate Advances or LIBO Rate Advances comprising part of the same Borrowing means the reserve percentage applicable two Business Days before the first day of such Interest Period under regulations issued from time to time by the Board of Governors of the Federal Reserve System (or any successor) for determining the maximum reserve requirement (including, without limitation, any emergency, supplemental or other marginal reserve requirement) for a member bank of the Federal Reserve System in New York City with respect to liabilities or assets consisting of or including Eurocurrency Liabilities (or with respect to any other category of liabilities that includes deposits by reference to which the interest rate on Eurodollar Rate Advances or LIBO Rate Advances is determined) having a term equal to such Interest Period.

"Events of Default" has the meaning specified in Section 6.01.

"Existing Credit Agreement" has the meaning specified in the preliminary statements to this Agreement.

"Federal Funds Rate" means, for any period, a fluctuating interest rate per annum equal for each day during such period to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published for such day (or, if such day is not a Business Day, for the next preceding Business Day) by the Federal Reserve Bank of New York, or, if such rate is not so published for any day that is a Business Day, the average of the

quotations for such day on such transactions received by the Agent from three Federal funds brokers of recognized standing selected by it.

"Fixed Rate Advances" has the meaning specified in Section 2.03(a)(i).

"GAAP" has the meaning specified in Section 1.03.

"Guaranty" has the meaning specified in Section 5.01(j).

"Hazardous Materials" means (a) petroleum and petroleum products, byproducts or breakdown products, radioactive materials, asbestos-containing materials, polychlorinated biphenyls and radon gas and (b) any other chemicals, materials or substances designated, classified or regulated as hazardous or toxic or as a pollutant or contaminant under any Environmental Law.

"Hedge Agreements" means interest rate swap, cap or collar agreements, interest rate future or option contracts, currency swap agreements, currency future or option contracts and other similar agreements.

"Increase Date" has the meaning specified in Section 2.06(b)(i).

"Increasing Lender" has the meaning specified in Section 2.06(b)(i).

"Initial Issuing Bank", "Initial Lender Parties" and "Initial Lenders" each has the meaning specified in the recital of parties to this Agreement.

"Interest Period" means, for each Eurodollar Rate Advance comprising part of the same Revolving Credit Borrowing and each LIBO Rate Advance comprising part of the same Competitive Bid Borrowing, the period commencing on the date of such Eurodollar Rate Advance or LIBO Rate Advance or the date of the Conversion of any Base Rate Advance into such Eurodollar Rate Advance and ending on the last day of the period selected by the Borrower pursuant to the provisions below and, thereafter, with respect to Eurodollar Rate Advances, each subsequent period commencing on the last day of the immediately preceding Interest Period and ending on the last day of the period selected by the Borrower pursuant to the provisions below. The duration of each such Interest Period shall be one, two, three or six months, as the Borrower may, upon notice received by the Agent not later than 11:00 A.M. (New York City time) on the third Business Day prior to the first day of such Interest Period, select; provided, however, that:

(i) the Borrower may not select any Interest Period that ends after the Termination Date;

(ii) Interest Periods commencing on the same date for Eurodollar Rate Advances comprising part of the same Revolving Credit Borrowing or for LIBO Rate Advances comprising part of the same Competitive Bid Borrowing shall be of the same duration;

(iii) whenever the last day of any Interest Period would otherwise occur on a day other than a Business Day, the last day of such Interest Period shall be extended to occur on the next succeeding Business Day, provided, however, that, if such extension would cause the last day of such Interest Period to occur in the next following calendar month, the last day of such Interest Period shall occur on the next preceding Business Day; and

(iv) whenever the first day of any Interest Period occurs on a day of an initial calendar month for which there is no numerically corresponding day in the calendar month that succeeds such initial calendar month by the number of months equal to the number of months in such Interest Period, such Interest Period shall end on the last Business Day of such succeeding calendar month.

"Internal Revenue Code" means the Internal Revenue Code of 1986, as amended from time to time, and the regulations promulgated and rulings issued thereunder.

"Issuing Bank" means the Initial Issuing Bank or any Eligible Assignee to which 100% of the Letter of Credit Commitment hereunder has been assigned pursuant to Section 8.07 so long as such Eligible Assignee expressly agrees to perform in accordance with their terms all of the obligations that by the terms of this Agreement are required to be performed by it as the Issuing Bank and notifies the Agent of its Applicable Lending Office (which information shall be recorded by the Agent in the Register), for so long as the Initial Issuing Bank or Eligible Assignee, as the case may be, shall have a Letter of Credit Commitment.

"L/C Cash Collateral Account" means an interest bearing cash collateral account to be established and maintained by the Agent, over which the Agent shall have sole dominion and control, upon terms as may be satisfactory to the Agent.

"L/C Related Documents" has the meaning specified in Section 2.07(b)(ii)(A).

"Lender Party" means any Lender or the Issuing Bank.

"Lenders" means the Initial Lenders and each Person that shall become a party hereto pursuant to Section 2.06(b) or Section 8.07(a), (b) and (c).

"Letter of Credit Advance" means an advance made by the Issuing Bank pursuant to Section 2.04(c).

"Letter of Credit Agreement" has the meaning specified in Section 2.04(a).

"Letter of Credit Commitment" means, with respect to the Issuing Bank at any time, the amount set forth opposite the Issuing Bank's name on the signature pages hereto under the caption "Letter of Credit Commitment" or, if the Issuing Bank has entered into one or more Assignment and Acceptances, set forth for the Issuing Bank in the Register maintained by the Agent pursuant to Section 8.07(d) as the Issuing Bank's "Letter of Credit Commitment", as such amount may be reduced at or prior to such time pursuant to Section 2.06.

"Letter of Credit Facility" means, at any time, an amount equal to the lesser of (a) the amount of the Issuing Bank's Letter of Credit Commitment at such time and (b) $2,000,000,000, as such amount may be reduced at or prior to such time pursuant to Section 2.06.

"Letters of Credit" has the meaning specified in Section 2.01(b).

"LIBO Rate" means, for any Interest Period for all LIBO Rate Advances comprising part of the same Competitive Bid Borrowing, an interest rate per annum equal to the average (rounded upward to the nearest whole multiple of 1/16 of 1% per annum, if such average is not such a multiple) of the rate per annum at which deposits in U.S. dollars are offered to the principal office of each of the Reference Banks in London, England by prime banks in the London interbank market at 11:00 A.M. (London time) two Business Days before the first day of such Interest Period in an amount substantially equal to the amount that would be such Reference Bank's ratable share of such Borrowing if such Borrowing were to be a Revolving Credit Borrowing to be outstanding during such Interest Period and for a period equal to such Interest Period. The LIBO Rate for any Interest Period for each LIBO Rate Advance comprising part of the same Competitive Bid Borrowing shall be determined by the Agent on the basis of applicable rates furnished to and received by the Agent from the Reference Banks two Business Days before the first day of such Interest Period, subject, however, to the provisions of Section 2.09.

"LIBO Rate Advances" has the meaning specified in Section 2.03(a)(i).

"Lien" means any lien, security interest or other charge or encumbrance of any kind.

"Material Adverse Change" means any material adverse change in the business, condition (financial or otherwise), operations, performance, properties or prospects of the Borrower or the Borrower and its Subsidiaries taken as a whole.

"Material Adverse Effect" means a material adverse effect on (a) the ability of the Borrower to conduct its business on substantially the same basis as conducted on the Restatement Effective Date or (b) the ability of the Borrower to service its Debt obligations on a timely basis.

"Material Subsidiary" means each Domestic Subsidiary of the Borrower to which as of the end of any fiscal quarter is attributed 6% of more of the Consolidated total revenues or sales of the Borrower and its Subsidiaries, as shown on the Consolidated financial statements of the Borrower and its Subsidiaries for such fiscal quarter or, in the case of any Subsidiary of the Borrower that is acquired or is merged with or into any other Subsidiary of the Borrower, determined by reference to the pro forma financial statements of the Borrower and its Subsidiaries prepared in accordance with GAAP as of the most recent fiscal quarter of the Borrower, giving effect to such acquisition or merger as if such transaction had been consummated as of the first day of such fiscal quarter.

"Moody's" means Moody's Investors Service, Inc.

"Multiemployer Plan" means a multiemployer plan, as defined in Section 4001(a)(3) of ERISA, to which the Borrower or any ERISA Affiliate is making or accruing an obligation to make contributions, or has within any of the preceding five plan years made or accrued an obligation to make contributions.

"Multiple Employer Plan" means a single employer plan, as defined in Section 4001(a)(15) of ERISA, that (a) is maintained for employees of the Borrower or any ERISA Affiliate and at least one Person other than the Borrower and the ERISA Affiliates or (b) was so maintained and in respect of which the Borrower or any ERISA Affiliate could have liability under Section 4064 or 4069 of ERISA in the event such plan has been or were to be terminated.

"Note" means a Revolving Credit Note or a Competitive Bid Note.

"Notice of Competitive Bid Borrowing" has the meaning specified in Section 2.03(a)(i).

"Notice of Issuance" has the meaning specified in Section 2.04(a).

"Notice of Revolving Credit Borrowing" has the meaning specified in Section 2.02(a).

"Other Taxes" has the meaning specified in Section 2.15(b).

"PBGC" means the Pension Benefit Guaranty Corporation (or any successor).

"Performance Level" means, as of any date of the determination, the level set forth below as then in effect for the Borrower, as determined in accordance with the following provisions of this definition:

Level 1:	Public Debt Rating of not lower than A+ by S&P or not lower than A1 by Moody's.
Level 2:	Public Debt Rating of lower than Level 1 but not lower than A by S&P or not lower than A2 by Moody's.
Level 3:	Public Debt Rating of lower than Level 2 but not lower than A- by S&P or not lower than A3 by Moody's.
Level 4:	Public Debt Rating of lower than Level 3 but not lower than BBB+ by S&P or not lower than Baa1 by Moody's.
Level 5:	Public Debt Rating of lower than Level 4 but not lower than BBB by S&P or not lower than Baa2 by Moody's.
Level 6:	Public Debt Rating of lower than Level 5 but not lower than BBB- by S&P or not lower than Baa3 by Moody's.

Level 7: Public Debt Rating of lower than Level 6 but not lower than BB+ by S&P or not lower than Ba1 by Moody's.

Level 8: Public Debt Rating of lower than Level 7 but not lower than BB by S&P or not lower than Ba2 by Moody's.

Level 9: Public Debt Rating of lower than Level 8 but not lower than BB- by S&P or not lower than Ba3 by Moody's.

Level 10: Public Debt Rating of lower than Level 9 but not lower than B+ by S&P or not lower than B1 by Moody's.

Level 11: Public Debt Rating of lower than Level 10 but not lower than B by S&P or not lower than B2 by Moody's.

Level 12: Public Debt Rating of lower than Level 11 or no Public Debt Rating available.

For purposes of the foregoing, (a) if only one of S&P and Moody's shall have in effect a Public Debt Rating, the Performance Level shall be determined by reference to the available rating and (b) if the Public Debt Ratings established by S&P and Moody's shall fall within different Performance Levels, the Performance Level shall be based upon the higher rating, unless the ratings differ by more than one Performance Level, in which case the Performance Level shall be determined by reference to the midpoint of the two Performance Levels, or in the case that such midpoint is not at a Performance Level, at the Performance Level immediately above such midpoint.

"Permitted Liens" means, with respect to any Person, (a) Liens for taxes, assessments and governmental charges and levies to the extent not required to be paid under Section 5.01(b) hereof; (b) pledges or deposits to secure obligations under workers' compensation laws or similar legislation, unemployment insurance, old age pensions or other social security; (c) pledges or deposits to secure performance in connection with bids, tenders, contracts (other than contracts for the payment of money) or leases to which such Person is a party; (d) deposits to secure public or statutory obligations of such Person; (e) materialmen's, mechanics', carriers', workers', repairmen's or other like Liens in the ordinary course of business, or deposits to obtain the release of such Liens to the extent such Liens, in the aggregate, would not have a Material Adverse Effect; (f) deposits to secure surety and appeal bonds to which such Person is a party; (g) pledges or deposits to secure indemnity, performance or other similar bonds in the ordinary course of business; (h) other pledges or deposits for similar purposes in the ordinary course of business, including pledges and deposits in connection with insurance maintenance in accordance with Section 5.01(c); (i) Liens created by or resulting from any litigation or legal proceeding which at the time is currently being contested in good faith by appropriate proceedings; (j) leases made, or existing on property acquired, in the ordinary course of business; (k) landlord's Liens under leases to which such Person is a party; (l) zoning restrictions, easements, licenses, restrictions on the use of real property or minor irregularities in title thereto, which do not materially impair the use of such

property in the operation of the business of such Person or the value or such property for the purpose of such business; and (m) restrictions under federal, state and foreign securities laws on the transfer of securities.

"Person" means an individual, partnership, corporation (including a business trust), joint stock company, trust, unincorporated association, joint venture, limited liability company or other entity, or a government or any political subdivision or agency thereof.

"Plan" means a Single Employer Plan or a Multiple Employer Plan.

"Pro Rata Share" of any amount means, with respect to any Lender at any time, the product of such amount *times* a fraction the numerator of which is the amount of such Lender's Revolving Commitment at such time (or, if the Revolving Commitments shall have been terminated pursuant to Section 2.06 or 6.01, such Lender's Revolving Commitment as in effect immediately prior to such termination) and the denominator of which is the aggregate amount of all Revolving Commitments at such time (or, if the Revolving Commitments shall have been terminated pursuant to Section 2.06 or 6.01, the aggregate amount of all Revolving Commitments as in effect immediately prior to such termination).

"Public Debt Rating" means, as of any date, the lowest rating that has been most recently announced by any of S&P or Moody's, as the case may be, for any class of non-credit enhanced long-term senior unsecured debt issued by the Borrower. For purposes of the foregoing, (a) if any rating established by S&P or Moody's shall be changed, such change shall be effective as of the date on which such change is first announced publicly by the rating agency making such change; and (b) if S&P or Moody's shall change the basis on which ratings are established, each reference to the Public Debt Rating announced by S&P or Moody's, as the case may be, shall refer to the then equivalent rating by S&P or Moody's, as the case may be.

"Reference Banks" means initially, Chase and Citibank, N.A., or, if less than two of such banks are able to furnish timely information in accordance with Section 2.09, any other commercial bank designated by the Borrower and approved by the Required Lenders as constituting a "Reference Bank" hereunder.

"Register" has the meaning specified in Section 8.07(d).

"Reimbursement Agreement" has the meaning specified in Section 2.04(c).

"Required Lenders" means at any time Lenders owed at least a majority in interest of the sum of (a) the aggregate unpaid principal amount of the Revolving Credit Advances outstanding at such time and (b) the aggregate unpaid principal amount of all Letter of Credit Advances outstanding at such time, or, if no such principal amount is outstanding at such time, Lenders having at least a majority in interest of the Revolving Commitments.

"Requisite Amount" has the meaning specified in Section 6.01(d).

"Restatement Effective Date" has the meaning specified in Section 3.01.

"Revolving Commitment" means, with respect to any Lender at any time, the amount set forth opposite such Lender's name on the signature pages hereto under the caption "Revolving Commitment" or, if such Lender has entered into one or more Assignment and Acceptances, set forth for such Lender in the Register maintained by the Agent pursuant to Section 8.07(d) as such Lender's "Revolving Commitment", as such amount may be reduced at or prior to such time pursuant to Section 2.06.

"Revolving Credit Advance" means an advance by a Lender to the Borrower as part of a Revolving Credit Borrowing and refers to a Base Rate Advance or a Eurodollar Rate Advance (each of which shall be a "Type" of Revolving Credit Advance).

"Revolving Credit Borrowing" means a borrowing consisting of simultaneous Revolving Credit Advances of the same Type made by each of the Lenders pursuant to Section 2.01.

"Revolving Credit Facility" means, at any time, the aggregate of the Revolving Commitments at such time.

"Revolving Credit Note" means a promissory note of the Borrower payable to the order of any Lender, in substantially the form of Exhibit A-1 hereto, evidencing the aggregate indebtedness of the Borrower to such Lender resulting from the Revolving Credit Advances and Letter of Credit Advances made by such Lender.

"S&P" means Standard & Poor's Ratings Group, a division of The McGraw-Hill Companies, Inc.

"Single Employer Plan" means a single employer plan, as defined in Section 4001(a)(15) of ERISA, that (a) is maintained for employees of the Borrower or any ERISA Affiliate and no Person other than the Borrower and the ERISA Affiliates or (b) was so maintained and in respect of which the Borrower or any ERISA Affiliate could have liability under Section 4069 of ERISA in the event such plan has been or were to be terminated.

"Subsidiary" of any Person means any corporation, partnership, joint venture, limited liability company, trust or estate of which (or in which) more than 50% of (a) the issued and outstanding capital stock having ordinary voting power to elect a majority of the Board of Directors of such corporation (irrespective of whether at the time capital stock of any other class or classes of such corporation shall or might have voting power upon the occurrence of any contingency), (b) the interest in the capital or profits of such limited liability company, partnership or joint venture or (c) the beneficial interest in such trust or estate, is at the time directly or indirectly owned or controlled by such Person, by such Person and one or more of its other Subsidiaries or by one or more of such Person's other Subsidiaries.

"Taxes" has the meaning specified in Section 2.15(a).

"Termination Date" means, subject to the provisions of Section 2.06, the earliest of (a) September 5, 2005, (b) the date that is three months before any scheduled expiration of the Verizon Option and (c) the date of termination in whole of the Revolving Commitments pursuant to Section 2.06 or 6.01; provided that the date set forth in clause (a) above shall be automatically amended to September 5, 2006 upon the exercise of the Verizon Option.

"Unused Commitment" means, with respect to each Lender at any time, (a) such Lender's Revolving Commitment at such time minus (b) the sum of (i) the aggregate principal amount of all Revolving Credit Advances and Letter of Credit Advances made by such Lender (in its capacity as a Lender) and outstanding at such time, plus (ii) such Lender's Pro Rata Share of (A) the aggregate Available Amount of the all Letters of Credit outstanding at such time, (B) the aggregate principal amount of all Letter of Credit Advances made by the Issuing Bank pursuant to Section 2.04(c) and outstanding at such time and (C) the aggregate principal amount of Competitive Bid Advances then outstanding.

"Usage" means, at any time the sum of the aggregate principal amount of the Advances then outstanding plus the Available Amount of the outstanding Letters of Credit.

"Verizon" means Verizon Communications Inc. (as the survivor of the merger of GTE Corporation with and into Bell Atlantic Corporation), and its successors.

"Verizon Option" means the five-year (or, if extended under certain conditions, six-year) option held by Verizon to exchange its Class B Common Stock of the Borrower for Class C Common Stock of the Borrower that will represent up to 82% of the aggregate equity and up to 95% of the combined voting power of all Voting Stock of the Borrower.

"Voting Stock" means capital stock issued by a corporation, or equivalent interests in any other Person, the holders of which are ordinarily, in the absence of contingencies, entitled to vote for the election of directors (or persons performing similar functions) of such Person, even if the right so to vote has been suspended by the happening of such a contingency.

SECTION 1.02. Computation of Time Periods. In this Agreement in the computation of periods of time from a specified date to a later specified date, the word "from" means "from and including" and the words "to" and "until" each mean "to but excluding".

SECTION 1.03. Accounting Terms. All terms of an accounting or financial nature not otherwise defined herein shall be construed in accordance with generally accepted accounting principles ("GAAP"), as in effect from time to time; provided, however, that if the Borrower notifies the Agent that the Borrower wishes to amend the covenant in Section 5.03 or any related definition to eliminate the effect of any change in GAAP occurring after the date of this Agreement on the operation of such covenant, or if the Agent notifies the Borrower that the Required Lenders wish to amend Section 5.03 or any related definition for such purpose, then the

Borrower's compliance with such covenant shall be determined on the basis of GAAP in effect immediately before the relevant change in GAAP became effective, until either such notice is withdrawn or such covenant is amended in a manner satisfactory to the Borrower and the Required Lenders.

ARTICLE II
AMOUNTS AND TERMS OF THE ADVANCES AND THE LETTERS OF CREDIT

SECTION 2.01. The Revolving Credit Advances and the Letters of Credit. (a) The Revolving Credit Advances. Each Lender severally agrees, on the terms and conditions hereinafter set forth, to make Revolving Credit Advances to the Borrower from time to time on any Business Day during the period from the Restatement Effective Date until the Termination Date in an aggregate amount not to exceed at any time such Lender's Unused Commitment at such time. Each Revolving Credit Borrowing shall be in an aggregate amount of $10,000,000 or an integral multiple of $1,000,000 in excess thereof and shall consist of Revolving Credit Advances of the same Type made on the same day by the Lenders ratably according to their respective Revolving Commitments. Within the limits of this Section 2.01(a), the Borrower may borrow under this Section 2.01(a), prepay pursuant to Section 2.11 and reborrow under this Section 2.01(a).

(b) Letters of Credit. The Issuing Bank agrees, on the terms and conditions hereinafter set forth, to issue letters of credit (each a "Letter of Credit") for the account of the Borrower from time to time on any Business Day during the period from the Restatement Effective Date until 30 days before the Termination Date in an aggregate Available Amount (i) for all Letters of Credit issued by the Issuing Bank not to exceed at any time the lesser of (x) the Letter of Credit Facility at such time and (y) the Issuing Bank's Letter of Credit Commitment at such time and (ii) for each such Letter of Credit not to exceed an amount equal to the Unused Commitments of the Lenders at such time. No Letter of Credit shall have an expiration date (including all rights of the Borrower or the beneficiary to require renewal) later than 5 Business Days before the Termination Date. Within the limits referred to above, the Borrower may request the issuance of Letters of Credit under this Section 2.01(b), repay any Letter of Credit Advances resulting from drawings thereunder pursuant to Section 2.04(c) and request the issuance of additional Letters of Credit under this Section 2.01(b).

SECTION 2.02. Making the Revolving Credit Advances. (a) Each Revolving Credit Borrowing shall be made on notice, given not later than 11:00 A.M. (New York City time) on the third Business Day prior to the date of the proposed Revolving Credit Borrowing in the case of a Revolving Credit Borrowing consisting of Eurodollar Rate Advances, or the Business Day of the proposed Revolving Credit Borrowing in the case of a Revolving Credit Borrowing consisting of Base Rate Advances, by the Borrower to the Agent, which shall give to each Lender prompt notice thereof by telecopier or telex. Each such notice of a Revolving Credit Borrowing (a "Notice of Revolving Credit Borrowing") shall be by telephone, confirmed immediately in writing, or telecopier or telex in substantially the form of Exhibit B-1 hereto, specifying therein the requested (i) date of such Revolving Credit Borrowing, (ii) Type of Advances comprising such Revolving Credit Borrowing, (iii) aggregate amount of such Revolving Credit Borrowing, and (iv) in the case of a Revolving Credit Borrowing consisting of

Eurodollar Rate Advances, initial Interest Period for each such Revolving Credit Advance. Each Lender shall, before 12:00 noon (New York City time) on the date of such Revolving Credit Borrowing, make available for the account of its Applicable Lending Office to the Agent at the Agent's Account, in same day funds, such Lender's ratable portion of such Revolving Credit Borrowing. After the Agent's receipt of such funds and upon fulfillment of the applicable conditions set forth in Article III, the Agent will make such funds available to the Borrower at the Agent's address referred to in Section 8.02; provided, however, that the Agent shall first make a portion of such funds equal to the aggregate principal amount of any Letter of Credit Advances outstanding on the date of such Revolving Credit Borrowing, plus interest accrued and unpaid thereon to and as of such date, available to the Lenders for repayment of such Letter of Credit Advances.

(b) Anything in Section 2.02(a) to the contrary notwithstanding, the Borrower may not select Eurodollar Rate Advances for any Revolving Credit Borrowing if the aggregate obligation of the Lenders to make Eurodollar Rate Advances shall then be suspended pursuant to Section 2.09 or 2.13.

(c) Each Notice of Revolving Credit Borrowing shall be irrevocable and binding on the Borrower. In the case of any Revolving Credit Borrowing that the related Notice of Revolving Credit Borrowing specifies is to be comprised of Eurodollar Rate Advances, the Borrower shall indemnify each Lender against any loss, cost or expense incurred by such Lender as a result of any failure to fulfill on or before the date specified in such Notice of Revolving Credit Borrowing for such Revolving Credit Borrowing the applicable conditions set forth in Article III, including, without limitation, any loss (excluding loss of anticipated profits), cost or expense incurred by reason of the liquidation or reemployment of deposits or other funds acquired by such Lender to fund the Revolving Credit Advance to be made by such Lender as part of such Revolving Credit Borrowing when such Revolving Credit Advance, as a result of such failure, is not made on such date.

(d) Unless the Agent shall have received notice from a Lender prior to the date of any Revolving Credit Borrowing that such Lender will not make available to the Agent such Lender's ratable portion of such Revolving Credit Borrowing, the Agent may assume that such Lender has made such portion available to the Agent on the date of such Revolving Credit Borrowing in accordance with Section 2.02(a) and the Agent may, in reliance upon such assumption, make available to the Borrower on such date a corresponding amount. If and to the extent that such Lender shall not have so made such ratable portion available to the Agent, such Lender and the Borrower severally agree to repay to the Agent forthwith on demand such corresponding amount together with interest thereon, for each day from the date such amount is made available to the Borrower until the date such amount is repaid to the Agent, at (i) in the case of the Borrower, the interest rate applicable at the time to Revolving Credit Advances comprising such Revolving Credit Borrowing and (ii) in the case of such Lender, the Federal Funds Rate. If such Lender shall repay to the Agent such corresponding amount, such amount so repaid shall constitute such Lender's Revolving Credit Advance as part of such Revolving Credit Borrowing for purposes of this Agreement and the Borrower shall be relieved of its obligations to repay such amount under this Section 2.02(d).

(e) The failure of any Lender to make the Revolving Credit Advance to be made by it as part of any Revolving Credit Borrowing shall not relieve any other Lender of its obligation, if any, hereunder to make its Revolving Credit Advance on the date of such Revolving Credit Borrowing, but no Lender shall be responsible for the failure of any other Lender to make the Revolving Credit Advance to be made by such other Lender on the date of any Revolving Credit Borrowing.

SECTION 2.03. The Competitive Bid Advances. (a) Each Lender severally agrees that the Borrower may make Competitive Bid Borrowings under this Section 2.03 from time to time on any Business Day during the period from the Restatement Effective Date until the date occurring 30 days prior to the Termination Date in the manner set forth below; provided that, following the making of each Competitive Bid Borrowing, the Usage shall not exceed the aggregate amount of the Revolving Commitments of the Lenders.

(i) The Borrower may request a Competitive Bid Borrowing under this Section 2.03 by delivering to the Agent, by telecopier or telex, a notice of a Competitive Bid Borrowing (a "Notice of Competitive Bid Borrowing"), in substantially the form of Exhibit B-2 hereto, specifying therein the requested (A) date of such proposed Competitive Bid Borrowing, (B) aggregate amount of such proposed Competitive Bid Borrowing, (C) (1) in the case of a Competitive Bid Borrowing consisting of LIBO Rate Advances, Interest Period and maturity date for repayment of each LIBO Rate Advance to be made as part of such Competitive Bid Borrowing or (2) in the case of a Competitive Bid Borrowing consisting of Fixed Rate Advances, maturity date for repayment of each Fixed Rate Advance to be made as part of such Competitive Bid Borrowing (which maturity date may not be earlier than the date occurring 7 days after the date of such Competitive Bid Borrowing or later than the Termination Date), (D) interest payment date or dates relating thereto, and (E) other terms (if any) to be applicable to such Competitive Bid Borrowing, not later than 10:00 A.M. (New York City time) (y) at least one Business Day prior to the date of the proposed Competitive Bid Borrowing, if the Borrower shall specify in the Notice of Competitive Bid Borrowing that the rates of interest to be offered by the Lenders shall be fixed rates per annum (the Advances comprising any such Competitive Bid Borrowing being referred to herein as "Fixed Rate Advances") and (z) at least four Business Days prior to the date of the proposed Competitive Bid Borrowing, if the Borrower shall instead specify in the Notice of Competitive Bid Borrowing that the rates of interest to be offered by the Lenders are to be based on the LIBO Rate (the Advances comprising such Competitive Bid Borrowing being referred to herein as "LIBO Rate Advances"). Each Notice of Competitive Bid Borrowing shall be irrevocable and binding on the Borrower. The Agent shall in turn promptly notify each Lender of each request for a Competitive Bid Borrowing received by it from the Borrower by sending such Lender a copy of the related Notice of Competitive Bid Borrowing.

(ii) Each Lender may, if, in its sole discretion, it elects to do so, irrevocably offer to make one or more Competitive Bid Advances to the Borrower as part of such proposed Competitive Bid Borrowing at a rate or rates of interest specified by such Lender in its sole discretion, by notifying the Agent (which shall give prompt notice thereof to the Borrower), (A) before 9:30 A.M. (New York City time) on the date of such

proposed Competitive Bid Borrowing, in the case of a Competitive Bid Borrowing consisting of Fixed Rate Advances, and (B) before 10:00 A.M. (New York City time) two Business Days before the date of such proposed Competitive Bid Borrowing, in the case of a Competitive Bid Borrowing consisting of LIBO Rate Advances, of (1) the minimum amount and maximum amount of each Competitive Bid Advance which such Lender would be willing to make as part of such proposed Competitive Bid Borrowing (which amounts may, subject to the proviso to the first sentence of this Section 2.03(a), exceed such Lender's Revolving Commitment, if any), (2) the rate or rates of interest therefor and (3) such Lender's Applicable Lending Office with respect to such Competitive Bid Advance; provided that if the Agent in its capacity as a Lender shall, in its sole discretion, elect to make any such offer, it shall notify the Borrower of such offer at least 30 minutes before the time and on the date on which notice of such election is to be given to the Agent by the other Lenders. If any Lender shall elect not to make such an offer, such Lender shall so notify the Agent, before 10:00 A.M. (New York City time) on the date on which notice of such election is to be given to the Agent by the other Lenders, and such Lender shall not be obligated to, and shall not, make any Competitive Bid Advance as part of such Competitive Bid Borrowing; provided that the failure by any Lender to give such notice shall not cause such Lender to be obligated to make any Competitive Bid Advance as part of such proposed Competitive Bid Borrowing.

(iii) The Borrower shall, in turn, (A) before 10:30 A.M. (New York City time) on the date of such proposed Competitive Bid Borrowing, in the case of a Competitive Bid Borrowing consisting of Fixed Rate Advances, and (B) before 11:00 A.M. (New York City time) two Business Days before the date of such proposed Competitive Bid Borrowing, in the case of a Competitive Bid Borrowing consisting of LIBO Rate Advances, either:

(1) cancel such Competitive Bid Borrowing by giving the Agent notice to that effect, or

(2) accept one or more of the offers made by any Lender or Lenders pursuant to Section 2.03(a)(ii) (provided that the Borrower may not accept bids in excess of the aggregate amount of such Competitive Bid Borrowing), in its sole discretion, by giving notice to the Agent of the amount of each Competitive Bid Advance (which amount shall be equal to or greater than the minimum amount, and equal to or less than the maximum amount, notified to the Borrower by the Agent on behalf of such Lender for such Competitive Bid Advance pursuant to Section 2.03(a)(ii)) to be made by each Lender as part of such Competitive Bid Borrowing, and reject any remaining offers made by Lenders pursuant to Section 2.03(a)(ii) by giving the Agent notice to that effect. The Borrower shall accept the offers made by any Lender or Lenders to make Competitive Bid Advances in order of the lowest to the highest rates of interest offered by such Lenders. If two or more Lenders have offered the same interest rate, the amount to be borrowed at such interest rate will be allocated among such Lenders in proportion to the amount that each such Lender offered at such interest rate.

(iv) If the Borrower notifies the Agent that such Competitive Bid Borrowing is cancelled pursuant to clause (1) of Section 2.03(a)(iii), the Agent shall give prompt notice thereof to the Lenders and such Competitive Bid Borrowing shall not be made.

(v) If the Borrower accepts one or more of the offers made by any Lender or Lenders pursuant to clause (2) of Section 2.03(a)(iii), the Agent shall in turn promptly notify (A) each Lender that has made an offer as described in Section 2.03(a)(ii), of the date and aggregate amount of such Competitive Bid Borrowing and whether or not any offer or offers made by such Lender pursuant to Section 2.03(a)(ii) have been accepted by the Borrower, (B) each Lender that is to make a Competitive Bid Advance as part of such Competitive Bid Borrowing, of the amount of each Competitive Bid Advance to be made by such Lender as part of such Competitive Bid Borrowing, and (C) each Lender that is to make a Competitive Bid Advance as part of such Competitive Bid Borrowing, upon receipt, that the Agent has received forms of documents appearing to fulfill the applicable conditions set forth in Article III. Each Lender that is to make a Competitive Bid Advance as part of such Competitive Bid Borrowing shall, before 12:00 noon (New York City time) on the date of such Competitive Bid Borrowing specified in the notice received from the Agent pursuant to clause (A) of the immediately preceding sentence or any later time when such Lender shall have received notice from the Agent pursuant to clause (C) of the immediately preceding sentence, make available for the account of its Applicable Lending Office to the Agent at the Agent's Account, in same day funds, such Lender's portion of such Competitive Bid Borrowing. Upon fulfillment of the applicable conditions set forth in Article III and after receipt by the Agent of such funds, the Agent will make such funds available to the Borrower at the Agent's address referred to in Section 8.02. Promptly after each Competitive Bid Borrowing the Agent will notify each Lender of the amount of the Competitive Bid Borrowing and the dates upon which such Competitive Bid Borrowing commenced and will terminate.

(vi) If the Borrower notifies the Agent that it accepts one or more of the offers made by any Lender or Lenders pursuant to clause (2) of Section 2.03(a)(iii), such notice of acceptance shall be irrevocable and binding on the Borrower. The Borrower shall indemnify each Lender against any loss, cost or expense incurred by such Lender as a result of any failure to fulfill on or before the date specified in the related Notice of Competitive Bid Borrowing for such Competitive Bid Borrowing the applicable conditions set forth in Article III, including, without limitation, any loss (including loss of anticipated profits), cost or expense incurred by reason of the liquidation or reemployment of deposits or other funds acquired by such Lender to fund the Competitive Bid Advance to be made by such Lender as part of such Competitive Bid Borrowing when such Competitive Bid Advance, as a result of such failure, is not made on such date.

(b) Each Competitive Bid Borrowing shall be in an aggregate amount of $10,000,000 or an integral multiple of $1,000,000 in excess thereof and, following the making of each Competitive Bid Borrowing, the Borrower shall be in compliance with the limitations set forth in the proviso to the first sentence of Section 2.03(a).

(c) Within the limits and on the conditions set forth in this Section 2.03, the Borrower may from time to time borrow under this Section 2.03, repay or prepay pursuant to Section 2.03(d), and reborrow under this Section 2.03, provided that a Competitive Bid Borrowing shall not be made within three Business Days of the date of any other Competitive Bid Borrowing.

(d) The Borrower shall repay to the Agent for the account of each Lender that has made a Competitive Bid Advance, on the maturity date of each Competitive Bid Advance (such maturity date being that specified by the Borrower for repayment of such Competitive Bid Advance in the related Notice of Competitive Bid Borrowing delivered pursuant to Section 2.03(a)(i) and provided in the Competitive Bid Note evidencing such Competitive Bid Advance), the then unpaid principal amount of such Competitive Bid Advance. The Borrower shall have no right to prepay any principal amount of any Competitive Bid Advance unless, and then only on the terms, specified by the Borrower for such Competitive Bid Advance in the related Notice of Competitive Bid Borrowing delivered pursuant to Section 2.03(a)(i) and set forth in the Competitive Bid Note evidencing such Competitive Bid Advance.

(e) The Borrower shall pay interest on the unpaid principal amount of each Competitive Bid Advance from the date of such Competitive Bid Advance to the date the principal amount of such Competitive Bid Advance is repaid in full, at the rate of interest for such Competitive Bid Advance specified by the Lender making such Competitive Bid Advance in its notice with respect thereto delivered pursuant to Section 2.03(a)(ii), payable on the interest payment date or dates specified by the Borrower for such Competitive Bid Advance in the related Notice of Competitive Bid Borrowing delivered pursuant to Section 2.03(a)(i), as provided in the Competitive Bid Note evidencing such Competitive Bid Advance. Upon the occurrence and during the continuance of an Event of Default under Section 6.01(a), the Borrower shall pay interest on the amount of unpaid principal of and interest on each Competitive Bid Advance owing to a Lender, payable in arrears on the date or dates interest is payable thereon, at a rate per annum equal at all times to 2% per annum above the rate per annum required to be paid on such Competitive Bid Advance under the terms of the Competitive Bid Note evidencing such Competitive Bid Advance unless otherwise agreed in such Competitive Bid Note.

(f) The indebtedness of the Borrower resulting from each Competitive Bid Advance as part of a Competitive Bid Borrowing shall be evidenced by a separate Competitive Bid Note payable to the order of the Lender making such Competitive Bid Advance.

SECTION 2.04. Issuance of and Drawings and Reimbursement Under Letters of Credit. (a) Request for Issuance. (i) Each Letter of Credit shall be issued upon notice, given not later than 11:00 A.M. (New York City time) on the fifth Business Day prior to the date of the proposed issuance of such Letter of Credit, by the Borrower to the Issuing Bank, which shall give the Agent and each Lender prompt notice thereof by telex, telecopier or cable. Each such notice of issuance of a Letter of Credit (a "Notice of Issuance") shall be by telex, telecopier or cable, confirmed immediately in writing, specifying therein the requested (A) date of such issuance (which shall be a Business Day), (B) Available Amount of such Letter of Credit, (C) expiration date of such Letter of Credit, (D) name and address of the beneficiary of such Letter of Credit and (E) form of such Letter of Credit, and shall be accompanied by such

application and agreement for letter of credit as the Issuing Bank may reasonably specify to the Borrower for use in connection with such requested Letter of Credit (a "Letter of Credit Agreement"). If the requested form of such Letter of Credit is acceptable to the Issuing Bank in its sole discretion, the Issuing Bank will, upon fulfillment of the applicable conditions set forth in Article III, make such Letter of Credit available to the Borrower at its office referred to in Section 8.02 or as otherwise agreed with the Borrower in connection with such issuance. In the event and to the extent that the provisions of any Letter of Credit Agreement shall conflict with this Agreement, the provisions of this Agreement shall govern.

(b) Participations. By the issuance of a Letter of Credit (or an amendment to a Letter of Credit increasing the amount thereof) and without any further action on the part of the Issuing Bank or the Lenders, the Issuing Bank hereby grants to each Lender, and each Lender hereby acquires from the Issuing Bank, a participation in such Letter of Credit equal to such Lender's Pro Rata Share of the aggregate amount available to be drawn under such Letter of Credit. The Borrower hereby agrees to each such participation. In consideration and in furtherance of the foregoing, each Lender hereby absolutely and unconditionally agrees to pay to the Agent, for the account of the Issuing Bank, such Lender's Pro Rata Share of each Letter of Credit Advance made by the Issuing Bank and not reimbursed by the Borrower on the date made, or of any reimbursement payment required to be refunded to the Borrower for any reason. Each Lender acknowledges and agrees that its obligation to acquire participations pursuant to this paragraph in respect of Letters of Credit is absolute and unconditional and shall not be affected by any circumstance whatsoever, including any amendment, renewal or extension of any Letter of Credit or the occurrence and continuance of a Default or reduction or termination of the Revolving Commitments, and that each such payment shall be made without any offset, abatement, withholding or reduction whatsoever.

(c) Drawing and Reimbursement. The payment by the Issuing Bank of a draft drawn under any Letter of Credit shall constitute for all purposes of this Agreement the making by the Issuing Bank of a Letter of Credit Advance, which shall be a Base Rate Advance, in the amount of such draft. Upon written demand by the Issuing Bank, with a copy of such demand to the Agent, each Lender shall pay to the Agent such Lender's Pro Rata Share of such outstanding Letter of Credit Advance, by making available for the account of its Applicable Lending Office to the Agent for the account of the Issuing Bank, by deposit to the Agent's Account, in same day funds, an amount equal to the portion of the outstanding principal amount of such Letter of Credit Advance to be funded by such Lender. Promptly after receipt thereof, the Agent shall transfer such funds to the Issuing Bank. Each Lender agrees to fund its Pro Rata Share of an outstanding Letter of Credit Advance on (i) the Business Day on which demand therefor is made by the Issuing Bank, *provided* that notice of such demand is given not later than 11:00 A.M. (New York City time) on such Business Day, or (ii) the first Business Day next succeeding such demand if notice of such demand is given after such time. If and to the extent that any Lender shall not have so made the amount of such Letter of Credit Advance available to the Agent, such Lender agrees to pay to the Agent (such agreement to pay being a "Reimbursement Agreement") forthwith on demand such amount together with interest thereon, for each day from the date of demand by the Issuing Bank until the date such amount is paid to the Agent, at the Federal Funds Rate for its account or the account of the Issuing Bank, as applicable. If such Lender shall pay to the Agent such amount for the account of the Issuing Bank on any Business Day, such amount so paid in respect of principal shall constitute a Letter of Credit Advance made by such Lender on

such Business Day for purposes of this Agreement, and the outstanding principal amount of the Letter of Credit Advance made by the Issuing Bank shall be reduced by such amount on such Business Day.

(d) Letter of Credit Reports. The Issuing Bank shall furnish (A) to the Agent on the first Business Day of each week a written report summarizing issuance and expiration dates of Letters of Credit issued during the previous week and drawings during such week under all Letters of Credit, (B) to each Lender on the first Business Day of each month a written report summarizing issuance and expiration dates of Letters of Credit during the preceding month and drawings during such month under all Letters of Credit and (C) to the Agent and each Lender on the first Business Day of each calendar quarter a written report setting forth the average daily aggregate Available Amount during the preceding calendar quarter of all Letters of Credit.

(e) Failure to Make Letter of Credit Advances. The failure of any Lender to make the Letter of Credit Advance to be made by it on the date specified in Section 2.04(c) shall not relieve any other Lender of its obligation hereunder to make its Letter of Credit Advance on such date, but no Lender shall be responsible for the failure of any other Lender to make the Letter of Credit Advance to be made by such other Lender on such date.

SECTION 2.05. Fees. (a) Facility Fee. The Borrower agrees to pay to the Agent for the account of each Lender a facility fee on the aggregate amount of such Lender's Revolving Commitment from (i) the Restatement Effective Date, in the case of each Initial Lender, and (ii) the later of the Restatement Effective Date and the effective date specified in the Assumption Agreement or the Assignment and Acceptance pursuant to which it became a Lender, in the case of each other Lender, until the Termination Date at a rate per annum equal to the Applicable Percentage in effect from time to time, payable in arrears quarterly on the last day of each March, June, September and December, commencing September 30, 2001, and on the Termination Date.

(b) Letter of Credit Fees (i) The Borrower shall pay to the Agent for the account of each Lender a commission on such Lender's Pro Rata Share of the average daily aggregate Available Amount of all Letters of Credit outstanding from time to time at a rate per annum equal to 0.60% per annum over the Applicable Margin for Eurodollar Rate Advances in effect from time to time, payable in arrears quarterly on the last day of each March, June, September and December, commencing September 30, 2001, and on the Termination Date.

(ii) The Borrower shall pay to the Issuing Bank, for its own account, such commissions, issuance fees, transfer fees and other fees and charges in connection with the issuance or administration of each Letter of Credit as the Borrower and the Issuing Bank shall agree.

(c) Agent's Fees. The Borrower shall pay to the Agent for its own account such fees as may from time to time be agreed between the Borrower and the Agent.

SECTION 2.06. Termination, Reduction or Increase of the Commitments. (a) Termination or Reduction. The Borrower shall have the right, upon at least three Business Days' notice to the Agent, to terminate in whole or reduce ratably in part the Unused Commitments of

the Lender Parties, provided that (i) each partial reduction shall be in the aggregate amount of $10,000,000 or an integral multiple of $1,000,000 in excess thereof and (ii) once terminated, a Commitment may not be reinstated except as provided in Section 2.06(b).

(b) Increase in Aggregate of the Commitments. (i) The Borrower may at any time, by notice to the Agent, propose that the aggregate amount of the Commitments be increased (such aggregate amount being, a "Commitment Increase"), effective as at a date prior to the Termination Date (an "Increase Date") as to which agreement is to be reached by an earlier date specified in such notice (a "Commitment Date"); provided, however, that (A) the Borrower may not propose more than one Commitment Increase in any twelve month period, (B) the minimum proposed Commitment Increase per notice shall be $50,000,000, (C) in no event shall the aggregate amount of the Commitments at any time exceed $2,500,000,000, (D) the Borrower has a Public Debt Rating from at least one of Moody's and S&P of better than or equal to Baa2 and BBB, respectively, (E) no Default shall have occurred and be continuing on such Increase Date and (F) a certificate as to corporate authorization and other appropriate documentation is received by the Agent. The Agent shall notify the Lender Parties thereof promptly upon its receipt of any such notice. The Agent agrees that it will cooperate with the Borrower in discussions with the Lenders, the Issuing Bank and other Eligible Assignees with a view to arranging the proposed Commitment Increase through the increase of the Commitments of one or more of the Lenders and the Issuing Bank (each such Lender and the Issuing Bank that are willing to increase their respective Commitments hereunder being the "Increasing Lenders") and, with the consent of the Borrower (which consent may be withheld in the Borrower's sole and absolute discretion), the addition of one or more other Eligible Assignees as Assuming Lenders and as parties to this Agreement; provided, however, that it shall be in each Lender's and the Issuing Bank's sole discretion whether to increase its Commitment hereunder in connection with the proposed Commitment Increase; and provided further that the minimum Commitment of each such Assuming Lender that becomes a party to this Agreement pursuant to this Section 2.06(b), shall be at least equal to $20,000,000. If any of the Lenders agree to increase their respective Commitments by an aggregate amount in excess of the proposed Commitment Increase, the proposed Commitment Increase shall be allocated among such Lenders as determined at such time by the Borrower. If agreement is reached on or prior to the applicable Commitment Date with any Increasing Lenders and Assuming Lenders as to a Commitment Increase (which may be less than but not greater than specified in the applicable notice from the Borrower), such agreement to be evidenced by a notice in reasonable detail from the Borrower to the Agent on or prior to the applicable Commitment Date, such Assuming Lenders, if any, shall become Lenders hereunder as of the applicable Increase Date and the Commitments of such Increasing Lenders and such Assuming Lenders shall become or be, as the case may be, as of the Increase Date, the amounts specified in such notice; provided that:

(1) the Agent shall have received (with copies for each such Lender, including each such Assuming Lender) by no later than 10:00 A.M. (New York City time) on the applicable Increase Date a copy certified by the Secretary, an Assistant Secretary or a comparable officer of the Borrower, of the resolutions adopted by the Board of Directors of the Borrower authorizing such Commitment Increase;

(2) each such Assuming Lender shall have delivered to the Agent by no later than 10:00 A.M. (New York City time) on such Increase Date, an appropriate

Assumption Agreement in substantially the form of Exhibit D hereto, duly executed by such Assuming Lender and the Borrower; and

(3) each such Increasing Lender shall have delivered to the Agent by no later than 10:00 A.M. (New York City time) on such Increase Date (y) its existing Revolving Credit Note and (z) confirmation in writing satisfactory to the Agent as to its increased Commitment.

(ii) In the event that the Agent shall have received notice from the Borrower as to its agreement to a Commitment Increase on or prior to the applicable Commitment Date and each of the actions provided for in clauses (1) through (3) of Section 2.06(b)(i) shall have occurred prior to 10:00 A.M. (New York City time) on the applicable Increase Date to the satisfaction of the Agent, the Agent shall notify the Lenders (including any Assuming Lenders), the Issuing Bank and the Borrower of the occurrence of such Commitment Increase by telephone, confirmed immediately in writing, telecopier, telex or cable and in any event no later than 1:00 P.M. (New York City time) on such Increase Date and shall record in the Register the relevant information with respect to each Increasing Lender and Assuming Lender. Each Increasing Lender and each Assuming Lender shall, before 2:00 P.M. (New York City time) on the applicable Increase Date, make available for the account of its Applicable Lending Office to the Agent at the Agent's Account, in same day funds, in the case of such Assuming Lender, an amount equal to such Assuming Lender's ratable portion of the Revolving Credit Borrowings then outstanding (calculated based on its Commitment as a percentage of the aggregate Commitments outstanding after giving effect to the relevant Commitment Increase) and, in the case of such Increasing Lender, an amount equal to the excess of (A) such Increasing Lender's ratable portion of the Revolving Credit Borrowings then outstanding (calculated based on its Commitment as a percentage of the aggregate Commitments outstanding after giving effect to the relevant Commitment Increase) over (B) such Increasing Lender's ratable portion of the Revolving Credit Borrowings then outstanding (calculated based on its Commitment (without giving effect to the relevant Commitment Increase) as a percentage of the aggregate Commitments (without giving effect to the relevant Commitment Increase)). After the Agent's receipt of such funds from each such Increasing Lender and each such Assuming Lender, the Agent will promptly thereafter cause to be distributed like funds to the other Lenders for the account of their respective Applicable Lending Offices in an amount to each other Lender such that the aggregate amount of the outstanding Revolving Credit Advances and Letter of Credit Advances owing to each Lender after giving effect to such distribution equals such Lender's ratable portion of the Revolving Credit Borrowings and Letter of Credit Advances then outstanding (calculated based on its Commitment as a percentage of the aggregate Commitments outstanding after giving effect to the relevant Commitment Increase). Within five Business Day after the Borrower receives notice from the Agent, the Borrower, at its own expense, shall execute and deliver to the Agent, Revolving Credit Notes dated as of the applicable Increase Date and payable to the order of each Assuming Lender, if any, and each Increasing Lender in a principal amount equal to such Lender's Commitment after giving effect to the relevant Commitment Increase, and substantially in the form of Exhibit A-1 hereto. The Agent, upon receipt of such Revolving Credit Notes, shall promptly deliver such Revolving Credit Notes to the respective Assuming Lenders and Increasing Lenders.

(iii) In the event that the Agent shall not have received notice from the Borrower as to such agreement on or prior to the applicable Commitment Date or the Borrower shall, by notice to the Agent prior to the applicable Increase Date, withdraw its proposal for a Commitment Increase or any of the actions provided for above in clauses (1) through (3) of Section 2.06(b)(i) shall not have occurred by 10:00 A.M. (New York City time) on the such Increase Date, such proposal by the Borrower shall be deemed not to have been made. In such event, any actions theretofore taken under clauses (1) through (3) of Section 2.06(b)(i) shall be deemed to be of no effect and all the rights and obligations of the parties shall continue as if no such proposal had been made.

SECTION 2.07. Repayment of Revolving Credit Advances and Letter of Credit Advances. (a) Revolving Credit Advances. The Borrower shall repay to the Agent for the ratable account of the Lenders on the Termination Date the aggregate principal amount of the Revolving Credit Advances then outstanding.

(b) Letter of Credit Advances. (i) The Borrower shall repay the outstanding principal amount of the each Letter of Credit Advance made by each Lender Party that has made a Letter of Credit Advance to the Agent for the ratable account of each such Lender Party on the earlier of demand and the Termination Date.

(ii) The obligations of the Borrower under this Agreement, any Letter of Credit Agreement and any other agreement or instrument relating to any Letter of Credit shall be unconditional and irrevocable, and shall be paid strictly in accordance with the terms of this Agreement, such Letter of Credit Agreement and such other agreement or instrument under all circumstances, including, without limitation, the following circumstances (it being understood that any such payment by the Borrower is without prejudice to, and does not constitute a waiver of, any rights the Borrower might have or might acquire as a result of the payment by any Lender of any draft or the reimbursement by the Borrower thereof):

(A) any lack of validity or enforceability of this Agreement, any Note, any Letter of Credit Agreement, any Letter of Credit or any other agreement or instrument relating thereto (all of the foregoing being, collectively, the "L/C Related Documents");

(B) any change in the time, manner or place of payment of, or in any other term of, all or any of the obligations of the Borrower in respect of any L/C Related Document or any other amendment or waiver of or any consent to departure from all or any of the L/C Related Documents;

(C) the existence of any claim, set-off, defense or other right that the Borrower may have at any time against any beneficiary or any transferee of a Letter of Credit (or any Persons for which any such beneficiary or any such transferee may be acting), the Issuing Bank, any Agent, any Lender or any other Person, whether in connection with the transactions contemplated by the L/C Related Documents or any unrelated transaction;

(D) any statement or any other document presented under a 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;

(E) payment by the Issuing Bank under a Letter of Credit against presentation of a draft or certificate that does not strictly comply with the terms of such Letter of Credit;

(F) any exchange, release or non-perfection of any collateral, or any release or amendment or waiver of or consent to departure from any guarantee, for all or any of the obligations of the Borrower in respect of the L/C Related Documents; or

(G) any other circumstance or happening whatsoever, whether or not similar to any of the foregoing, including, without limitation, any other circumstance that might otherwise constitute a defense available to, or a discharge of, the Borrower or a guarantor.

SECTION 2.08. Interest. (a) Scheduled Interest. The Borrower shall pay interest on the unpaid principal amount of each Advance (other than a Competitive Bid Advance) owing to each Lender from the date of such Advance until such principal amount shall be paid in full, at the following rates per annum:

(i) Base Rate Advances. During such periods as such Advance is a Base Rate Advance, a rate per annum equal at all times to the sum of (A) the Base Rate in effect from time to time plus (B) the Applicable Margin in effect from time to time, payable in arrears quarterly on the last day of each March, June, September and December during such periods and on the date such Base Rate Advance shall be Converted or paid in full.

(ii) Eurodollar Rate Advances. During such periods as such Advance is a Eurodollar Rate Advance, a rate per annum equal at all times during each Interest Period for such Advance to the sum of (A) the Eurodollar Rate for such Interest Period for such Advance plus (B) the Applicable Margin in effect from time to time, payable in arrears on the last day of such Interest Period and, if such Interest Period has a duration of more than three months, on each day that occurs during such Interest Period every three months from the first day of such Interest Period and on the date such Eurodollar Rate Advance shall be Converted or paid in full.

(b) Default Interest. Upon the occurrence and during the continuance of an Event of Default under Section 6.01(a), the Borrower shall pay interest on (i) the unpaid principal amount of each Revolving Credit Advance and each Letter of Credit Advance owing to each Lender, payable in arrears on the dates referred to in Section 2.08(a)(i) or 2.08(a)(ii), at a rate per annum equal at all times to 2% per annum above the rate per annum required to be paid on such Advance pursuant to Section 2.08(a)(i) or 2.08(a)(ii) and (ii) to the fullest extent permitted by law, the amount of any interest, fee or other amount payable hereunder that is not paid when due, from the date such amount shall be due until such amount shall be paid in full, payable in arrears on the date such amount shall be paid in full and on demand, at a rate per annum equal at all times to 2% per annum above the rate per annum required to be paid on Base Rate Advances pursuant to Section 2.08(a)(i).

SECTION 2.09. Interest Rate Determination. (a) Each Reference Bank agrees to furnish to the Agent timely information for the purpose of determining each Eurodollar Rate and

each LIBO Rate. If any one or more of the Reference Banks shall not furnish such timely information to the Agent for the purpose of determining any such interest rate, the Agent shall determine such interest rate on the basis of timely information furnished by the remaining Reference Banks. The Agent shall give prompt notice to the Borrower and the Lenders of the applicable interest rate determined by the Agent for purposes of Section 2.08(a)(i) or 2.08(ii), and the rate, if any, furnished by each Reference Bank for the purpose of determining the interest rate under Section 2.08(a)(ii).

(b) If, with respect to any Eurodollar Rate Advances, the Required Lenders notify the Agent that the Eurodollar Rate for any Interest Period for such Advances will not adequately reflect the cost to such Required Lenders of making, funding or maintaining their respective Eurodollar Rate Advances for such Interest Period, the Agent shall forthwith so notify the Borrower and the Lenders, whereupon (i) each Eurodollar Rate Advance will automatically, on the last day of the then existing Interest Period therefor, Convert into a Base Rate Advance, and (ii) the obligation of the Lenders to make, or to Convert Revolving Credit Advances into, Eurodollar Rate Advances shall be suspended until the Agent shall notify the Borrower and the Lenders that the circumstances causing such suspension no longer exist.

(c) If the Borrower shall fail to select the duration of any Interest Period for any Eurodollar Rate Advances in accordance with the provisions contained in the definition of "Interest Period" in Section 1.01, the Agent will forthwith so notify the Borrower and the Lenders and such Advances will automatically, on the last day of the then existing Interest Period therefor, Convert into Base Rate Advances.

(d) On the date on which the aggregate unpaid principal amount of Eurodollar Rate Advances comprising any Borrowing shall be reduced, by payment or prepayment or otherwise, to less than $10,000,000, such Advances shall automatically Convert into Base Rate Advances.

(e) Upon the occurrence and during the continuance of any Event of Default under Section 6.01(a), (i) each Eurodollar Rate Advance will automatically, on the last day of the then existing Interest Period therefor, Convert into a Base Rate Advance and (ii) the obligation of the Lenders to make, or to Convert Advances into, Eurodollar Rate Advances shall be suspended.

(f) If fewer than two Reference Banks determine and furnish timely information to the Agent for determining the Eurodollar Rate or LIBO Rate for any Eurodollar Rate Advances or LIBO Rate Advances, as the case may be,

(i) the Agent shall forthwith notify the Borrower and the Lenders that the interest rate cannot be determined for such Eurodollar Rate Advances or LIBO Rate Advances, as the case may be,

(ii) with respect to Eurodollar Rate Advances, each such Advance will automatically, on the last day of the then existing Interest Period therefor, Convert into a Base Rate Advance (or if such Advance is then a Base Rate Advance, will continue as a Base Rate Advance), and

(iii) the obligation of the Lenders to make Eurodollar Rate Advances or LIBO Rate Advances or to Convert Revolving Credit Advances into Eurodollar Rate Advances shall be suspended until the Agent shall notify the Borrower and the Lenders that the circumstances causing such suspension no longer exist.

SECTION 2.10. Optional Conversion of Revolving Credit Advances. The Borrower may on any Business Day, upon notice given to the Agent not later than 11:00 A.M. (New York City time) on the third Business Day prior to the date of the proposed Conversion and subject to the provisions of Sections 2.09 and 2.13, Convert all Revolving Credit Advances of one Type comprising the same Borrowing into Revolving Credit Advances of the other Type; provided, however, that any Conversion of Eurodollar Rate Advances into Base Rate Advances shall be made only on the last day of an Interest Period for such Eurodollar Rate Advances and any Conversion of Base Rate Advances into Eurodollar Rate Advances shall be in an amount not less than $10,000,000. Each such notice of a Conversion shall, within the restrictions specified above, specify (a) the date of such Conversion, (b) the Revolving Credit Advances to be Converted and (c) if such Conversion is into Eurodollar Rate Advances, the duration of the initial Interest Period for each such Advance. Each notice of Conversion shall be irrevocable and binding on the Borrower.

SECTION 2.11. Optional Prepayments of Revolving Credit Advances and Letter of Credit Advances. The Borrower may, upon notice not later than 11:00 A.M. (New York City time) for Base Rate Advances and upon at least two Business Days' notice to the Agent for Eurodollar Rate Advances stating the proposed date and aggregate principal amount of the prepayment, and if such notice is given the Borrower shall, prepay the outstanding principal amount of the Revolving Credit Advances comprising part of the same Borrowing or the Letter of Credit Advances in whole or ratably in part, together with accrued interest to the date of such prepayment on the principal amount prepaid; provided, however, that (a) each partial prepayment shall be in an aggregate principal amount of $10,000,000 or an integral multiple of $1,000,000 in excess thereof and (b) in the event of any such prepayment of a Eurodollar Rate Advance, the Borrower shall be obligated to reimburse the Lenders in respect thereof pursuant to Section 8.04(c).

SECTION 2.12. Increased Costs. (a) If, due to either (i) the introduction of or any change in or in the interpretation of any law or regulation or (ii) the compliance with any written guideline or request from any central bank or other governmental authority (whether or not having the force of law), there shall be any increase in the cost to any Lender Party of agreeing to make or making, funding or maintaining Eurodollar Rate Advances or LIBO Rate Advances or of agreeing to issue or of issuing or maintaining or participating in Letters of Credit or of agreeing to make or of making or maintaining Letter of Credit Advances (excluding for purposes of this Section 2.12 any such increased costs resulting from (A) Taxes or Other Taxes (as to which Section 2.15 shall govern) and (B) changes in the basis of taxation of overall net income or overall gross income by the United States or by the foreign jurisdiction or state under the laws of which such Lender Party is organized or has its Applicable Lending Office or any political subdivision thereof), then the Borrower shall from time to time, upon demand by such Lender Party (with a copy of such demand to the Agent), pay to the Agent for the account of such Lender Party additional amounts sufficient to compensate such Lender Party for such increased cost (whether or not such increased costs arise prior to the receipt of written

notification from such central bank or other governmental authority); provided that the Borrower shall not be required to pay any such increased costs to the extent such increased costs accrued prior to the date that is six months prior to such notice. A certificate as to the amount of such increased cost, submitted to the Borrower and the Agent by such Lender Party, shall be conclusive and binding for all purposes, absent error in the calculation of such amount.

(b) If any Lender Party determines that compliance with any law or regulation or any written guideline or request from any central bank or other governmental authority (whether or not having the force of law) affects or would affect the amount of capital required or expected to be maintained by such Lender Party or any corporation controlling such Lender Party and that the amount of such capital is increased by or based upon the existence of such Lender Party's commitment to lend hereunder and other commitments of this type, then, upon demand by such Lender Party (with a copy of such demand to the Agent), the Borrower shall pay to the Agent for the account of such Lender Party, from time to time as specified by such Lender Party, additional amounts sufficient to compensate such Lender Party or such corporation (whether or not such amounts arise prior to the receipt of written notification from such central bank or other governmental authority) in the light of such circumstances, to the extent that such Lender Party reasonably determines such increase in capital to be allocable to the existence of such Lender Party's commitment to lend hereunder; provided that the Borrower shall not be required to compensate such Lender Party to the extent such amounts arose prior to the date that is six months prior to such notice. A certificate as to such amounts submitted to the Borrower and the Agent by such Lender Party shall be conclusive and binding for all purposes, absent error in the calculation of such amounts.

(c) Any Lender Party claiming any additional amounts payable pursuant to this Section 2.12 agrees to use reasonable efforts (consistent with its internal policy and legal and regulatory restrictions) to minimize such additional amounts and to change the jurisdiction of its Applicable Lending Office if the making of such a change would avoid the need for, or reduce the amount of, any additional amounts that may thereafter accrue and would not, in the reasonable judgment of such Lender Party, be otherwise notably disadvantageous to such Lender Party. The Borrower shall reimburse such Lender Party for such Lender Party's reasonable expenses incurred in connection with such change or in considering such a change in an amount not to exceed the Borrower's pro rata share of such expenses based on such Lender Party's Commitment and Advances to the Borrower and the total lending commitments and loans of such Lender Party to its similarly situated customers.

SECTION 2.13. Illegality. Notwithstanding any other provision of this Agreement, if any Lender Party shall notify the Agent that the introduction of or any change in or in the interpretation of any law or regulation makes it unlawful, or any central bank or other governmental authority having relevant jurisdiction asserts that it is unlawful, for any Lender Party or its Eurodollar Lending Office to perform its obligations hereunder to make Eurodollar Rate Advances or LIBO Rate Advances or to fund or maintain Eurodollar Rate Advances or LIBO Rate Advances hereunder, (a) each Eurodollar Rate Advance or LIBO Rate Advance, as the case may be, will automatically, upon such demand, Convert into a Base Rate Advance or an Advance that bears interest at the rate set forth in Section 2.08(a)(i), as the case may be, and (b) the obligation of the Lender Parties to make Eurodollar Rate Advances or LIBO Rate Advances or to Convert Revolving Credit Advances into Eurodollar Rate Advances shall be

suspended until the Agent shall notify the Borrower and the Lender Parties that the circumstances causing such suspension no longer exist.

SECTION 2.14. Payments and Computations. (a) The Borrower shall make each payment hereunder and under the Notes not later than 11:00 A.M. (New York City time) on the day when due in U.S. dollars to the Agent at the Agent's Account in same day funds. The Agent will promptly thereafter cause to be distributed like funds relating to the payment of principal or interest or facility fees ratably (other than amounts payable pursuant to Section 2.03, 2.12, 2.15 or 8.04(c)) to the Lender Parties for the account of their respective Applicable Lending Offices, and like funds relating to the payment of any other amount payable to any Lender Party to such Lender Party for the account of its Applicable Lending Office, in each case to be applied in accordance with the terms of this Agreement. Upon its acceptance of an Assignment and Acceptance and recording of the information contained therein in the Register pursuant to Section 8.07(c), from and after the effective date specified in such Assignment and Acceptance, the Agent shall make all payments hereunder and under the Notes in respect of the interest assigned thereby to the Lender Party assignee thereunder, and the parties to such Assignment and Acceptance shall make all appropriate adjustments in such payments for periods prior to such effective date directly between themselves. Upon any Assuming Lender becoming a Lender Party hereunder as a result of a Commitment Increase pursuant to Section 2.06(b) and upon the Agent's receipt of such Lender Party's Assumption Agreement and recording the information contained therein in the Register, from and after the applicable Increase Date, the Agent shall make all payments hereunder and under the Notes in respect of the interest assumed thereby to such Assuming Lender.

(b) All computations of interest based on the Base Rate shall be made by the Agent on the basis of a year of 365 or 366 days, as the case may be, and all computations of interest based on the Eurodollar Rate, LIBO Rate or the Federal Funds Rate and of fees or Letter of Credit commissions shall be made by the Agent on the basis of a year of 360 days, in each case for the actual number of days (including the first day but excluding the last day) occurring in the period for which such interest, fees or commissions are payable. Each determination by the Agent of an interest rate hereunder shall be conclusive and binding for all purposes, absent error in the calculation of such interest rate.

(c) Whenever any payment hereunder or under the Notes shall be stated to be due on a day other than a Business Day, such payment shall be made on the next succeeding Business Day, and such extension of time shall in such case be included in the computation of payment of interest or facility fee, as the case may be; provided, however, that, if such extension would cause payment of interest on or principal of Eurodollar Rate Advances or LIBO Rate Advances to be made in the next following calendar month, such payment shall be made on the next preceding Business Day.

(d) Unless the Agent shall have received notice from the Borrower prior to the date on which any payment is due to the any Lender Party hereunder that the Borrower will not make such payment in full, the Agent may assume that the Borrower has made such payment in full to the Agent on such date and the Agent may, in reliance upon such assumption, cause to be distributed to each Lender Party on such due date an amount equal to the amount then due such Lender Party. If and to the extent the Borrower shall not have so made such payment in full to

the Agent, each Lender Party shall repay to the Agent forthwith on demand such amount distributed to such Lender Party together with interest thereon, for each day from the date such amount is distributed to such Lender Party until the date such Lender Party repays such amount to the Agent, at the Federal Funds Rate.

SECTION 2.15. Taxes. (a) Subject to Sections 2.15(e) and 2.15(f), any and all payments by the Borrower hereunder or under the Notes shall be made, in accordance with Section 2.14, free and clear of and without deduction for any and all present or future taxes, levies, imposts, deductions, charges or withholdings, and all liabilities with respect thereto imposed by the United States or any political subdivision thereof (or in the case of any payments by or behalf of the Borrower through an account or branch outside the United States or by or on behalf of the Borrower by a payor that is not a United States person, such payments shall be made free and clear of and without deduction for any and all present or future taxes, levies, imposts, deductions, charges or withholdings, and all liabilities with respect thereto imposed by a foreign jurisdiction or any political subdivision thereof), excluding, in the case of each Lender Party and the Agent, taxes imposed on its overall net income, and franchise taxes imposed on it in lieu of net income taxes (all such non-excluded taxes, levies, imposts, deductions, charges, withholdings and liabilities in respect of payments hereunder or under the Notes being hereinafter referred to as "Taxes"). Subject to Sections 2.15(e) and 2.15(f), if the Borrower shall be required by law to deduct any Taxes from or in respect of any sum payable hereunder or under any Note to any Lender Party or the Agent, (i) the sum payable shall be increased as may be necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section 2.15) such Lender Party or the Agent (as the case may be) receives an amount equal to the sum it would have received had no such deductions been made, (ii) the Borrower shall make such deductions and (iii) the Borrower shall pay the full amount deducted to the relevant taxation authority or other authority in accordance with applicable law. Within 30 days after the date of any payment of Taxes, the Borrower shall furnish to the Agent, at its address referred to in Section 8.02, the original or a certified copy of a receipt evidencing payment thereof. For purposes of this Section 2.15(a) and Section 2.15(e), the terms "United States" and "United States person" shall have the meanings specified in Section 7701 of the Internal Revenue Code.

(b) In addition, the Borrower agrees to pay any stamp or documentary taxes or any other excise or property taxes, charges or similar levies that arise from any payment made hereunder or under the Notes or from the execution, delivery or registration of, performing under, or otherwise with respect to, this Agreement or the Notes as a result of the introduction of, any change in, or any change in the interpretation of, any law or regulation after the Restatement Effective Date (hereinafter referred to as "Other Taxes").

(c) Subject to Sections 2.15(d), 2.15(e) and 2.15(f), the Borrower shall indemnify each Lender Party and the Agent for the full amount of Taxes or Other Taxes (to the extent not previously paid under Section 2.15(a) or 2.15(b)) imposed on or paid by such Lender Party or the Agent (as the case may be) and any liability (including penalties, interest and expenses but excluding any taxes imposed by any jurisdiction on amounts payable under this Section 2.15) arising therefrom or with respect thereto. This indemnification shall be made within 30 days from the date such Lender Party or the Agent (as the case may be) makes written demand therefor.

(d) Each Lender Party organized under the laws of a jurisdiction outside the United States, on or prior to the date of its execution and delivery of this Agreement in the case of each Initial Lender Party and on the date of the Assumption Agreement or the Assignment and Acceptance, as the case may be, pursuant to which it becomes a Lender Party in the case of each other Lender Party, and from time to time thereafter as requested in writing by the Borrower (but only so long as such Lender Party remains lawfully able to do so), shall provide each of the Agent and the Borrower with two properly and accurately completed and duly executed original Internal Revenue Service forms W-8BEN or W-8ECI, as appropriate, or any successor or other form prescribed by the Internal Revenue Service, establishing that payments to such Lender Party are not subject to United States federal withholding tax under the Internal Revenue Code because such payment is either effectively connected with the conduct by such Lender Party of a trade or business in the United States or totally exempt from United States federal withholding tax by reason of the application of an income tax treaty to which the United States is a party. If any Lender Party which is organized under the laws of a jurisdiction outside the United States is unable to provide the above-described forms for a relevant interest period (or if the Lender Party's appropriate personnel responsible for providing the forms actually become aware that the forms provided by it are inaccurate), such Lender Party shall notify the Borrower in writing prior to or immediately upon the commencement of such relevant interest period.

(e) For any period with respect to which a Lender Party has failed to provide the Borrower with the appropriate form described in Section 2.15(d) (other than if such failure is due to a change in law occurring subsequent to the date on which a form originally was required to be provided, or if such form is no longer required to establish an exemption from United States federal withholding tax), such Lender Party shall not be entitled to indemnification under Section 2.15(a) or 2.15(c) with respect to Taxes imposed by the United States by reason of such failure and the Borrower shall be entitled to withhold Taxes from payments to such Lender Party; provided, however, that should a Lender Party become subject to Taxes because of its failure to deliver a form required hereunder, the Borrower shall take such steps at such Lender Party's expense as such Lender Party shall reasonably request to assist such Lender Party to recover such Taxes.

(f) Notwithstanding anything else contained in this Section 2.15, the Borrower shall only be required to pay additional sums with respect to Taxes (subject to Section 2.15(h)), to a Lender Party (or the Agent, as the case may be) pursuant to Section 2.15(a) or 2.15(c) if the obligation to pay such Taxes results from such Lender Party's inability to obtain a complete exemption from Taxes as a result of (i) any amendment to the laws (or any regulations thereunder), or any amendment to, or change in, an interpretation or application of any such laws or regulations by any legislative body, court, governmental agency or regulatory authority adopted or enacted after the date hereof (or in the case of an entity that becomes a Lender Party after the date hereof, the date such entity becomes a Lender Party), (ii) an amendment, modification or revocation of any existing applicable tax treaty ratified, enacted or amended after the date hereof (or in the case of an entity that becomes a Lender Party after the date hereof, the date such entity becomes a Lender Party), or (iii) the ratification of a new tax treaty ratified after the date hereof (or in the case of an entity that becomes a Lender Party after the date hereof, the date such entity becomes a Lender Party).

(g) In the event that the Borrower makes an additional payment under Section 2.15(a) or 2.15(c) for the account of any Lender Party and such Lender Party, in its sole opinion, determines that it has finally and irrevocably received or been granted a credit against, or relief or remission from, or repayment of, any tax paid or payable by it in respect of or calculated with reference to the deduction or withholding giving rise to such additional payment, such Lender Party shall, to the extent that it determines that it can do so without prejudice to the retention of the amount of such credit, relief, remission or repayment, pay to the Borrower such amount as such Lender Party shall, in its sole opinion, have determined is attributable to such deduction or withholding and will leave such Lender Party (after such payment) in no worse position than it would have been had the Borrower not been required to make such deduction or withholding. Nothing contained herein shall (i) interfere with the right of a Lender Party to arrange its tax affairs in whatever manner it thinks fit or (ii) oblige any Lender Party to claim any tax credit or to disclose any information relating to its tax affairs or any computations in respect thereof or (iii) require any Lender Party to take or refrain from taking any action that would prejudice its ability to benefit from any other credits, reliefs, remissions or repayments to which it may be entitled. Each Lender Party and the Agent shall reasonably cooperate with the Borrower at the Borrower's written request and sole expense, in contesting any Tax or Other Tax the Borrower would bear pursuant to this Section 2.15, provided, however, that (A) no tax return of such Lender Party or the Agent is or would be held open as a result of such contest, (B) neither such Lender Party nor the Agent is required to reopen a tax year that has already closed and (C) such Lender Party and the Agent shall, in the sole opinions of such Lender Party and the Agent, respectively, have determined that such contest will leave such Lender Party and the Agent, respectively, in no worse position than it would have been in had it not contested such Tax or Other Tax. Nothing contained herein shall interfere with the right of a Lender Party or the Agent to arrange its tax affairs in whatever manner it thinks fit, if in the sole judgment of such Lender Party or the Agent, such contest would be disadvantageous to such Lender Party or the Agent. In pursuing a contest in any Lender Party's or the Agent's name, such Lender Party or the Agent will be represented by counsel of such Lender Party's or the Agent's choice, and will defend against, settle or otherwise control the contest and will not relinquish control or decision making over the contest.

(h) Any Lender Party claiming any additional amounts payable pursuant to this Section 2.15 agrees to use reasonable efforts (consistent with its internal policy and legal and regulatory restrictions) to minimize such additional amounts and to change the jurisdiction of its Eurodollar Lending Office if the making of such a change would avoid the need for, or reduce the amount of, any additional amounts that may thereafter accrue and would not, in the reasonable judgment of such Lender Party, be otherwise notably disadvantageous to such Lender Party. The Borrower shall reimburse such Lender Party for such Lender Party's reasonable expenses incurred in connection with such change or in considering such a change in an amount not to exceed the Borrower's pro rata share of such expenses based on such Lender Party's Commitment and Advances to the Borrower and the total lending commitments and loans of such Lender Party to its similarly situated customers.

SECTION 2.16. Sharing of Payments, Etc. If any Lender Party shall obtain any payment (whether voluntary, involuntary, through the exercise of any right of set-off, or otherwise) on account of the Revolving Credit Advances or Letter of Credit Advances owing to it (other than pursuant to Section 2.12, 2.15, 8.01(b), 8.04(c) or 8.07) in excess of its ratable

share of payments on account of the Revolving Credit Advances and Letter of Credit Advances obtained by all the Lender Parties, such Lender Party shall forthwith purchase from the other Lender Parties such participations in the Revolving Credit Advances and Letter of Credit Advances owing to them as shall be necessary to cause such purchasing Lender Party to share the excess payment ratably with each of them; provided, however, that if all or any portion of such excess payment is thereafter recovered from such purchasing Lender Party, such purchase from each Lender Party shall be rescinded and such Lender Party shall repay to the purchasing Lender Party the purchase price to the extent of such recovery together with an amount equal to such Lender Party's ratable share (according to the proportion of (a) the amount of such Lender Party's required repayment to (b) the total amount so recovered from the purchasing Lender Party) of any interest or other amount paid or payable by the purchasing Lender Party in respect of the total amount so recovered. The Borrower agrees that any Lender Party so purchasing a participation from another Lender Party by delivering payment pursuant to this Section 2.16 may, to the fullest extent permitted by law, exercise all its rights of payment (including the right of set-off) with respect to such participation as fully as if such Lender Party were the direct creditor of the Borrower in the amount of such participation.

SECTION 2.17. Use of Proceeds. The proceeds of the Advances and issuances of Letters of Credit shall be available (and the Borrower agrees that it shall use such proceeds and Letters of Credit) solely for general corporate purposes of the Borrower and its Subsidiaries, including, without limitation, as a commercial paper backstop, provided that such proceeds shall not be used for the purpose of purchasing or carrying margin stock (within the meaning of Regulation U issued by the Board of Governors of the Federal Reserve System).

ARTICLE III
CONDITIONS TO EFFECTIVENESS AND LENDING AND ISSUANCES

SECTION 3.01. Conditions Precedent to Effectiveness of Sections 2.01 and 2.03. Sections 2.01 and 2.03 of this Agreement shall become effective on and as of the first date (the "Restatement Effective Date") on which the following conditions precedent have been satisfied:

(a) The Borrower shall have paid all invoiced fees and expenses of the Agent and the Lender Parties (including the invoiced fees and expenses of counsel to the Agent).

(b) On the Restatement Effective Date, the following statements shall be true and the Agent shall have received for the account of each Lender Party a certificate signed by a duly authorized officer of the Borrower, dated the Restatement Effective Date, stating that:

(i) the representations and warranties contained in Section 4.01 are correct on and as of the Restatement Effective Date; and

(ii) no event has occurred and is continuing that constitutes a Default.

(c) The Agent shall have received on or before the Restatement Effective Date the following, each dated the Restatement Effective Date, in form and substance satisfactory to the Agent and (except for the Revolving Credit Notes) in sufficient copies for each Lender Party:

(i) the Revolving Credit Notes to the order of the Lenders, respectively;

(ii) certified copies of the resolutions of the Board of Directors of the Borrower approving the transactions contemplated by this Agreement and the Notes, and of all documents evidencing other necessary corporate action and governmental approvals, if any, with respect to this Agreement and such Notes;

(iii) a certificate of the Secretary or an Assistant Secretary of the Borrower certifying the names and true signatures of the officers of the Borrower authorized to sign this Agreement and the Notes and the other documents to be delivered hereunder;

(iv) a favorable opinion of Burt Fealing, Assistant General Counsel for the Borrower, substantially in the form of Exhibit E hereto; and

(v) a favorable opinion of Shearman & Sterling, counsel for the Agent, in form and substance satisfactory to the Agent.

SECTION 3.02. Conditions Precedent to Each Revolving Credit Borrowing and each Issuance of Letters of Credit. The obligation of each Lender to make a Revolving Credit Advance on the occasion of each Revolving Credit Borrowing and the obligation of the Issuing Bank to issue a Letter of Credit shall be subject to the conditions precedent that the Restatement Effective Date shall have occurred and on the date of such Revolving Credit Borrowing or such issuance the following statements shall be true (and each of the giving of the applicable Notice of Revolving Credit Borrowing, Notice of Issuance and the acceptance by the Borrower of the proceeds of such Revolving Credit Borrowing or issuance of such Letter of Credit shall constitute a representation and warranty by the Borrower that on the date of such Borrowing or issuance such statements are true):

(a) the representations and warranties contained in Section 4.01 and in each Guaranty are correct on and as of such date, before and after giving effect to such Revolving Credit Borrowing or issuance and to the application of the proceeds therefrom, as though made on and as of such date (except to the extent that any such representation or warranty relates to a specific earlier date); and

(b) no event has occurred and is continuing, or would result from such Revolving Credit Borrowing, from such issuance or from the application of the proceeds therefrom, that constitutes a Default.

SECTION 3.03. Conditions Precedent to Each Competitive Bid Borrowing. The obligation of each Lender that is to make a Competitive Bid Advance on the occasion of a Competitive Bid Borrowing to make such Competitive Bid Advance as part of such Competitive Bid Borrowing is subject to the conditions precedent that (a) the Agent shall have received the written confirmatory Notice of Competitive Bid Borrowing with respect thereto, (b) on or before the date of such Competitive Bid Borrowing, but prior to such Competitive Bid Borrowing, the Agent shall have received a Competitive Bid Note payable to the order of such Lender for each of the one or more Competitive Bid Advances to be made by such Lender as part of such

Competitive Bid Borrowing, in a principal amount equal to the principal amount of the Competitive Bid Advance to be evidenced thereby and otherwise on such terms as were agreed to for such Competitive Bid Advance in accordance with Section 2.03, and (c) on the date of such Competitive Bid Borrowing the following statements shall be true (and each of the giving of the applicable Notice of Competitive Bid Borrowing and the acceptance by the Borrower of the proceeds of such Competitive Bid Borrowing shall constitute a representation and warranty by the Borrower that on the date of such Competitive Bid Borrowing such statements are true):

(i) the representations and warranties contained in Section 4.01 and in each Guaranty are correct on and as of the date of such Competitive Bid Borrowing, before and after giving effect to such Competitive Bid Borrowing and to the application of the proceeds therefrom, as though made on and as of such date (except to the extent that any such representation or warranty relates to a specific earlier date);

(ii) no event has occurred and is continuing, or would result from such Competitive Bid Borrowing or from the application of the proceeds therefrom, that constitutes a Default; and

(iii) no event has occurred and no circumstance exists as a result of which the information concerning the Borrower that has been provided to the Agent and each Lender Party by the Borrower in connection herewith would include an untrue statement of a material fact or omit to state any material fact or any fact necessary to make the statements contained therein, in the light of the circumstances under which they were made, not misleading.

SECTION 3.04. Determinations Under Section 3.01. For purposes of determining compliance with the conditions specified in Section 3.01, each Lender Party 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 the Lender Parties unless an officer of the Agent responsible for the transactions contemplated by this Agreement shall have received notice from such Lender Party prior to the date that the Borrower, by notice to the Lender Parties, designates as the proposed Restatement Effective Date, specifying its objection thereto. The Agent shall promptly notify the Lender Parties of the occurrence of the Restatement Effective Date.

ARTICLE IV
REPRESENTATIONS AND WARRANTIES

SECTION 4.01. Representations and Warranties of the Borrower. The Borrower represents and warrants as follows:

(a) The Borrower is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation.

(b) The execution, delivery and performance by the Borrower of this Agreement and the Notes, and the consummation of the transactions contemplated hereby, are within the Borrower's corporate powers, have been duly authorized by all necessary corporate action, and do not contravene (i) the Borrower's charter or by-laws (or other equivalent

organizational documents) or (ii) any law or contractual restriction binding on or affecting the Borrower.

(c) No authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body or any other third party is required for the due execution, delivery and performance by the Borrower of this Agreement or the Notes.

(d) This Agreement has been, and each of the Notes when delivered hereunder will have been, duly executed and delivered by the Borrower. Assuming that this Agreement has been duly executed and delivered by the Agent and each of the Initial Lender Parties, this Agreement is, and each of the Notes when delivered hereunder will be, the legal, valid and binding obligation of the Borrower enforceable against the Borrower in accordance with its terms, subject to (i) bankruptcy, insolvency, reorganization, moratorium and other similar laws of general application affecting the rights and remedies of creditors and secured parties and (ii) general principals of equity, regardless of whether applied in proceedings in equity or at law.

(e) The Consolidated balance sheet of the Borrower and its Subsidiaries as at December 31, 2000, and the related Consolidated statements of income and cash flows of the Borrower and its Subsidiaries for the fiscal year then ended, accompanied by an opinion of Arthur Andersen LLP, independent public accountants, and the Consolidated balance sheet of the Borrower and its Subsidiaries as at June 30, 2001, and the related Consolidated statements of income and cash flows of the Borrower and its Subsidiaries for the six months then ended, copies of which have been furnished to each Lender Party, fairly present, subject, in the case of said balance sheets as at June 30, 2001, and said statements of income and cash flows for the six months then ended, to year-end audit adjustments, the Consolidated financial condition of the Borrower and its Subsidiaries as at such dates and the Consolidated results of the operations of the Borrower and its Subsidiaries for the periods ended on such dates, all in accordance with generally accepted accounting principles consistently applied.

(f) There is no pending or (to the knowledge of the Borrower) threatened action or proceeding, including, without limitation, any Environmental Action, affecting the Borrower or any of its Subsidiaries before any court, governmental agency or arbitrator that is initiated by any Person other than a Lender Party in its capacity as a Lender Party that purports to affect the legality, validity or enforceability of this Agreement or any Note.

(g) Neither the Borrower nor any of its Subsidiaries is an Investment Company, as such term is defined in the Investment Company Act of 1940, as amended.

ARTICLE V
COVENANTS OF THE BORROWER

SECTION 5.01. Affirmative Covenants. So long as any Advance shall remain unpaid, any Lender Party shall have any Commitment hereunder or any Letter of Credit shall be outstanding, the Borrower will:

(a) Compliance with Laws, Etc. Comply, and cause each of its Subsidiaries to comply, in all material respects, with all applicable laws, rules, regulations and orders, such compliance to include, without limitation, compliance with ERISA and Environmental Laws, except where the failure to so comply would not have a Material Adverse Effect.

(b) Payment of Taxes, Etc. Pay and discharge, and cause each of its Subsidiaries to pay and discharge, before the same shall become delinquent, (i) all taxes, assessments and governmental charges or levies imposed upon it or upon its property and (ii) all lawful claims that, if unpaid, might by law become a Lien upon its property; provided, however, that neither the Borrower nor any of its Subsidiaries shall be required to pay or discharge any such tax, assessment, charge or claim that is being contested in good faith and by proper proceedings and as to which appropriate reserves are being maintained, unless and until any Lien resulting therefrom attaches to its property and becomes enforceable against its other creditors and the aggregate of such Liens would have a Material Adverse Effect.

(c) Maintenance of Insurance. Maintain, and cause each of its Subsidiaries to maintain, insurance with responsible and reputable insurance companies or associations in such amounts and covering such risks as is usually carried by companies engaged in similar businesses and owning similar properties in the same general areas in which the Borrower or such Subsidiary operates; provided, however, that each of the Borrower and its Subsidiaries may self-insure to the extent consistent with prudent business practice.

(d) Preservation of Corporate Existence, Etc. Preserve and maintain, and cause each of its Subsidiaries to preserve and maintain, its corporate existence, rights (charter and statutory) and franchises; provided, however, that the Borrower and its Subsidiaries may consummate any transaction permitted under Section 5.02(b) and provided further that neither the Borrower nor any of its Subsidiaries shall be required to preserve any right or franchise if the senior management of the Borrower or of such Subsidiary shall determine that the preservation thereof is no longer desirable in the conduct of the business of the Borrower or such Subsidiary, as the case may be, and that the loss thereof is not disadvantageous in any material respect to the Borrower or such Subsidiary.

(e) Visitation Rights. During normal business hours and upon not less than five days' notice, permit the Agent or any of the Lender Parties or any agents or representatives thereof, to examine and make copies of and abstracts from the records and books of account of (excluding any confidential information), and visit the properties of, the Borrower and any of its Subsidiaries, and to discuss the affairs, finances and accounts of the Borrower and any of its Subsidiaries with the appropriate representatives of the

Borrower and together with the appropriate representatives of the Borrower's independent certified public accountants, provided, however, that examination of the records of the Borrower shall occur only at times when an Advance or Advances shall be outstanding to the Borrower and provided, further, that the Agent and the Lender Parties may make copies of and abstracts from the records and books of account only at times when a Default has occurred and is continuing.

(f) Keeping of Books. Keep, and cause each of its Subsidiaries to keep, proper books of record and account, in which full and correct entries shall be made of all financial transactions and the assets and business of the Borrower and each such Subsidiary in accordance with generally accepted accounting principles in effect from time to time.

(g) Maintenance of Properties, Etc. Maintain and preserve, and cause each of its Subsidiaries to maintain and preserve, its properties that are used or useful in the conduct of its business in good working order and condition, ordinary wear and tear excepted.

(h) Transactions with Affiliates. Conduct, and cause each of its Subsidiaries to conduct, all transactions otherwise permitted under this Agreement with any of their Affiliates on terms that are fair and reasonable and no less favorable to the Borrower or such Subsidiary than it would obtain in a comparable arm's-length transaction with a Person not an Affiliate, except where the failure to do so, in the aggregate, would not have a Material Adverse Effect.

(i) Reporting Requirements. Furnish to the Lender Parties:

(i) As soon as available and in any event within 60 days after the end of each of the first three quarters of each fiscal year of the Borrower, the Consolidated balance sheet of the Borrower and its Subsidiaries as of the end of such quarter and the Consolidated statements of income and cash flows of the Borrower and its Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such quarter, duly certified (subject to year-end audit adjustments) by the chief financial officer, treasurer or controller of the Borrower as having been prepared in accordance with generally accepted accounting principles and certificates of the chief financial officer, treasurer or controller of the Borrower as to compliance with the terms of this Agreement and setting forth in reasonable detail the calculations necessary to demonstrate compliance with Section 5.03, provided that in the event of any change in GAAP used in the preparation of such financial statements, the Borrower shall also provide, if necessary for the determination of compliance with Section 5.03, a description of such change in GAAP and the effect of such change on the calculations required to make such determination of compliance;

(ii) as soon as available and in any event within 120 days after the end of each fiscal year of the Borrower, a copy of the annual audited report for such year for the Borrower and its Subsidiaries, containing the Consolidated balance sheet of the Borrower and its Subsidiaries as of the end of such fiscal year and the

Consolidated statements of income and cash flows of the Borrower and its Subsidiaries for such fiscal year, in each case accompanied by an opinion acceptable to the Required Lenders by Arthur Andersen LLP or other independent public accountants of nationally recognized standing, provided that in the event of any change in GAAP used in the preparation of such financial statements, the Borrower shall also provide, if necessary for the determination of compliance with Section 5.03, a description of such change in GAAP and the effect of such change on the calculations required to make such determination of compliance;

(iii) as soon as possible and in any event within five Business Days after the occurrence of each Default continuing on the date of such statement, a statement of the chief financial officer, treasurer or controller of the Borrower setting forth details of such Default and the action that the Borrower has taken and proposes to take with respect thereto;

(iv) promptly after the sending or filing thereof, copies of all quarterly and annual reports and proxy solicitations that the Borrower sends to any of its securityholders, and copies of all reports on Form 8-K that the Borrower files with the Securities and Exchange Commission (other than reports on Form 8-K filed solely for the purpose of incorporating exhibits into a registration statement previously filed with the Securities and Exchange Commission);

(v) prompt notice of all actions and proceedings before any court, governmental agency or arbitrator affecting the Borrower or any of its Subsidiaries of the type described in Section 3.01(b); and

(vi) such other information respecting the Borrower or any of its Subsidiaries as any Lender Party through the Agent may from time to time reasonably request.

Reports required to be delivered pursuant to clauses (i), (ii) and (iv) above shall be deemed to have been delivered on the date on which such report is posted on the SEC's website at www.sec.gov, and such posting shall be deemed to satisfy the reporting requirements of clauses (i), (ii) and (iv) above; provided that in every instance the Borrower shall provide paper copies of the certificate required by clauses (iii) and (v) above to the Agent and each of the Lender Parties until such time as the Agent shall provided the Borrower written notice otherwise.

(j) Covenant to Guarantee Obligations. Promptly and in any event within 10 days of either (i) the formation or acquisition of any new direct or indirect Material Subsidiary or (ii) the delivery of audited annual financial statements pursuant to Section 5.01(i) that indicate that a Subsidiary of the Borrower that is not at such time a guarantor is a Material Subsidiary, at the Borrower's expense, cause such Material Subsidiary to duly execute and deliver to the Agent a guaranty in substantially the form of Exhibit F hereto (a "Guaranty") or Guaranty Supplement (as defined in the Guaranty), together with such documents as the Required Lenders may request evidencing corporate action taken to authorize such execution and delivery, the incumbency and signatures of officers of

such Material Subsidiary and a signed copy of a favorable opinion, addressed to the Agent and the Lender Parties, of counsel for the Borrower reasonably acceptable to the Agent as to (A) such Guaranties and Guaranty Supplements being legal, valid and binding obligations of each Person party thereto, enforceable in accordance with their terms, subject to (1) bankruptcy, insolvency, reorganization, moratorium and other similar laws of general application affecting the rights and remedies of creditors and secured parties and (2) general principles of equity, regardless of whether applied in proceedings in equity or at law, and (B) such other matters as the Required Lenders may reasonably request.

SECTION 5.02. Negative Covenants. So long as any Advance shall remain unpaid, any Lender Party shall have any Commitment hereunder or any Letter of Credit shall be outstanding, the Borrower will not:

(a) Liens, Etc. Create or suffer to exist, or permit any Subsidiary to create or suffer to exist, any Lien on or with respect to any of its properties, whether now owned or hereafter acquired, or on any of the income or profits therefrom, unless it shall have made effective provision whereby the Advances shall be secured by such Lien equally and ratably with any and all obligations and Debt so secured so long as such obligations and Debt are so secured; provided that nothing in this Section 5.02 shall be construed to prevent or restrict the following:

(i) Permitted Liens;

(ii) purchase money Liens (including mortgages, conditional sales, capital leases and any other title retention, deferred purchase or vendor financing device or arrangement) upon or in any real property or equipment acquired or held by the Borrower or any of its Subsidiaries in the ordinary course of business to secure the purchase price of such property or equipment or to secure Debt incurred solely for the purpose of financing the acquisition of such property or equipment if such Liens attach within 180 days after the date of such acquisition, or Liens existing on such property or equipment at the time of its acquisition, or conditional sales or other similar title retention agreements with respect to property hereafter acquired or extensions, renewals or replacements of any of the foregoing for the same or a lesser amount, provided, however, that no such Lien shall extend to or cover any properties of any character other than the real property or equipment being acquired, and no such extension, renewal or replacement shall extend to or cover any properties not theretofore subject to the Lien being extended, renewed or replaced;

(iii) the Liens existing on the Restatement Effective Date and described on Schedule 5.02(a) hereto;

(iv) Liens on property or assets of a Person existing at the time (A) such Person is merged into or consolidated with the Borrower or any of its Subsidiaries or (B) any property or assets of such Person is acquired by the Borrower or any of its Subsidiaries; provided that any such Liens that were

created during the period immediately prior to such merger, consolidation or acquisition were created in the ordinary course of business of such Person and the Debt secured by such Liens does not exceed the fair market value of the assets (including intangible assets) of such Person so merged into or consolidated with the Borrower or any of its Subsidiaries or so acquired by the Borrower or any of its Subsidiaries;

(v) the subordination of the Borrower's rights with respect to any Debt owed to the Borrower by any of its Subsidiaries to the right of any creditor of such Subsidiary for money or credit advanced to such Subsidiary;

(vi) the replacement, extension or renewal of any Lien permitted by clauses (iii) and (iv) above upon or in the same property theretofore subject thereto or the replacement, extension or renewal (without increase in the amount or extension of the final maturity date) of the Debt secured thereby;

(vii) Liens on deposits with banks, if such Liens are made in connection with loans made by such banks to any Subsidiaries of the Borrower so long as all such deposits subject to such Liens shall not in the aggregate exceed $35,000,000; and

(viii) other Liens securing Debt in an aggregate principal amount not to exceed $200,000,000 at any time outstanding; *provided* that no Liens permitted by this clause (viii) shall secure Debt owing to Verizon or any of its Affiliates.

(b) Mergers, Etc. Merge or consolidate with or into, or convey, transfer, lease or otherwise 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, any Person, or permit its Subsidiaries to merge or consolidate with or into, or convey, transfer, lease or otherwise dispose of (whether in one transaction or in a series of transactions) all or substantially all of their assets to, any Person (other than the Borrower or any Subsidiary), except that (i) any Person primarily engaged in the communications business may merge into or consolidate with the Borrower so long as the Borrower is the surviving corporation, (ii) the Subsidiaries may merge into, consolidate with or dispose of assets to Persons other than the Borrower and its Subsidiaries so long as, after giving effect to such transaction, the Subsidiaries, taken as a whole, have not disposed of all or substantially all of their assets, and (iii) the Borrower may merge with any of its Subsidiaries so long as the surviving corporation assumes all obligations of the Borrower hereunder and under the Notes and such surviving corporation has a Public Debt Rating from at least one of Moody's and S&P of better than or equal to Baa2 and BBB, respectively, provided, in each case, that no Default shall have occurred and be continuing at the time of such proposed transaction or would result therefrom.

(c) Accounting Changes. Make or permit, or permit any of its Subsidiaries to make or permit, any change in accounting policies or reporting practices, except (i) as required or permitted by GAAP or (ii) where the effect of such change, together with all other changes in accounting policies or reporting practices made pursuant to this

clause (ii) since the Restatement Effective Date, is immaterial to the Borrower and its Subsidiaries taken as a whole.

SECTION 5.03. Financial Covenant. So long as any Advance shall remain unpaid, any Lender Party shall have any Commitment hereunder or any Letter of Credit shall be outstanding, the Borrower shall maintain, at the end of each fiscal quarter, a ratio of (a) Consolidated Debt to (b) the sum of Consolidated Debt plus Consolidated Contributed Capital, of not more than 0.73:1.0.

ARTICLE VI
EVENTS OF DEFAULT

SECTION 6.01. Events of Default. If any of the following events ("Events of Default") shall occur and be continuing:

(a) the Borrower shall fail to pay any principal of any Advance when the same becomes due and payable; or the Borrower shall fail to pay any interest on any Advance or make any other payment of fees or other amounts payable under this Agreement or any Note within five Business Days after the same becomes due and payable; or

(b) any representation or warranty made or deemed made by the Borrower herein or by the Borrower (or any of its officers) in connection with this Agreement or by any Material Subsidiary in any Guaranty shall prove to have been incorrect in any material respect when made or deemed made; or

(c) (i) the Borrower shall fail to perform or observe any term, covenant or agreement contained in Section 5.01(d), 5.01(e), 5.01(h), 5.01(i)(iii) or 5.01(i)(v), 5.02 or 5.03, or (ii) the Borrower shall fail to perform or observe any term, covenant or agreement contained in Section 5.01(i) (other than clauses (iii) and (v) thereof) if such failure shall remain unremedied for five Business Days after written notice thereof shall have been given to the Borrower by the Agent or any Lender Party, or (iii) the Borrower shall fail to perform or observe any other term, covenant or agreement contained in this Agreement on its part to be performed or observed if such failure shall remain unremedied for 30 days after written notice thereof shall have been given to the Borrower by the Agent or any Lender Party; *provided* that, solely with respect to this clause (iii), if the Borrower is working in good faith to remedy such failure, the 30 day period shall be extended to the earlier of (a) the date on which the Borrower is no longer working in good faith to remedy such failure or (b) the date that is 60 days after the initial written notice of such failure was given to the Borrower by the Agent or any Lender Party; or

(d) the Borrower or any Subsidiary shall fail to pay any principal of or premium or interest on any Debt that is outstanding in a principal or, in the case of Hedge Agreements, net amount of at least $100,000,000 in the aggregate (but excluding Debt outstanding hereunder) of the Borrower or such Subsidiary (as the case may be) (the "Requisite Amount"), when the same becomes due and payable (whether by scheduled maturity, required prepayment, acceleration, demand or otherwise), and such failure shall continue after the later of five Business Days and the applicable grace period, if any,

specified in the agreement or instrument relating to such Debt; or any such Debt aggregating the Requisite Amount shall be declared due and payable or any other event shall occur or condition shall exist under any agreement or instrument relating to any such Debt aggregating the Requisite Amount and shall continue after the applicable grace period, if any, specified in such agreement or instrument, if the effect of such event or condition is to accelerate the maturity of such Debt; or any such Debt aggregating the Requisite Amount shall be required to be prepaid or redeemed (other than by a regularly scheduled required prepayment or redemption), purchased or defeased, in each case prior to the stated maturity thereof where the cause of such prepayment, redemption, purchase or defeasance is the occurrence of an event or condition that is premised on a material adverse deterioration of the financial condition, results of operations or properties of the Borrower or such Subsidiary; provided that with respect to Debt aggregating the Requisite Amount of the types described in clauses (h) or (i) of the definition of "Debt" and to the extent such Debt relates to the obligations of any Person other than a Subsidiary of the Borrower, no Event of Default shall occur so long as the payment of such Debt is being contested in good faith and by proper proceedings and as to which appropriate reserves are being maintained; or

(e) the Borrower or any of its Material Subsidiaries shall generally not pay its debts as such debts become due, or shall admit in writing its inability to pay its debts generally, or shall make a general assignment for the benefit of creditors; or any proceeding shall be instituted by or against the Borrower or any of its Material Subsidiaries seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee, custodian or other similar official for it or for any substantial part of its property and, in the case of any such proceeding instituted against it (but not instituted by it), either such proceeding shall remain undismissed or unstayed for a period of 60 days, or any of the actions sought in such proceeding (including, without limitation, the entry of an order for relief against, or the appointment of a receiver, trustee, custodian or other similar official for, it or for any substantial part of its property) shall occur; or the Borrower or any of its Material Subsidiaries shall take any corporate action to authorize any of the actions set forth in this Section 6.01(e) under any law relating to bankruptcy, insolvency or reorganization or relief of debtors; or

(f) any judgment or order for the payment of money in excess of $100,000,000 shall be rendered against the Borrower or any of its Material Subsidiaries and enforcement proceedings shall have been commenced by any creditor upon such judgment or order for which a stay of enforcement of such judgment or order, by reason of a pending appeal or otherwise, shall not be in effect; provided, however, that any such judgment or order shall not be an Event of Default under this Section 6.01(f) if and for so long as (i) the amount of such judgment or order is covered by a valid and binding policy of insurance between the defendant and the insurer or insurers covering payment thereof, (ii) such insurer shall be rated, or if more than one insurer, at least 90% of such insurers as measured by the amount of risk insured shall be rated, at least "A-" by A.M. Best Company or its successor or its successors and (iii) each such insurer has been notified

of, and has not disputed the claim made for payment of, the amount of such judgment or order; or

(g) (i) Verizon shall cease, prior to the exercise of the Verizon Option, to control, directly or indirectly, a sufficient number of shares of the Borrower's capital stock such that, upon exercise of the Verizon Option, Verizon would own, directly or indirectly, at least 50% of the combined voting power of all Voting Stock of the Borrower; or (ii) the Verizon Option is cancelled or becomes invalid or unenforceable (other than upon the exercise thereof) or the U.S. Federal Communications Commission issues a final ruling that will prevent the exercise of the Verizon Option; or (iii) after the exercise of the Verizon Option, Verizon shall cease to own, directly or indirectly, at least 50% of the combined voting power of all Voting Stock of the Borrower; or

(h) the Borrower or its ERISA Affiliates shall incur, or shall be reasonably likely to incur, liability that would have a Material Adverse Effect as a result of one or more of the following: (i) the occurrence of any ERISA Event; (ii) the partial or complete withdrawal of the Borrower or its ERISA Affiliates from a Multiemployer Plan; or (iii) the reorganization or termination of a Multiemployer Plan;

then, and in any such event, the Agent (i) shall at the request, or may with the consent, of the Required Lenders, by notice to the Borrower, declare the obligation of each Lender Party to make Advances (other than Letter of Credit Advances by the Issuing Bank or a Lender pursuant to Section 2.04(c)) and of the Issuing Bank to issue Letters of Credit to be terminated, whereupon the same shall forthwith terminate, and (ii) shall at the request, or may with the consent, of the Required Lenders, by notice to the Borrower, declare the Advances, all interest thereon and all other amounts payable under this Agreement by the Borrower to be forthwith due and payable, whereupon the Advances, all such interest and all such amounts shall become and be forthwith due and payable, without presentment, demand, protest or further notice of any kind, all of which are hereby expressly waived; provided, however, that in the event of an actual or deemed entry of an order for relief under the Federal Bankruptcy Code, (A) the obligation of each Lender Party to make Advances (other than Letter of Credit Advances by the Issuing Bank or a Lender pursuant to Section 2.04(c)) or to issue Letters of Credit shall automatically be terminated and (B) the Notes, all such interest and all such amounts shall automatically become and be due and payable, without presentment, demand, protest or any notice of any kind, all of which are hereby expressly waived.

SECTION 6.02. Actions in Respect of the Letters of Credit upon Default. If any Event of Default shall have occurred and be continuing, the Agent may with the consent, or shall at the request, of the Required Lenders, irrespective of whether it is taking any of the actions described in Section 6.01 or otherwise, make demand upon the Borrower to, and forthwith upon such demand the Borrower will, (a) pay to the Agent on behalf of the Lender Parties in same day funds at the Agent's office designated in such demand, for deposit in the L/C Cash Collateral Account, an amount equal to the aggregate Available Amount of all Letters of Credit then outstanding or (b) make such other arrangements in respect of the outstanding Letters of Credit as shall be acceptable to the Required Lenders. If at any time the Agent determines that any funds held in the L/C Cash Collateral Account are subject to any right or claim of any Person other than the Agent and the Lender Parties or that the total amount of such funds is less than the

aggregate Available Amount of all Letters of Credit, the Borrower will, forthwith upon demand by the Agent, pay to the Agent, as additional funds to be deposited and held in the L/C Cash Collateral Account, an amount equal to the excess of (a) such aggregate Available Amount over (b) the total amount of funds, if any, then held in the L/C Cash Collateral Account that the Agent determines to be free and clear of any such right and claim. Upon the drawing of any Letter of Credit, to the extent funds are on deposit in the L/C Cash Collateral Account, such funds shall be applied to reimburse the Issuing Bank to the extent permitted by applicable law.

ARTICLE VII
THE AGENT

SECTION 7.01. Authorization and Action. Each Lender Party (in its capacities as a Lender and the Issuing Bank (if applicable)) hereby appoints and authorizes the Agent to take such action as agent on its behalf and to exercise such powers and discretion under this Agreement as are delegated to the Agent by the terms hereof, together with such powers and discretion as are reasonably incidental thereto. As to any matters not expressly provided for by this Agreement (including, without limitation, enforcement or collection of the Notes), the Agent shall not be required to exercise any discretion or take any action, but shall be required to act or to refrain from acting (and shall be fully protected in so acting or refraining from acting) upon the instructions of the Required Lenders and such instructions shall be binding upon all Lender Parties and all holders of Notes; provided, however, that the Agent shall not be required to take any action that exposes the Agent to personal liability or that is contrary to this Agreement or applicable law. The Agent agrees to give to each Lender Party prompt notice of each notice given to it by the Borrower pursuant to the terms of this Agreement.

SECTION 7.02. Agent's Reliance, Etc. Neither the Agent nor any of its directors, officers, agents or employees shall be liable for any action taken or omitted to be taken by it or them under or in connection with this Agreement, except for its or their own gross negligence or willful misconduct. Without limitation of the generality of the foregoing, the Agent: (a) may treat the payee of any Note as the holder thereof until the Agent receives and accepts an Assignment and Acceptance entered into by the Lender that is the payee of such Note, as assignor, and an Eligible Assignee, as assignee, as provided in Section 8.07; (b) may consult with legal counsel (including counsel for the Borrower), independent public accountants and other experts selected by it and shall not be liable for any action taken or omitted to be taken in good faith by it in accordance with the advice of such counsel, accountants or experts; (c) makes no warranty or representation to any Lender and shall not be responsible to any Lender for any statements, warranties or representations (whether written or oral) made in or in connection with this Agreement; (d) shall not have any duty to ascertain or to inquire as to the performance or observance of any of the terms, covenants or conditions of this Agreement on the part of the Borrower or to inspect the property (including the books and records) of the Borrower; (e) shall not be responsible to any Lender for the due execution, legality, validity, enforceability, genuineness, sufficiency or value of, or the perfection or priority of any lien or security interest created or purported to be created under or in connection with, this Agreement or any other instrument or document furnished pursuant hereto; and (f) shall incur no liability under or in respect of this Agreement by acting upon any notice, consent, certificate or other instrument or writing (which may be by telecopier, telegram or telex) believed by it to be genuine and signed or sent by the proper party or parties.

SECTION 7.03. Chase and Affiliates. With respect to its Commitment, the Advances made by it and the Notes issued to it, Chase shall have the same rights and powers under this Agreement as any other Lender Party and may exercise the same as though it were not the Agent; and the term "Lender Party" or " Lender Parties" shall, unless otherwise expressly indicated, include Chase in its individual capacity. Chase and its Affiliates may accept deposits from, lend money to, act as trustee under indentures of, accept investment banking engagements from and generally engage in any kind of business with, the Borrower, its Subsidiaries and any Person who may do business with or own securities of the Borrower or its Subsidiaries, all as if Chase were not the Agent and without any duty to account therefor to the Lender Parties.

SECTION 7.04. Lender Party Credit Decision. Each Lender Party acknowledges that it has, independently and without reliance upon the Agent or any other Lender Party and based on the financial statements referred to in Section 4.01(e) and such other documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Lender Party also acknowledges that it will, independently and without reliance upon the Agent or any other Lender Party and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under this Agreement.

SECTION 7.05. Indemnification. (a) Each Lender Party severally agrees to indemnify the Agent (to the extent not reimbursed by the Borrower), ratably according to the respective principal amounts of the Revolving Credit Advances and Letter of Credit Advances owed each of them (or if no Revolving Credit Advances or Letter of Credit Advances are at the time outstanding, ratably according to their Commitments), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever that may be imposed on, incurred by, or asserted against the Agent in any way relating to or arising out of this Agreement or any action taken or omitted by the Agent under this Agreement, provided that no Lender Party shall be liable for any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting from the Agent's gross negligence or willful misconduct. Without limitation of the foregoing, each Lender Party agrees to reimburse the Agent promptly upon demand for its ratable share of any out-of-pocket expenses (including counsel fees) incurred by the Agent in connection with the preparation, execution, delivery, administration, modification, amendment or enforcement (whether through negotiations, legal proceedings or otherwise) of, or legal advice in respect of rights or responsibilities under, this Agreement, to the extent that the Agent is not reimbursed for such expenses by the Borrower.

(b) Each Lender Party severally agrees to indemnify the Issuing Bank (to the extent not promptly reimbursed by the Borrower) from and against such Lender Party's ratable share (determined as provided below) of any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever that may be imposed on, incurred by, or asserted against the Issuing Bank in any way relating to or arising out of this Agreement or any action taken or omitted by the Issuing Bank hereunder or in connection herewith; provided, however, that no Lender Party shall be liable for any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting from the Issuing Bank's gross negligence or willful misconduct as found in a final, non-appealable judgment by a court of competent jurisdiction.

Without limitation of the foregoing, each Lender Party agrees to reimburse the Issuing Bank promptly upon demand for its ratable share of any costs and expenses (including, without limitation, fees and expenses of counsel) payable by the Borrower under Section 8.04, to the extent that the Issuing Bank is not promptly reimbursed for such costs and expenses by the Borrower.

(c) For purposes of this Section 7.05, the Lender Parties' respective ratable shares of any amount shall be determined, at any time, according to the sum of (i) the aggregate principal amount of the Advances (other than Competitive Bid Advances) outstanding at such time and owing to the respective Lender Parties, (ii) their respective Pro Rata Shares of the aggregate Available Amount of all Letters of Credit outstanding at such time and (iii) their respective Unused Commitments at such time; provided that the aggregate principal amount of Letter of Credit Advances owing to the Issuing Bank shall be considered to be owed to the Lenders ratably in accordance with their respective Revolving Commitments. The failure of any Lender Party to reimburse the Agent or the Issuing Bank, as the case may be, promptly upon demand for its ratable share of any amount required to be paid by the Lender Parties to such Agent or the Issuing Bank, as the case may be, as provided herein shall not relieve any other Lender Party of its obligation hereunder to reimburse such Agent or Issuing Bank, as the case may be, for its ratable share of such amount, but no Lender Party shall be responsible for the failure of any other Lender Party to reimburse the Agent or the Issuing Bank, as the case may be, for such other Lender Party's ratable share of such amount. Without prejudice to the survival of any other agreement of any Lender Party hereunder, the agreement and obligations of each Lender Party contained in this Section 7.05 shall survive the payment in full of principal, interest and all other amounts payable hereunder and under the Notes.

SECTION 7.06. Successor Agent. The Agent may resign at any time by giving written notice thereof to the Lender Parties and the Borrower and may be removed at any time with or without cause by the Required Lenders. Upon any such resignation or removal, the Required Lenders shall have the right to appoint a successor Agent which, so long as no Default shall have occurred and be continuing, shall be subject to the Borrower's approval, which approval shall not be unreasonably withheld. If no successor Agent shall have been so appointed by the Required Lenders, and shall have accepted such appointment, within 30 days after the retiring Agent's giving of notice of resignation or the Required Lenders' removal of the retiring Agent, then the retiring Agent may, on behalf of the Lender Parties, appoint a successor Agent, which shall be a commercial bank organized or licensed under the laws of the United States of America or of any State thereof and having a combined capital and surplus of at least $50,000,000. Upon the acceptance of any appointment as Agent hereunder by a successor Agent, such successor Agent shall thereupon succeed to and become vested with all the rights, powers, discretion, privileges and duties of the retiring Agent, and the retiring Agent, upon appointment of such successor Agent, shall be discharged from its duties and obligations under this Agreement. After any retiring Agent's resignation or removal hereunder as Agent, the provisions of this Article VII shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Agent under this Agreement.

SECTION 7.07. Other Agents. Citibank, N.A. has been designated as syndication agent, Credit Suisse First Boston and Deutsche Bank AG New York Branch have been designated as co-documentation agents and certain other Lenders have been designated as

managing agents or co-agents on the signature pages hereof; the use of such titles does not impose on Citibank, N.A., Credit Suisse First Boston, Deutsche Bank AG New York Branch or any such other Lender any duties or obligations greater than those of any other Lender Party.

ARTICLE VIII
MISCELLANEOUS

SECTION 8.01. Amendments, Etc. (a) No amendment or waiver of any provision of this Agreement or the Revolving Credit Notes, nor consent to any departure by the Borrower therefrom, shall in any event be effective unless the same shall be in writing and signed by the Borrower and the Required Lenders, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given; provided, however, that: (i) no amendment, waiver or consent shall, unless in writing and signed by all the Lenders, (A) waive any of the conditions specified in Section 3.01, (B) change the percentage of the Commitments or of the aggregate unpaid principal amount of the Revolving Credit Notes, or the number of Lenders, that shall be required for the Lenders or any of them to take any action hereunder or (C) amend this Section 8.01; and (ii) no amendment, waiver or consent shall, unless in writing and signed by the Required Lenders and each Lender that has or is owed obligations under this Agreement or the Notes that are modified by such amendment, waiver or consent, (A) increase the Commitment of such Lender or subject such Lender to any additional obligations, (B) reduce the principal of, or interest on, the Advances (other than Competitive Bid Advances) held by such Lender or any fees or other amounts payable hereunder to such Lender, (C) postpone any date fixed for any payment of principal of, or interest on, the Advances (other than Competitive Bid Advances) held by such Lender or any fees or other amounts payable hereunder to such Lender or (D) waive the application of Section 2.16; and provided further that no amendment, waiver or consent shall, unless in writing and signed by the Agent in addition to the Lenders required above to take such action, affect the rights or duties of the Agent under this Agreement or any Note; and provided further that no amendment, waiver or consent shall, unless in writing and signed by the Issuing Bank in addition to the Lenders required above to take such action, affect the rights or obligations of the Issuing Bank under this Agreement.

(b) Each Lender Party grants (i) to the Agent the right to purchase all (but not less than all) of such Lender Party's Commitments and Advances owing to it and the Notes held by it and all of its rights and obligations hereunder and under the other Loan Documents at a price equal to the aggregate amount of outstanding Advances owed to such Lender Party (together with all accrued and unpaid interest and fees owed to such Lender Party), and (ii) to the Borrower the right to cause an assignment of all (but not less than all) of such Lender Party's Commitments and Advances owing to it and the Notes held by it and all of its rights and obligations hereunder and under the other Loan Documents to Eligible Assignees, which right may be exercised by the Agent or the Borrower, as the case may be, if such Lender Party refuses to execute any amendment, waiver or consent which requires the written consent of all the Lender Parties and to which Lender Parties owed at least 90% of the aggregate unpaid principal amount of Revolving Credit Advances and Letter of Credit Advances or, if no such principal amount is then outstanding, Lender Parties having at least 90% of the Commitments, the Agent and the Borrower have agreed. Each Lender Party agrees that if the Agent or the Borrower, as the case may be, exercises its option hereunder, it shall promptly execute and deliver all

agreements and documentation necessary to effectuate such assignment as set forth in Section 8.07.

SECTION 8.02. Notices, Etc. All notices and other communications provided for hereunder shall be in writing (including telecopier communication) and mailed, telecopied or delivered by hand or by courier, if to the Borrower, at its address at 225 Presidential Way, Woburn, Massachusetts 01801, Attention: Treasurer (fax no. 781 865-8824), with a copy to its Secretary (fax no. 781 865-8863); if to any Initial Lender Party, at its Domestic Lending Office specified opposite its name on Schedule I hereto; if to any other Lender Party, at its Domestic Lending Office specified in the Assumption Agreement or the Assignment and Acceptance pursuant to which it became a Lender Party; and if to the Agent, at its address at 270 Park Avenue, New York, New York 10017, Attention: Constance Coleman (fax no. 212 270-4584), with a copy to One Chase Plaza, New York, New York 10081, Attention: Stephen T. McArdle (fax no. 212 552-5700); or, as to the Borrower or the Agent, at such other address as shall be designated by such party in a written notice to the other parties and, as to each Lender Party, at such other address as shall be designated by such Lender Party in a written notice to the Borrower and the Agent. All such notices and communications to any Person shall be effective (a) when actually delivered in fully legible form to such Person or (b) five days after being deposited in the United States mails, with first class postage prepaid and registered or certified, provided that notices and communications to the Agent pursuant to Article II, III or VII shall not be effective until received by the Agent, and provided, further, that notices and communications to any Person required to be provided hereunder within five Business Days shall only be made by hand or via telecopy or courier. Delivery by telecopier of an executed counterpart of any amendment or waiver of any provision of this Agreement or the Notes or of any Exhibit hereto to be executed and delivered hereunder shall be effective as delivery of an original executed counterpart thereof.

SECTION 8.03. No Waiver; Remedies. No failure on the part of any Lender Party or the Agent to exercise, and no delay in exercising, any right hereunder or under any Note shall operate as a waiver thereof; nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

SECTION 8.04. Costs and Expenses. (a) The Borrower agrees to pay on demand all reasonable out-of-pocket costs and expenses of the Agent and the Arranger in connection with the preparation, execution, delivery, administration, modification and amendment of this Agreement, the Notes and the other documents to be delivered hereunder, including, without limitation, (i) all reasonable due diligence, syndication (including, without limitation, printing, distribution and bank meetings), transportation, computer, duplication, appraisal, audit and insurance expenses and (ii) the reasonable fees and expenses of counsel for the Agent with respect thereto and with respect to advising the Agent as to its rights and responsibilities under this Agreement. Such expenses shall be paid by the Borrower upon presentation of an itemized statement of account (after reasonable time for the Borrower to review such statement of account), regardless of whether the transactions contemplated by this Agreement are consummated. The Borrower further agrees to pay on demand all costs and expenses of the Agent and the Lender Parties, if any (including, without limitation, reasonable counsel fees and expenses), in connection with the enforcement (whether through negotiations,

legal proceedings or otherwise) of this Agreement, the Notes and the other documents to be delivered hereunder, including, without limitation, reasonable fees and expenses of counsel for the Agent and each Lender Party in connection with the enforcement of rights under this Section 8.04(a).

(b) The Borrower agrees to indemnify and hold harmless the Agent and each Lender Party and each of their Affiliates and their officers, directors, employees, agents and advisors (each, an "Indemnified Party") from and against any and all claims, damages, losses, liabilities and expenses (including, without limitation, reasonable fees and expenses of counsel) that may be incurred by or asserted or awarded against any Indemnified Party, in each case arising out of or in connection with or by reason of, or in connection with the preparation for a defense of, any investigation, litigation or proceeding arising out of, related to or in connection with (i) the Notes, this Agreement, any of the transactions contemplated herein or the actual or proposed use of the proceeds of the Advances or (ii) the actual or alleged presence of Hazardous Materials on any property of the Borrower or any of its Subsidiaries or any Environmental Action relating in any way to the Borrower or any of its Subsidiaries, in each case whether or not such investigation, litigation or proceeding is brought by the Borrower, its directors, shareholders or creditors or an Indemnified Party or any other Person or any Indemnified Party is otherwise a party thereto and whether or not the transactions contemplated hereby are consummated, except to the extent such claim, damage, loss, liability or expense (A) results from such Indemnified Party's gross negligence or willful misconduct, (B) arises from disputes among two or more Lender Parties (but not including any such dispute that involves a Lender Party to the extent such Lender Party is acting in any different capacity (i.e., Agent, Arranger, Syndication Agent or Documentation Agent) under the Loan Documents or to the extent that it involves the Agent's syndication activities) or (C) arises from litigation commenced by the Borrower against the Lender Parties or the Agent which seeks enforcement of any of the rights of the Borrower hereunder or under the Notes and is determined adversely to the Lender Parties or the Agent in a final non-appealable judgment. The Borrower also agrees not to assert any claim against the Agent, any Lender Party, any of their Affiliates, or any of their respective directors, officers, employees, attorneys and agents, on any theory of liability, for special, indirect, consequential or punitive damages arising out of or otherwise relating to the Notes, this Agreement, any of the transactions contemplated herein or the actual or proposed use of the proceeds of the Advances.

(c) If any payment of principal of, or Conversion of, any Eurodollar Rate Advance or LIBO Rate Advance is made by the Borrower (or pursuant to Section 8.01(b)) to or for the account of a Lender Party other than on the last day of the Interest Period for such Advance, as a result of a payment, prepayment or Conversion pursuant to this Agreement or acceleration of the maturity of the Notes pursuant to Section 6.01, the Borrower shall, upon demand by such Lender Party (with a copy of such demand to the Agent), pay to the Agent for the account of such Lender Party any amounts required to compensate such Lender Party for any additional losses, costs or expenses that it may reasonably incur as a result of such payment or Conversion, including, without limitation, any loss (excluding loss of anticipated profits), cost or expense incurred by reason of the liquidation or reemployment of deposits or other funds acquired by any Lender Party to fund or maintain such Advance.

(d) Without prejudice to the survival of any other agreement of the Borrower hereunder, the agreements and obligations of the Borrower contained in Sections 2.12 and 2.15

and this Section 8.04 shall survive the payment in full of principal, interest and all other amounts payable hereunder and under the Notes.

SECTION 8.05. Right of Set-off. Upon (a) the occurrence and during the continuance of any Event of Default and (b) the making of the request or the granting of the consent specified by Section 6.01 by the Required Lenders to authorize the Agent to declare the Notes due and payable pursuant to the provisions of Section 6.01 and notice to the Borrower as required under Section 6.01, each Lender Party and each of its Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by such Lender Party or such Affiliate to or for the credit or the account of the Borrower against any and all of the obligations of the Borrower now or hereafter existing under this Agreement and the Note held by such Lender Party, whether or not such Lender Party shall have made any demand under this Agreement or such Note and although such obligations may be unmatured. Each Lender Party agrees promptly to notify the Borrower after any such set-off and application, provided that the failure to give such notice shall not affect the validity of such set-off and application. The rights of each Lender Party and its Affiliates under this Section 8.05 are in addition to other rights and remedies (including, without limitation, other rights of set-off) that such Lender Party and its Affiliates may have.

SECTION 8.06. Binding Effect. This Agreement shall become effective (other than Sections 2.01 and 2.03, which shall only become effective upon satisfaction of the conditions precedent set forth in Section 3.01) when it shall have been executed by the Borrower and the Agent and when the Agent shall have been notified by each Initial Lender Party that such Initial Lender Party has executed it and thereafter shall be binding upon and inure to the benefit of the Borrower, the Agent and each Lender Party and their respective successors and permitted assigns, except that the Borrower shall not have the right to assign its rights hereunder or any interest herein without the prior written consent of the Lender Parties.

SECTION 8.07. Assignments and Participations. (a) Each Lender may, with the consent of the Agent and the Issuing Bank (except, in each case, as provided in Section 8.07(g)) and the Borrower (which consent may be withheld in the Borrower's sole and absolute discretion) and, if demanded by the Borrower (i) following a request for a payment to or on behalf of such Lender under Section 2.12 or Section 2.15, (ii) following a notice given by such Lender pursuant to Section 2.13 or (iii) pursuant to Section 8.01(b) upon at least ten Business Days' notice to such Lender and the Agent, will, assign to one or more Persons all or a portion of its rights and obligations under this Agreement (including, without limitation, all or a portion of its Commitment, the Revolving Credit Advances and Letter of Credit Advances owing to it and the Revolving Credit Notes held by it); provided, that the Borrower may make demand with respect to a Lender that has given notice pursuant to Section 2.13 only if the Borrower makes such demand of all Lenders similarly situated that have given such notice; provided, further, that (A) each such assignment shall be of a constant, and not a varying, percentage of all rights and obligations under this Agreement and the Revolving Credit Notes (other than any right to make Competitive Bid Advances, Competitive Bid Advances owing to it and Competitive Bid Notes), (B) except in the case of an assignment to a Person that, immediately prior to such assignment, was a Lender or an assignment of all of a Lender's rights and obligations under this Agreement, the amount of the Commitment of the assigning Lender being assigned pursuant to each such

assignment (determined as of the date of the Assignment and Acceptance with respect to such assignment) shall in no event be less than $20,000,000 or an integral multiple of $1,000,000 in excess thereof, (C) each such assignment shall be to an Eligible Assignee, (D) each such assignment made as a result of a demand by the Borrower shall be arranged by the Borrower after consultation with the Agent and shall be either an assignment of all of the rights and obligations of the assigning Lender under this Agreement or an assignment of a portion of such rights and obligations made concurrently with another such assignment or other such assignments that together cover all of the rights and obligations of the assigning Lender under this Agreement, (E) no Lender shall be obligated to make any such assignment as a result of a demand by the Borrower unless and until such Lender shall have received one or more payments from either the Borrower or one or more Eligible Assignees in an aggregate amount at least equal to the aggregate outstanding principal amount of the Advances owing to such Lender, together with accrued interest thereon to the date of payment of such principal and all other amounts payable to such Lender under this Agreement and (F) the parties to each such assignment shall execute and deliver to the Agent, for its acceptance and recording in the Register, an Assignment and Acceptance, together with any Revolving Credit Notes subject to such assignment and a processing and recordation fee of $3,500 (which shall be paid by Persons other than the Borrower unless such assignment is made as a result of a demand by the Borrower). Upon such execution, delivery, acceptance and recording, from and after the effective date specified in each Assignment and Acceptance, (1) the assignee thereunder shall (x) be a party hereto and (y) to the extent that rights and obligations hereunder have been assigned to it pursuant to such Assignment and Acceptance, have the rights and obligations of a Lender or the Issuing Bank, as the case may be, hereunder and (2) the Lender or the Issuing Bank assignor thereunder shall, to the extent that rights and obligations hereunder have been assigned by it pursuant to such Assignment and Acceptance, relinquish its rights other than rights of indemnification under Section 8.04 or otherwise relating to a time prior to the effective date of such Assignment and Acceptance, and be released from its obligations under this Agreement (and, in the case of an Assignment and Acceptance covering all or the remaining portion of an assigning Lender's or Issuing Bank's rights and obligations under this Agreement, such Lender or the Issuing Bank shall cease to be a party hereto).

(b) By executing and delivering an Assignment and Acceptance, the Lender Party assignor thereunder and the assignee thereunder confirm to and agree with each other and the other parties hereto as follows: (i) other than as provided in such Assignment and Acceptance, such assigning Lender Party makes no representation or warranty and assumes no responsibility with respect to any statements, warranties or representations made in or in connection with this Agreement or the execution, legality, validity, enforceability, genuineness, sufficiency or value of, or the perfection or priority or any lien or security interest created or purported to be created under or in connection with, this Agreement or any other instrument or document furnished pursuant hereto; (ii) such assigning Lender Party makes no representation or warranty and assumes no responsibility with respect to the financial condition of the Borrower or the performance or observance by the Borrower of any of its obligations under this Agreement or any other instrument or document furnished pursuant hereto; (iii) such assignee confirms that it has received a copy of this Agreement, together with copies of the financial statements referred to in Section 4.01(e) or the most recent financial statements required to be delivered pursuant to Section 5.01(i) and such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into such Assignment and Acceptance; (iv) such

assignment (determined as of the date of the Assignment and Acceptance with respect to such assignment) shall in no event be less than $20,000,000 or an integral multiple of $1,000,000 in excess thereof, (C) each such assignment shall be to an Eligible Assignee, (D) each such assignment made as a result of a demand by the Borrower shall be arranged by the Borrower after consultation with the Agent and shall be either an assignment of all of the rights and obligations of the assigning Lender under this Agreement or an assignment of a portion of such rights and obligations made concurrently with another such assignment or other such assignments that together cover all of the rights and obligations of the assigning Lender under this Agreement, (E) no Lender shall be obligated to make any such assignment as a result of a demand by the Borrower unless and until such Lender shall have received one or more payments from either the Borrower or one or more Eligible Assignees in an aggregate amount at least equal to the aggregate outstanding principal amount of the Advances owing to such Lender, together with accrued interest thereon to the date of payment of such principal and all other amounts payable to such Lender under this Agreement and (F) the parties to each such assignment shall execute and deliver to the Agent, for its acceptance and recording in the Register, an Assignment and Acceptance, together with any Revolving Credit Notes subject to such assignment and a processing and recordation fee of $3,500 (which shall be paid by Persons other than the Borrower unless such assignment is made as a result of a demand by the Borrower). Upon such execution, delivery, acceptance and recording, from and after the effective date specified in each Assignment and Acceptance, (1) the assignee thereunder shall (x) be a party hereto and (y) to the extent that rights and obligations hereunder have been assigned to it pursuant to such Assignment and Acceptance, have the rights and obligations of a Lender or the Issuing Bank, as the case may be, hereunder and (2) the Lender or the Issuing Bank assignor thereunder shall, to the extent that rights and obligations hereunder have been assigned by it pursuant to such Assignment and Acceptance, relinquish its rights other than rights of indemnification under Section 8.04 or otherwise relating to a time prior to the effective date of such Assignment and Acceptance, and be released from its obligations under this Agreement (and, in the case of an Assignment and Acceptance covering all or the remaining portion of an assigning Lender's or Issuing Bank's rights and obligations under this Agreement, such Lender or the Issuing Bank shall cease to be a party hereto).

(b) By executing and delivering an Assignment and Acceptance, the Lender Party assignor thereunder and the assignee thereunder confirm to and agree with each other and the other parties hereto as follows: (i) other than as provided in such Assignment and Acceptance, such assigning Lender Party makes no representation or warranty and assumes no responsibility with respect to any statements, warranties or representations made in or in connection with this Agreement or the execution, legality, validity, enforceability, genuineness, sufficiency or value of, or the perfection or priority or any lien or security interest created or purported to be created under or in connection with, this Agreement or any other instrument or document furnished pursuant hereto; (ii) such assigning Lender Party makes no representation or warranty and assumes no responsibility with respect to the financial condition of the Borrower or the performance or observance by the Borrower of any of its obligations under this Agreement or any other instrument or document furnished pursuant hereto; (iii) such assignee confirms that it has received a copy of this Agreement, together with copies of the financial statements referred to in Section 4.01(e) or the most recent financial statements required to be delivered pursuant to Section 5.01(i) and such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into such Assignment and Acceptance; (iv) such

assignee will, independently and without reliance upon the Agent, such assigning Lender Party or any other Lender Party and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under this Agreement; (v) such assignee confirms that it is an Eligible Assignee; (vi) such assignee appoints and authorizes the Agent to take such action as agent on behalf of such assignee and to exercise such powers and discretion under this Agreement as are delegated to the Agent by the terms hereof, together with such powers and discretion as are reasonably incidental thereto; and (vii) such assignee agrees that it will perform in accordance with their terms all of the obligations that by the terms of this Agreement are required to be performed by it as a Lender or the Issuing Bank, as the case may be.

(c) Upon its receipt of an Assignment and Acceptance executed by an assigning Lender Party, an assignee representing that it is an Eligible Assignee and the Borrower, together with the Revolving Credit Notes subject to such assignment, the Agent shall, if such Assignment and Acceptance has been completed and is in substantially the form of Exhibit C hereto, (i) accept such Assignment and Acceptance, (ii) record the information contained therein in the Register and (iii) give prompt notice thereof to the Borrower. Within five Business Days after its receipt of such notice, the Borrower, at its own expense, shall execute and deliver to the Agent in exchange for the surrendered Revolving Credit Notes new Revolving Credit Notes to the order of such Eligible Assignee in an amount equal to the Commitment assumed by it pursuant to such Assignment and Acceptance and, if the assigning Lender Party has retained a Commitment hereunder new Revolving Credit Notes to the order of the assigning Lender Party in an amount equal to the Commitment retained by it hereunder. Such new Revolving Credit Notes shall be in an aggregate principal amount equal to the aggregate principal amount of such surrendered Revolving Credit Notes, shall be dated the effective date of such Assignment and Acceptance and shall otherwise be in substantially the form of Exhibit A-1 hereto.

(d) The Agent shall maintain at its address referred to in Section 8.02 a copy of each Assignment and Acceptance delivered to and accepted by it and a register for the recordation of the names and addresses of the Lender Parties and the Commitment of, and principal amount of the Advances owing to, each Lender Party from time to time (the "Register"). The entries in the Register shall be conclusive and binding for all purposes, absent manifest error, and the Borrower, the Agent and the Lender Parties may treat each Person whose name is recorded in the Register as a Lender Party hereunder for all purposes of this Agreement. The Register shall be available for inspection by the Borrower or any Lender Party at any reasonable time and from time to time upon reasonable prior notice.

(e) Each Lender Party may, with the prior written consent of the Borrower (such consent not to be unreasonably withheld) sell participations to one or more banks or other entities (other than the Borrower or any of its Affiliates) in or to all or a portion of its rights and obligations under this Agreement (including, without limitation, all or a portion of its Commitment, the Advances owing to it and the Notes held by it); provided, however, that (i) such Lender Party's obligations under this Agreement (including, without limitation, its Commitment to the Borrower hereunder) shall remain unchanged, (ii) such Lender Party shall remain solely responsible to the other parties hereto for the performance of such obligations, (iii) such Lender Party shall remain the holder of any such Note for all purposes of this Agreement, (iv) the Borrower, the Agent and the other Lender Parties shall continue to deal

solely and directly with such Lender Party in connection with such Lender Party's rights and obligations under this Agreement, (v) no participant under any such participation shall have any right to approve any amendment or waiver of any provision of this Agreement or any Note, or any consent to any departure by the Borrower therefrom, except that a Lender Party may agree with a participant as to the manner in which the Lender Party shall exercise the Lender Party's rights to approve any amendment, waiver or consent to the extent that such amendment, waiver or consent would reduce the principal of, or interest on, the Notes or any fees or other amounts payable hereunder, in each case to the extent subject to such participation, or postpone any date fixed for any payment of principal of, or interest on, the Notes or any fees or other amounts payable hereunder, in each case to the extent subject to such participation, and (vi) the minimum amount of such participation shall in no event be less than $20,000,000 or an integral multiple of $1,000,000 in excess thereof.

(f) Any Lender Party may at any time, without the consent of the Agent or the Borrower, create a security interest in all or any portion of its rights under this Agreement (including, without limitation, the Advances owing to it and any Note held by it) in favor of any Federal Reserve Bank in accordance with Regulation A of the Board of Governors of the Federal Reserve System, provided, however, that no such assignment shall have the effect of increasing the costs payable by the Borrower.

(g) Any Lender Party may at any time, without the consent of, but with notice to the Agent, assign all or part of its rights or obligations under this Agreement to any Person that, directly or indirectly, controls, is controlled by or is under common control with such Lender Party, provided, however, that no such assignment shall have the effect of increasing the costs payable by the Borrower.

(h) The Issuing Bank may, with the consent of the Borrower (which consent may be withheld in the Borrower's sole and absolute discretion) assign to an Eligible Assignees all of its rights and obligations under the undrawn portion of its Letter of Credit Commitment at any time; provided, however, that (i) the amount of the Letter of Credit Commitment of the assigning Issuing Bank being assigned pursuant to each such assignment (determined as of the date of the Assignment and Acceptance with respect to such assignment) shall in no event be less than $20,000,000 or an integral multiple of $1,000,000 in excess thereof, and (b) the parties to each such assignment shall execute and deliver to the Agent, for its acceptance and recording in the Register, an Assignment and Acceptance, together with a processing and recordation fee of $3,500.

(i) Notwithstanding anything to the contrary contained herein, any Lender (a "Granting Lender") may grant to a special purpose funding vehicle (a "SPC"), identified as such in writing from time to time by the Granting Lender to the Agent and the Borrower, the option to provide to the Borrower all or any part of any Advance that such Granting Lender would otherwise be obligated to make to the Borrower pursuant to this Agreement; provided that (x) nothing herein shall constitute a commitment by any SPC to make any Advance and (y) if an SPC elects not to exercise such option or otherwise fails to provide all or any part of such Advance, the Granting Lender shall be obligated to make such Advance pursuant to the terms hereof. The making of an Advance by an SPC hereunder shall utilize the Commitment of the Granting Lender to the same extent, and as if, such Advance were made by such Granting

Lender. Each party hereto hereby agrees that no SPC shall be liable for any indemnity or similar payment obligation under this Agreement (all liability for which shall remain with the Granting Lender). In furtherance of the foregoing, each party hereto hereby agrees (which agreement shall survive the termination of this Agreement) that, prior to the date that is one year and one day after the payment in full of all outstanding commercial paper or other senior indebtedness of any SPC, it will not institute against, or join any other person in instituting against, such SPC any bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings under the laws of the United States or any State thereof. In addition, notwithstanding anything to the contrary contained in this Section 8.07(i), any SPC may (A) with notice to, but without the prior written consent of, the Borrower and the Agent and without paying any processing fee therefor, assign all or a portion of its interests in any Advances to the Granting Lender or to any financial institutions (consented to by the Borrower and Agent) providing liquidity and/or credit support to or for the account of such SPC to support the funding or maintenance of Advances and (B) disclose on a confidential basis any non-public information relating to its Advances to any rating agency, commercial paper dealer or provider of any surety, guarantee or credit or liquidity enhancement to such SPC. This Section 8.07(i) may not be amended without the written consent of the SPC.

SECTION 8.08. Governing Law. This Agreement and the Notes shall be governed by, and construed in accordance with, the laws of the State of New York.

SECTION 8.09. Execution in Counterparts. This Agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Agreement by telecopier shall be effective as delivery of an original executed counterpart of this Agreement.

SECTION 8.10. Jurisdiction, Etc. (a) Each of the parties hereto hereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of any New York State court or federal court of the United States of America sitting in New York City, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement or the Notes, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in any such New York State court or, to the extent permitted by 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 shall affect any right that any party may otherwise have to bring any action or proceeding relating to this Agreement or the Notes in the courts of any jurisdiction.

(b) Each of the parties hereto irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection that it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or the Notes in any New York State or federal court. Each of the parties hereto

hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

SECTION 8.11. SECTION 8.13. No Liability of the Issuing Bank. The Borrower assumes all risks of the acts or omissions of any beneficiary or transferee of any Letter of Credit with respect to its use of such Letter of Credit. Neither the Issuing Bank nor any of its officers or directors shall be liable or responsible for: (a) the use that may be made of any Letter of Credit or any acts or omissions of any beneficiary or transferee in connection therewith; (b) the validity, sufficiency or genuineness of documents, or of any endorsement thereon, even if such documents should prove to be in any or all respects invalid, insufficient, fraudulent or forged; (c) payment by the Issuing Bank against presentation of documents that do not comply with the terms of a Letter of Credit, including failure of any documents to bear any reference or adequate reference to the Letter of Credit; or (d) any other circumstances whatsoever in making or failing to make payment under any Letter of Credit, except that the Borrower shall have a claim against the Issuing Bank, and the Issuing Bank shall be liable to the Borrower, to the extent of any direct, but not consequential, damages suffered by the Borrower that the Borrower proves were caused by (i) the Issuing Bank's willful misconduct or gross negligence as determined in a final, non-appealable judgment by a court of competent jurisdiction in determining whether documents presented under any Letter of Credit comply with the terms of the Letter of Credit or (ii) the Issuing Bank's willful failure to make lawful payment under a Letter of Credit after the presentation to it of a draft and certificates strictly complying with the terms and conditions of the Letter of Credit. In furtherance and not in limitation of the foregoing, the Issuing Bank 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.

SECTION 8.12. Waiver of Jury Trial. Each of the Borrower, the Agent and the Lender Parties hereby irrevocably waives all right to trial by jury in any action, proceeding or counterclaim (whether based on contract, tort or otherwise) arising out of or relating to this Agreement or the Notes or the actions of the Agent or any Lender Party in the negotiation, administration, performance or enforcement thereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By _____
Vice President and Treasurer

THE CHASE MANHATTAN BANK
as Administrative Agent

By _____
Title:

Letter of Credit Commitment
$2,000,000,000

THE CHASE MANHATTAN BANK
as Initial Issuing Bank

By _____
Title:

The Agents

Revolving Commitment
$500,000,000

THE CHASE MANHATTAN BANK

By _____
Title:

$300,000,000

CITICORP USA, INC.

By _____
Title:

SECTION 8.12. Waiver of Jury Trial. Each of the Borrower, the Agent and the Lender Parties hereby irrevocably waives all right to trial by jury in any action, proceeding or counterclaim (whether based on contract, tort or otherwise) arising out of or relating to this Agreement or the Notes or the actions of the Agent or any Lender Party in the negotiation, administration, performance or enforcement thereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By _____
Title:

THE CHASE MANHATTAN BANK
as Administrative Agent

By _____
Title: V.P.

Letter of Credit Commitment
$2,000,000,000

THE CHASE MANHATTAN BANK
as Initial Issuing Bank

By _____
Title: V.P.

The Agents

Revolving Commitment
$500,000,000

THE CHASE MANHATTAN BANK

By _____
Title: V.P.

$300,000,000

CITICORP USA, INC.

By _____
Title:

SECTION 8.12. Waiver of Jury Trial. Each of the Borrower, the Agent and the Lender Parties hereby irrevocably waives all right to trial by jury in any action, proceeding or counterclaim (whether based on contract, tort or otherwise) arising out of or relating to this Agreement or the Notes or the actions of the Agent or any Lender Party in the negotiation, administration, performance or enforcement thereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By _____
Title:

THE CHASE MANHATTAN BANK
as Administrative Agent

By_____
Title:

Letter of Credit Commitment
$2,000,000,000

THE CHASE MANHATTAN BANK
as Initial Issuing Bank

By_____
Title:

The Agents

Revolving Commitment
$500,000,000

THE CHASE MANHATTAN BANK

By_____
Title:

$300,000,000

CITICORP USA, INC.

By
Title: Director

$300,000,000

CREDIT SUISSE FIRST BOSTON

By_____
Title: ROBERT HETU
DIRECTOR

MARK HERON
ASST. VICE PRESIDENT

$300,000,000

DEUTSCHE BANK AG NEW YORK BRANCH

By_____
Title:

By_____
Title:

$200,000,000

BNP PARIBAS

By_____
Title:

$100,000,000

THE BANK OF NEW YORK

By_____
Title:

$100,000,000

THE INDUSTRIAL BANK OF JAPAN

By_____
Title:

$100,000,000

TORONTO DOMINION (TEXAS) INC.

By_____
Title:

$100,000,000

WACHOVIA BANK, N.A.

By_____
Title:

$300,000,000

CREDIT SUISSE FIRST BOSTON

By_____
Title:

$300,000,000

DEUTSCHE BANK AG NEW YORK BRANCH

By_____
Title: Andreas Neumeier
Director

By_____
Title: SONJA K. SATL
ASSOCIATE

$200,000,000

BNP PARIBAS

By_____
Title:

$100,000,000

THE BANK OF NEW YORK

By_____
Title:

$100,000,000

THE INDUSTRIAL BANK OF JAPAN

By_____
Title:

$100,000,000

TORONTO DOMINION (TEXAS) INC.

By_____
Title:

$100,000,000

WACHOVIA BANK, N.A.

By_____
Title:

$300,000,000

CREDIT SUISSE FIRST BOSTON

By_____
Title:

$300,000,000

DEUTSCHE BANK AG NEW YORK BRANCH

By_____
Title:

By_____
Title:

$200,000,000

BNP PARIBAS

By_____
Title: Co-Head Media & Telecom Finance & Managing Dir.

By_____
Title: NUALA MARLEY
Director

$100,000,000

THE BANK OF NEW YORK

By_____
Title:

$100,000,000

THE INDUSTRIAL BANK OF JAPAN

By_____
Title:

$100,000,000

TORONTO DOMINION (TEXAS) INC.

By_____
Title:

$100,000,000

WACHOVIA BANK, N.A.

By_____
Title:

$300,000,000

CREDIT SUISSE FIRST BOSTON

By_____
Title:

$300,000,000

DEUTSCHE BANK AG NEW YORK BRANCH

By_____
Title:

By_____
Title:

$200,000,000

BNP PARIBAS

By_____
Title:

$100,000,000

THE BANK OF NEW YORK

By_____
Title: Senior Vice-President

$100,000,000

THE INDUSTRIAL BANK OF JAPAN

By_____
Title:

$100,000,000

TORONTO DOMINION (TEXAS) INC.

By_____
Title:

$100,000,000

WACHOVIA BANK, N.A.

By_____
Title:

$300,000,000	CREDIT SUISSE FIRST BOSTON By_____ Title:
$300,000,000	DEUTSCHE BANK AG NEW YORK BRANCH By_____ Title: By_____ Title:
$200,000,000	BNP PARIBAS By_____ Title:
$100,000,000	THE BANK OF NEW YORK By_____ Title:
$100,000,000	THE INDUSTRIAL BANK OF JAPAN By_____ Title: Akihiko Mabuchi Senior Vice President
$100,000,000	TORONTO DOMINION (TEXAS) INC. By_____ Title:
$100,000,000	WACHOVIA BANK, N.A. By_____ Title:

$300,000,000

CREDIT SUISSE FIRST BOSTON

By_____
Title:

$300,000,000

DEUTSCHE BANK AG NEW YORK BRANCH

By_____
Title:

By_____
Title:

$200,000,000

BNP PARIBAS

By_____
Title:

$100,000,000

THE BANK OF NEW YORK

By_____
Title:

$100,000,000

THE INDUSTRIAL BANK OF JAPAN

By_____
Title:

$100,000,000

TORONTO DOMINION (TEXAS) INC.

By_____
Title: PRESIDENT

$100,000,000

WACHOVIA BANK, N.A.

By_____
Title:

$300,000,000

CREDIT SUISSE FIRST BOSTON

By_____
Title:

$300,000,000

DEUTSCHE BANK AG NEW YORK BRANCH

By_____
Title:

By_____
Title:

$200,000,000

BNP PARIBAS

By_____
Title:

$100,000,000

THE BANK OF NEW YORK

By_____
Title:

$100,000,000

THE INDUSTRIAL BANK OF JAPAN

By_____
Title:

$100,000,000

TORONTO DOMINION (TEXAS) INC.

By_____
Title:

$100,000,000

WACHOVIA BANK, N.A.

By Charles D Barham III
Title: Vice President

SCHEDULE I

APPLICABLE LENDING OFFICES

Name of Lender	Domestic Lending Office	Eurodollar Lending Office
The Bank of New York	One Wall Street New York, NY 10286 Attn: Mike Masters T: 212 635-8742 F: 212 635-8593	One Wall Street New York, NY 10286 Attn: Mike Masters T: 212 635-8742 F: 212 635-8593
BNP Paribas	787 Seventh Avenue, 7th Floor New York, NY 10019 Attn: Brian Foster T: 212 841-2686 F: 212 841-2369	787 Seventh Avenue, 7th Floor New York, NY 10019 Attn: Brian Foster T: 212 841-2686 F: 212 841-2369
The Chase Manhattan Bank	270 Park Avenue New York, NY 10017 Attn: Constance Coleman T: 212 270-0372 F: 212 270-4584	270 Park Avenue New York, NY 10017 Attn: Constance Coleman T: 212 270-0372 F: 212 270-4584
Citicorp USA, Inc.	388 Greenwich Street New York, NY 10013 Attn: T: 212 816-____ F: 212 816-____	388 Greenwich Street New York, NY 10013 Attn: T: 212 816-____ F: 212 816-____
Credit Suisse First Boston	Eleven Madison Avenue New York, NY Attn: Robert Hetu T: 212 325-4542 F: 212 325-8309	Eleven Madison Avenue New York, NY Attn: Robert Hetu T: 212 325-4542 F: 212 325-8309
Deutsche Bank AG New York Branch	31 West 52nd Street New York, NY 10019 Attn: Paolo de Alessandrini T: 212 469-7204 F: 212 469-4604	31 West 52nd Street New York, NY 10019 Attn: Paolo de Alessandrini T: 212 469-7204 F: 212 469-4604
The Industrial Bank of Japan	1251 Avenue of the Americas New York 10020 Attn: Jonathan Rabinowtiz T: 212 282-3515 F: 212 282-4486	1251 Avenue of the Americas New York 10020 Attn: Jonathan Rabinowtiz T: 212 282-3515 F: 212 282-4486
Toronto Dominion (Texas), Inc.	909 Fannin, Suite 1700 Houston, TX 77010 Attn: Jean Pettit T: 713 653-8234 F: 713 951-9921	909 Fannin, Suite 1700 Houston, TX 77010 Attn: Jean Pettit T: 713 653-8234 F: 713 951-9921

Wachovia Bank, N.A.	191 Peachtree Street, N.E. Atlanta, GA 30303 Attn: Fitz Wickham T: 404 332-1013 F: 404 332-5016	191 Peachtree Street, N.E. Atlanta, GA 30303 Attn: Fitz Wickham T: 404 332-1013 F: 404 332-5016

Schedule 5.02(a)

Existing Liens

I. Genuity Inc. (formerly BBN Corp. and GTE Internetworking)*

1. UCC-1 filed with the Burlington, Massachusetts Town Clerk by Comdisco, Inc. on August 7, 1998, filing no. 446. Assigned to Sanwa Business Credit Corporation on November 9, 1998.

2. UCC-1 filed with the Burlington, Massachusetts Town Clerk by Comdisco, Inc. on October 19, 1998, filing no. 575. Assigned to Sanwa Business Credit Corporation on November 9, 1998.

3. UCC-1 filed with the Burlington, Massachusetts Town Clerk by Comdisco, Inc. on June 21, 1999, filing no. 356. Partial release July 3, 2000.

4. UCC-1 filed with the Burlington, Massachusetts Town Clerk by Comdisco, Inc. on March 4, 1999, filing no. 118. Partial release July 3, 2000.

5. UCC-1 filed with the Burlington, Massachusetts Town Clerk by Cisco Systems Capital Corporation on March 15, 1999, filing no. 147.

6. UCC-1 filed with the Burlington, Massachusetts Town Clerk by Cisco Systems Capital Corporation on April 30, 1999, filing no. 242.

7. UCC-1 filed with the Burlington, Massachusetts Town Clerk by Comdisco, Inc. on October 4, 1999, filing no. 610.

8. UCC-1 filed with the Burlington, Massachusetts Town Clerk by Silicon Graphics, Inc. on January 30, 2001, filing no. 72.

9. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Pitney Bowes Credit Corporation on October 21, 1998, filing no. 585275.

10. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Pitney Bowes Credit Corporation on April 21, 1999, filing no. 625884.

11. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Silicon Graphics, Inc. on March 15, 2000, filing no. 701677.

* Please note that all UCC-1s cover equipment subject to purchase money Liens (including mortgages, conditional sales, capital leases or other title retention, deferred purchase or vendor financing device or arrangement).

12. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by AT&T Credit Corporation on January 5, 1996, filing no. 361705.

13. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by AT&T Credit Corporation on October 17, 1996, filing no. 423733.

14. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by AT&T Credit Corporation on November 19, 1996, filing no. 430460.

15. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by AT&T Credit Corporation on November 19, 1996, filing no. 430461.

16. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on December 19, 1996, filing no. 436896.

17. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on December 24, 1996, filing no. 438027.

18. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by AT&T Credit Corporation on February 20, 1997, filing no. 449873.

19. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on May 14, 1997, filing no. 468943.

20. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by AT&T Credit Corporation on May 23, 1997, filing no. 471115.

21. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on June 11, 1997, filing no. 475455. Assigned to Keycorp Leasing Ltd. on June 20, 1997, filing no. 477814. Partial release of equipment by Keycorp Leasing Ltd. on June 11, 1997, filing no. 718513.

22. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on June 18, 1997, filing no. 476973.

23. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on July 9, 1997, filing no. 481850.

24. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on July 9, 1997, filing no. 481851.

25. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on July 9, 1997, filing no. 481852.

26. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by AT&T Credit Corporation on August 18, 1997, filing no. 490886.

27. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on September 3, 1997, filing no. 494480. Amendment filed on September 24, 1998, filing no. 579506. Amendment filed on September 29, 1998, filing no. 580355.

28. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on September 3, 1997, filing no. 494481. Amendment filed on September 10, 1998, filing no. 576633.

29. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on September 3, 1997, filing no. 494482. Amendment filed on September 10, 1998, filing no. 576636.

30. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on September 3, 1997, filing no. 494483. Amendment filed on September 10, 1998, filing no. 576634.

31. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on September 15, 1997, filing no. 497089. Amendment filed on September 10, 1998, filing no. 576633.

32. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on December 18, 1997, filing no. 517716. Amendment filed on September 15, 1998, filing no. 577529.

33. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on December 18, 1997, filing no. 517717. Amendment filed on September 10, 1998, filing no. 576632.

34. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on December 18, 1997, filing no. 517718. Amendment filed on September 10, 1998, filing no. 576630.

35. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on December 18, 1997, filing no. 517719. Amendment filed on September 10, 1998, filing no. 576631.

36. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc., assignee Hitachi Credit America Corp., on July 31, 1998, filing no. 568313. Assigned to Summit Bank on July 29, 1999, filing no. 650182.

37. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on July 31, 1998, filing no. 568314.

38. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc., assignee Hitachi Credit America Corp., on July 31, 1998, filing no. 568315. Assigned to Summit Bank on July 29, 1999, filing no. 650181. Partial release of equipment by Hitachi Credit America Corp. on July 31, 1998, filing no. 727897.

39. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on August 3, 1998, filing no. 568700. Assigned to Sanwa Business Credit Corporation on November 5, 1998, filing no. 588839.

40. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by AT&T Credit Corporation on September 2, 1998, filing no. 575379.

41. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on September 15, 1998, filing no. 577530.

42. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on September 15, filing no. 577531.

43. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on September 15, filing no. 577532.

44. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on October 16, 1998, filing no. 584379. Assigned to Sanwa Business Credit Corporation on November 5, 1998, filing no. 588840.

45. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on October 29, 1998, filing no. 587044.

46. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on October 29, 1998, filing no. 587045.

47. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on October 29, 1998, filing no. 587046.

48. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on October 29, 1998, filing no. 587047.

49. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on January 20, 1999, filing no. 604668.

50. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on January 20, 1999, filing no. 604669.

51. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on January 20, 1999, filing no. 604670.

52. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Newcourt Communications Finance Corporation on February 4, 1999, filing no. 608130.

53. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on February 24, 1999, filing no. 612348.

54. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on February 24, 1999, filing no. 612349.

55. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on February 24, 1999, filing no. 612350.

56. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc., assignee Fleet Business Credit Corporation, on March 2, 1999, filing no. 613757. Partial release of equipment on March 2, 1999, filing no. 727892.

57. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on March 15, 1999, filing no. 616707.

58. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on March 15, 1999, filing no. 616708.

59. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on March 15, 1999, filing no. 616709.

60. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on April 29, 1999, filing no. 628053.

61. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on April 29, 1999, filing no. 628054.

62. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Cisco Systems Capital Corp. on April 29, 1999, filing no. 628055.

63. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc., assignee Hitachi Credit America Corp., on June 18, 1999; filing no. 640376. Partial release of equipment by Hitachi Credit America Corp. on July 3, 2000, filing no. 727895.

64. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on September 29, 1999, filing no. 663421.

65. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Newcourt Communications Finance Corporation on November 30, 1999, filing no. 678012.

66. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Newcourt Communications Finance Corporation on March 15, 2000, filing no. 701680.

67. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Comdisco, Inc. on June 14, 2000, filing no. 723674.

68. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Silicon Graphics, Inc. on January 25, 2001, filing no. 773776.

69. UCC-1 filed with the Massachusetts Secretary of the Commonwealth by Silicon Graphics, Inc. on January 25, 2001, filing no. 773777.

II. Genuity Solutions Inc. (formerly BBN Solutions)

1. UCC-1 filed with the Secretary of State of the Commonwealth of Massachusetts by Newcourt Communications Finance Corporation on August 8, 2000, filing no. 736304

2. UCC-1 filed with the Secretary of State of the Commonwealth of Massachusetts by Cisco Systems Capital Corporation on January 16, 2001, filing no. 770986.

3. UCC-1 filed with the Woburn, Massachusetts City Clerk's office by Newcourt Communications Finance Corp. on August 8, 2000, filing no. 2000627.

III. Genuity Networks Inc. (formerly BBN Networks) - No records found.

EXHIBIT A-1 - FORM OF
REVOLVING CREDIT
PROMISSORY NOTE

U.S.$_____ Dated: _____, 200_

FOR VALUE RECEIVED, the undersigned, GENUITY INC., a Delaware corporation (the "Borrower"), HEREBY PROMISES TO PAY to the order of _____ (the "Lender") for the account of its Applicable Lending Office on the Termination Date (each as defined in the Credit Agreement referred to below) the principal sum of U.S.$[amount of the Lender's Commitment in figures] or, if less, the aggregate principal amount of the Revolving Credit Advances and Letter of Credit Advances made by the Lender to the Borrower pursuant to the Amended and Restated Credit Agreement dated as of September 24, 2001, as amended or modified from time to time (the "Credit Agreement") among the Borrower, the Lender and certain other lenders parties thereto, The Chase Manhattan Bank ("Chase"), as Agent for the Lender and such other lenders, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents, outstanding on the Termination Date. Terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meanings so defined.

The Borrower promises to pay interest on the unpaid principal amount of each Revolving Credit Advance and each Letter of Credit Advance from the date of such Advance until such principal amount is paid in full, at such interest rates, and payable at such times, as are specified in the Credit Agreement.

Both principal and interest are payable in lawful money of the United States of America to Chase, as Agent, at 270 Park Avenue, New York, New York 10017, in same day funds. Each Revolving Credit Advance and each Letter of Credit Advance owing to the Lender by the Borrower pursuant to the Credit Agreement, and all payments made on account of principal thereof, shall be recorded by the Lender and, prior to any transfer hereof, endorsed on the grid attached hereto which is part of this Promissory Note.

This Promissory Note is one of the Revolving Credit Notes referred to in, and is entitled to the benefits of, the Credit Agreement. The Credit Agreement, among other things, (i) provides for the making of Revolving Credit Advances and Letter of Credit Advances by the Lender to the Borrower from time to time in an aggregate amount not to exceed at any time outstanding the U.S. dollar amount first above mentioned, the indebtedness of the Borrower resulting from each such Advance being evidenced by this Promissory Note, and (ii) contains provisions for acceleration of the maturity hereof upon the happening of certain stated events and also for prepayments on account of principal hereof prior to the maturity hereof upon the terms and conditions therein specified.

GENUITY INC.

By_____
Title:

ADVANCES AND PAYMENTS OF PRINCIPAL

Date	Amount of Advance	Amount of Principal Paid or Prepaid	Unpaid Principal Balance	Notation Made By

EXHIBIT A-2 - FORM OF
COMPETITIVE BID
PROMISSORY NOTE

U.S.$_____ Dated: _____, 200_

FOR VALUE RECEIVED, the undersigned, GENUITY INC., a Delaware corporation (the "Borrower"), HEREBY PROMISES TO PAY to the order of _____ (the "Lender") for the account of its Applicable Lending Office (as defined in the Amended and Restated Credit Agreement dated as of September 24, 2001, as amended or modified from time to time (the "Credit Agreement") among the Borrower, the Lender and certain other lenders parties thereto, The Chase Manhattan Bank ("Chase"), as Agent for the Lender and such other lenders, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents, on _____, 200_, the principal amount of U.S.$_____. Terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meanings so defined.

The Borrower promises to pay interest on the unpaid principal amount hereof from the date hereof until such principal amount is paid in full, at the interest rate and payable on the interest payment date or dates provided below:

Interest Rate: _____% per annum (calculated on the basis of a year of _____ days for the actual number of days elapsed).

Interest Payment Date(s):_____.

Both principal and interest are payable in lawful money of the United States of America to Chase for the account of the Lender at the office of Chase, at 270 Park Avenue, New York, New York 10017, Account No. _____ Attention: _____, in same day funds.

This Promissory Note is one of the Competitive Bid Notes referred to in, and is entitled to the benefits of, the Credit Agreement. The Credit Agreement, among other things, contains provisions for acceleration of the maturity hereof upon the happening of certain stated events.

The Borrower hereby waives presentment, demand, protest and notice of any kind. No failure to exercise, and no delay in exercising, any rights hereunder on the part of the holder hereof shall operate as a waiver of such rights.

This Promissory Note shall be governed by, and construed in accordance with, the laws of the State of New York.

GENUITY INC.

By_____
Title:

EXHIBIT B-1 - FORM OF NOTICE OF
REVOLVING CREDIT BORROWING

The Chase Manhattan Bank, as Agent
for the Lender Parties party
to the Credit Agreement
referred to below
270 Park Avenue
New York, New York 10017

[Date]

Attention: _____

Ladies and Gentlemen:

The undersigned, Genuity Inc., refers to the Amended and Restated Credit Agreement, dated as of September 24, 2001 (as amended or modified from time to time, the "Credit Agreement"), among the undersigned, certain Lender Parties party thereto, The Chase Manhattan Bank, as Agent for said Lender Parties, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents. Terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meanings so defined. Pursuant to Section 2.02 of the Credit Agreement, the undersigned hereby gives you notice, irrevocably, that the undersigned hereby requests a Revolving Credit Borrowing under the Credit Agreement, and in that connection sets forth below the information relating to such Revolving Credit Borrowing (the "Proposed Revolving Credit Borrowing") as required by Section 2.02(a) of the Credit Agreement:

(i) The Business Day of the Proposed Revolving Credit Borrowing is _____, 200_.

(ii) The Type of Advances comprising the Proposed Revolving Credit Borrowing is [Base Rate Advances] [Eurodollar Rate Advances].

(iii) The aggregate amount of the Proposed Revolving Credit Borrowing is $_____.

[(iv) The initial Interest Period for each Eurodollar Rate Advance made as part of the Proposed Revolving Credit Borrowing is _____ month[s].]

The undersigned hereby certifies that the following statements are true on the date hereof, and will be true on the date of the Proposed Revolving Credit Borrowing:

(A) the representations and warranties contained in Section 4.01 of the Credit Agreement and in each Guaranty are correct, before and after giving effect to the Proposed Revolving Credit Borrowing and to the application of the proceeds therefrom, as though

made on and as of such date (except to the extent that any such representation or warranty relates to a specific earlier date); and

(B) no event has occurred and is continuing, or would result from such Proposed Revolving Credit Borrowing or from the application of the proceeds therefrom, that constitutes a Default.

Very truly yours,

GENUITY INC.

By_____
Title:

EXHIBIT B-2 - FORM OF NOTICE OF
COMPETITIVE BID BORROWING

The Chase Manhattan Bank, as Agent
for the Lender Parties party
to the Credit Agreement
referred to below
270 Park Avenue
New York, New York 10017

[Date]

Attention: _____

Ladies and Gentlemen:

The undersigned, Genuity Inc., refers to the Amended and Restated Credit Agreement, dated as of September 24, 2001 (as amended or modified from time to time, the "Credit Agreement"), among the undersigned, certain Lender Parties party thereto, The Chase Manhattan Bank, as Agent for said Lender Parties, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents. Terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meanings so defined. Pursuant to Section 2.03 of the Credit Agreement, the undersigned hereby gives you notice, irrevocably, that the undersigned hereby requests a Competitive Bid Borrowing under the Credit Agreement, and in that connection sets forth the terms on which such Competitive Bid Borrowing (the "Proposed Competitive Bid Borrowing") is requested to be made:

(A)	Date of Competitive Bid Borrowing	_____
(B)	Amount of Competitive Bid Borrowing	_____
(C)	[Maturity Date] [Interest Period]	_____
(D)	Interest Rate Basis	_____
(E)	Interest Payment Date(s)	_____
(F)	_____	_____
(G)	_____	_____
(H)	_____	_____

The undersigned hereby certifies that the following statements are true on the date hereof, and will be true on the date of the Proposed Competitive Bid Borrowing:

(a) the representations and warranties contained in Section 4.01 of the Credit Agreement and in each Guaranty are correct, before and after giving effect to the Proposed Competitive Bid Borrowing and to the application of the proceeds therefrom, as though made on and as of such date (except to the extent that any such representation or warranty relates to a specific earlier date);

(b) no event has occurred and is continuing, or would result from the Proposed Competitive Bid Borrowing or from the application of the proceeds therefrom, that constitutes a Default; and

(c) no event has occurred and no circumstance exists as a result of which the information concerning the undersigned that has been provided to the Agent and each Lender Party by the undersigned in connection with the Credit Agreement would include an untrue statement of a material fact or omit to state any material fact or any fact necessary to make the statements contained therein, in the light of the circumstances under which they were made, not misleading.

Subject to the undersigned's right to cancel the Proposed Competitive Bid Borrowing in accordance with Section 2.03(a)(iii) of the Credit Agreement, the undersigned hereby confirms that, if accepted by the undersigned in accordance with Section 2.03(a)(iii) of the Credit Agreement, the Proposed Competitive Bid Borrowing is to be made available to it in accordance with Section 2.03(a)(v) of the Credit Agreement.

Very truly yours,

GENUITY INC.

By_____
Title:

EXHIBIT C - FORM OF
ASSIGNMENT AND ACCEPTANCE

Reference is made to the Amended and Restated Credit Agreement dated as of September 24, 2001, as amended or modified from time to time (the "Credit Agreement"), among Genuity Inc. (the "Borrower"), the Lender Parties (as defined in the Credit Agreement), The Chase Manhattan Bank, as agent for the Lender Parties (the "Agent"), J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents. Terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meaning so defined.

The "Assignor" and the "Assignee" referred to on Schedule I hereto agree as follows:

1. The Assignor hereby sells and assigns to the Assignee, and the Assignee hereby purchases and assumes from the Assignor, an interest in and to the Assignor's rights and obligations under the Credit Agreement as of the date hereof (other than in respect of Competitive Bid Advances and Competitive Bid Notes) equal to the percentage interest specified on Schedule 1 hereto of all outstanding rights and obligations under the Credit Agreement (other than in respect of Competitive Bid Advances and Competitive Bid Notes) together with participations in Letters of Credit and Letter of Credit Advances held by the Assignor on the date hereof. After giving effect to such sale and assignment, the Assignee's Commitment and the amount of the Revolving Credit Advances and Letter of Credit Advances owing to the Assignee will be as set forth on Schedule 1 hereto.

2. The Assignor (i) represents and warrants that it is the legal and beneficial owner of the interest being assigned by it hereunder and that such interest is free and clear of any adverse claim; (ii) makes no representation or warranty and assumes no responsibility with respect to any statements, warranties or representations made in or in connection with the Credit Agreement or the execution, legality, validity, enforceability, genuineness, sufficiency or value of, or the perfection or priority of any lien or security interest created or purported to be created under or in connection with, the Credit Agreement or any other instrument or document furnished pursuant thereto; (iii) makes no representation or warranty and assumes no responsibility with respect to the financial condition of the Borrower or the performance or observance by the Borrower of any of its obligations under the Credit Agreement or any other instrument or document furnished pursuant thereto; and (iv) attaches the Revolving Credit Notes held by the Assignor and requests that the Agent exchange such Revolving Credit Notes for new Revolving Credit Notes payable to the order of the Assignee in an amount equal to the Commitment assumed by the Assignee pursuant hereto and, if applicable, the Assignor in an amount equal to the Commitment retained by the Assignor under the Credit Agreement, in each case, as specified on Schedule 1 hereto.

3. The Assignee (i) confirms that it has received a copy of the Credit Agreement, together with copies of the financial statements referred to in Section 4.01(e) thereof or the most recent financial statements required to be delivered pursuant to Section 5.01(i)(ii) and such other documents and information as it has deemed appropriate to make its own credit

analysis and decision to enter into this Assignment and Acceptance; (ii) agrees that it will, independently and without reliance upon the Agent, the Assignor or any other Lender Party and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under the Credit Agreement; (iii) confirms that it is an Eligible Assignee; (iv) appoints and authorizes the Agent to take such action as agent on its behalf and to exercise such powers and discretion under the Credit Agreement as are delegated to the Agent by the terms thereof, together with such powers and discretion as are reasonably incidental thereto; (v) agrees that it will perform in accordance with their terms all of the obligations that by the terms of the Credit Agreement are required to be performed by it as a Lender Party; and (vi) attaches any U.S. Internal Revenue Service forms required under Section 2.15 of the Credit Agreement.

4. Following the execution of this Assignment and Acceptance, it will be delivered to the Agent for acceptance and recording by the Agent. The effective date for this Assignment and Acceptance (the "Effective Date") shall be the date of acceptance hereof by the Agent, unless otherwise specified on Schedule 1 hereto.

5. Upon such acceptance and recording by the Agent, as of the Effective Date, (i) the Assignee shall be a party to the Credit Agreement and, to the extent provided in this Assignment and Acceptance, have the rights and obligations of a Lender Party thereunder and (ii) the Assignor shall, to the extent provided in this Assignment and Acceptance, relinquish its rights, other than rights of indemnification under Section 8.04 of the Credit Agreement or otherwise relating to a time prior to the Effective Date, and be released from its obligations under the Credit Agreement.

6. Upon such acceptance and recording by the Agent, from and after the Effective Date, the Agent shall make all payments under the Credit Agreement and the Revolving Credit Notes in respect of the interest assigned hereby (including, without limitation, all payments of principal, interest and facility fees with respect thereto) to the Assignee. The Assignor and Assignee shall make all appropriate adjustments in payments under the Credit Agreement and the Revolving Credit Notes for periods prior to the Effective Date directly between themselves.

7. This Assignment and Acceptance shall be governed by, and construed in accordance with, the laws of the State of New York.

8. This Assignment and Acceptance may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of Schedule 1 to this Assignment and Acceptance by telecopier shall be effective as delivery of a manually executed counterpart of this Assignment and Acceptance.

IN WITNESS WHEREOF, the Assignor and the Assignee have caused Schedule 1 to this Assignment and Acceptance to be executed by their officers thereunto duly authorized as of the date specified thereon.

Schedule 1
to
Assignment and Acceptance

Percentage interest assigned: _____%

Assignee's Commitment: $_____

Aggregate outstanding principal amount of
Revolving Credit Advances assigned: $_____

Aggregate outstanding principal amount of
Letter of Credit Advances assigned: $_____

Principal amount of Revolving Credit Note payable to Assignee: $ _____

Principal amount of Revolving Credit Note payable to Assignor: $ _____

Effective Date[1]: _____, 200_

[NAME OF ASSIGNOR], as Assignor

By_____
Title:

Dated: _____, 200_

[NAME OF ASSIGNEE], as Assignee

By_____
Title:

Dated: _____, 200_

Domestic Lending Office:
[Address]

Eurodollar Lending Office:
[Address]

---

[1] This date should be no earlier than five Business Days after the delivery of this Assignment and Acceptance to the Agent.

Accepted this
_____ day of _____, 200_

The Chase Manhattan Bank, as Agent

By_____
Title:

Approved this _____ day
of _____, 200_

GENUITY INC.

By_____
Title:

EXHIBIT D-FORM OF
ASSUMPTION AGREEMENT

Dated:_____

[Borrower]
[Borrower's Address]

Attention: Treasurer

The Chase Manhattan Bank, as Agent
270 Park Avenue
New York, New York 10017

Attention:

Ladies and Gentlemen:

Reference is made to the Amended and Restated Credit Agreement dated as of September 24, 2001, as amended or modified from time to time (the "Credit Agreement"), among Genuity Inc. (the "Borrower"), the Lender Parties party thereto, The Chase Manhattan Bank, as Agent, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents. Terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meanings so defined.

The undersigned (the "Assuming Lender") proposes to become an Assuming Lender pursuant to Section 2.06(b) of the Credit Agreement and, in that connection, hereby agrees that it shall become a Lender Party for purposes of the Credit Agreement on [applicable Increase Date] and that its Commitment shall as of such date be $_____.

The undersigned (i) confirms that it has received a copy of the Credit Agreement, together with copies of the financial statements referred to in Section 4.01(e) thereof or the most recent financial statements required to be delivered pursuant to Section 5.01(i)(ii) thereof and such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into this Assumption Agreement; (ii) agrees that it will, independently and without reliance upon the Agent or any other Lender Party and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under the Credit Agreement; (iii) appoints and authorizes the Agent to take such action as agent on its behalf and to exercise such powers under the Credit Agreement as are delegated to the Agent by the terms thereof, together with such powers as are reasonably incidental thereto; (iv) agrees that it will perform in accordance with their terms all of the obligations which by the terms of the Credit Agreement are required to be performed by it as a Lender Party; (v) confirms that it is an Eligible Assignee; (vi) specifies as its

Lending Office (and address for notices) the offices set forth beneath its name on the signature pages hereof; and (vii) attaches the forms prescribed by the Internal Revenue Service of the United States required under Section 2.15 of the Credit Agreement.

The Assuming Lender requests that the Company deliver to the Agent (to be promptly delivered to the Assuming Lender) Revolving Credit Notes payable to the order of the Assuming Lender, dated as of the [Increase Date] and substantially in the form of Exhibit A-1 to the Credit Agreement.

The effective date for this Assumption Agreement shall be [applicable Increase Date]. Upon delivery of this Assumption Agreement to the Company and the Agent, and satisfaction of all conditions imposed under Section 2.06(b) as of [date specified above], the undersigned shall be a party to the Credit Agreement and have the rights and obligations of a Lender Party thereunder. As of [date specified above], the Agent shall make all payments under the Credit Agreement in respect of the interest assumed hereby (including, without limitation, all payments of principal, interest and commitment fees) to the Assuming Lender.

This Assumption Agreement may be executed in counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart by telecopier shall be effective as delivery of a manually executed counterpart of this Assumption Agreement.

This Assumption Agreement shall be governed by, and construed in accordance with, the laws of the State of New York.

Very truly yours,

[NAME OF ASSUMING LENDER]

By_____
Name:
Title:

Domestic Lending Office
(and address for notices):

[Address]

Eurodollar Lending Office:
[Address]

[NAME OF ASSIGNOR]

By_____
Name:
Title:

[Address]

Above Acknowledged and Agreed to:

GENUITY INC.

By_____
Name:
Title:

GENUITY

225 Presidential Way
P.O. Box 4100
Woburn, MA 01888-4100
Tel 781-865-2000
www.genuity.com

September 24, 2001

To each of the Lender Parties party
to the Credit Agreement referred
to below and The Chase Manhattan Bank,
as Agent for such Lender Parties

Genuity Inc.

Ladies and Gentlemen:

This opinion is furnished to you pursuant to Section 3.01(g)(iv) of the Amended and Restated Credit Agreement, dated as of September 24, 2001 (the "Credit Agreement"), among Genuity Inc. (the "Borrower"), the Lender Parties parties thereto, The Chase Manhattan Bank, as Agent for such Lender Parties, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG, New York Branch, as co-documentation agents. Terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meanings so defined.

I am Assistant General Counsel for the Borrower and I have acted as counsel for the Borrower in connection with the preparation, execution and delivery of the Credit Agreement.

In that connection, I, or attorneys under my direction, have examined:

(a) The Credit Agreement;

(b) The documents furnished by the Borrower pursuant to Section 3.01 of the Credit Agreement;

(c) The Articles of Incorporation of the Borrower (the "Charter");

(d) The by-laws of the Borrower (the "By-laws"); and

(e) a certificate of the Secretary of State of Delaware, dated September 20, 2001, attesting to the continued corporate existence and good standing of the Borrower in that State.

In addition, I, or attorneys under my direction, have examined the originals, or copies certified to my satisfaction, of such other corporate records of the Borrower, certificates of public officials and of officers of the Borrower, and agreements, instruments and other documents, as I have deemed necessary as a basis for the opinions expressed below. As to questions of fact material to such opinions, I have, when relevant facts were not independently established by me, relied upon certificates of the Borrower or its officers or of public officials. I have assumed the due execution and delivery, pursuant to due authorization, of the Credit Agreement by the Initial Lender Parties and the Agent.

My opinions expressed below are limited to the law of The Commonwealth of Massachusetts and the Federal law of the United States.

Based upon the foregoing and upon such investigation as I have deemed necessary, I am of the following opinion:

1. The Borrower is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware.

2. The execution, delivery and performance by the Borrower of the Credit Agreement and the Notes, and the consummation of the transactions contemplated thereby, are within the Borrower's corporate powers, have been duly authorized by all necessary corporate action, and do not contravene (a) the Charter or the By-laws, (b) any law, rule or regulation applicable to the Borrower or (c) to the best of my knowledge, after due inquiry, any material contractual or material legal restriction contained in any document to which the Borrower is a party or which relates to or affects the property of the Borrower. The Credit Agreement and the Notes have been duly executed and delivered on behalf of the Borrower.

3. No authorization, approval or other action by, and no notice to or filing with, any governmental authority or regulatory body or, to the best of my knowledge after due inquiry, any other third party is required for the due execution, delivery and performance by the Borrower of the Credit Agreement and the Notes.

4. In any action or proceeding arising out of or relating to the Credit Agreement or the Notes in any court of The Commonwealth of Massachusetts or in any Federal court sitting in The Commonwealth of Massachusetts, such court would recognize and give effect to the provisions of Section 8.08 of the Credit Agreement wherein the parties thereto agree that the Credit Agreement and the Notes shall be governed by, and construed in accordance with, the laws of the State of New York. Without limiting the generality of the foregoing, a court of The Commonwealth of Massachusetts or a Federal court sitting in The Commonwealth of Massachusetts would apply the usury law of the State of New York, and would not apply the usury law of The Commonwealth of Massachusetts, to the Credit Agreement and the Notes. However, if a court of The Commonwealth of Massachusetts or a

Federal court sitting in The Commonwealth of Massachusetts were to hold that the Credit Agreement and the Notes are governed by, and to be construed in accordance with, the laws of The Commonwealth of Massachusetts, assuming the due execution and delivery of the Credit Agreement by the Agent and the Initial Lender Parties, the Credit Agreement and the Notes would be, under the laws of The Commonwealth of Massachusetts, legal, valid and binding obligations of the Borrower enforceable against the Borrower in accordance with their respective terms.

5. To the best of my knowledge, there are no pending or overtly threatened actions or proceedings against the Borrower or any of its Material Subsidiaries before any court, governmental agency or arbitrator that purport to affect the legality, validity, binding effect or enforceability of the Credit Agreement or any of the Notes or the consummation of the transactions contemplated thereby.

The opinions set forth above are subject to the following qualifications:

(a) My opinion in the last sentence of paragraph 4 above as to enforceability is subject to the effect of any applicable bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar law affecting creditors' rights generally.

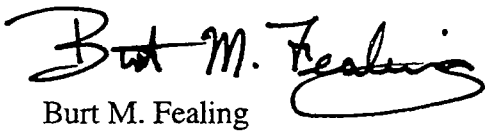
(b) My opinion in the last sentence of paragraph 4 above as to enforceability is subject to the effect of general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing (regardless of whether considered in a proceeding in equity or at law).

(c) I express no opinion as to (i) Section 2.16 of the Credit Agreement insofar as it provides that any Lender Party purchasing a participation from another Lender Party pursuant thereto may exercise set-off or similar rights with respect to such participation, (ii) the enforceability of the indemnification provisions set forth in Section 8.04 of the Credit Agreement to the extent enforcement thereof is contrary to public policy regarding the exculpation of criminal violations, intentional harm and acts of gross negligence or recklessness and (iii) the effect of the law of any jurisdiction other than The Commonwealth of Massachusetts wherein any Lender Party may be located or wherein enforcement of the Credit Agreement or the Notes may be sought that limits the rates of interest legally chargeable or collectible.

A copy of this opinion letter may be delivered by any Lender Party to any Person that becomes a Lender Party after the date hereof in accordance with the provisions of the Credit Agreement. Any such new Lender Party may rely on the opinions expressed above as if this opinion letter were addressed and delivered to such Lender Party on the date hereof.

This opinion letter speaks only as of the date hereof. I expressly disclaim any responsibility to advise the Agent or any Lender Party who is permitted to rely on the opinions expressed herein of any development or circumstance of any kind, including, without limitation, any change of law or fact that may occur after the date of this opinion letter, even though such development, circumstance or change may affect the legal analysis, a legal conclusion or any other matter set forth in or relating to this opinion letter. Accordingly, the Agent and each Lender Party relying on this opinion letter at any time should seek advice of its counsel as to the proper application of this opinion letter at such time.

Very truly yours,



Burt M. Fealing
Assistant General Counsel
Genuity Inc.

Exhibit F

FORM OF GUARANTY

Dated as of _____, 2001

From

THE GUARANTORS NAMED HEREIN

and

THE ADDITIONAL GUARANTORS REFERRED TO HEREIN

as Guarantors

in favor of

THE AGENT AND THE LENDERS REFERRED TO IN
THE CREDIT AGREEMENT REFERRED TO HEREIN

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GUARANTY

GUARANTY dated as of _____, 200_ made by the Persons listed on the signature pages hereof under the caption "Guarantors" and the Additional Guarantors (as defined in Section 8(b)) (such Persons so listed and the Additional Guarantors being, collectively, the "Guarantors" and, individually, each a "Guarantor") in favor of the Lenders (as defined in the Credit Agreement referred to below).

PRELIMINARY STATEMENT. Genuity Inc., a Delaware corporation (the "Borrower"), is party to an Amended and Restated Credit Agreement dated as of September 24, 2001 (as amended, amended and restated, supplemented or otherwise modified from time to time, the "Credit Agreement") with certain Lenders party thereto, The Chase Manhattan Bank, as Agent for such Lenders, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents. Each Guarantor may receive, directly or indirectly, a portion of the proceeds of the Advances under the Credit Agreement and will derive substantial direct and indirect benefits from the transactions contemplated by the Credit Agreement.

NOW, THEREFORE, in consideration of the premises and in order to induce the Lenders to make Advances under the Credit Agreement from time to time, each Guarantor, jointly and severally with each other Guarantor, hereby agrees as follows:

Section 1. Definitions. Capitalized terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meanings so defined.

1. Guaranty; Limitation of Liability. (a) Each Guarantor hereby: (i) absolutely, unconditionally and irrevocably guarantees the punctual payment when due, whether at scheduled maturity or on any date of a required prepayment or by acceleration, demand or otherwise, of all obligations of the Borrower now or hereafter existing under or in respect of the Credit Agreement and the Notes (including, without limitation, any extensions, modifications, substitutions, amendments or renewals of any or all of the foregoing obligations), whether direct or indirect, absolute or contingent, and whether for principal, interest, premiums, fees, indemnities, contract causes of action, costs, expenses or otherwise, provided that the liability of such Guarantor with respect to such obligations of the Borrower shall not exceed the aggregate Debt of such Guarantor (other than Debt arising hereunder) (such obligations, as so limited, being the "Guaranteed Obligations"); and (ii) agrees to pay any and all expenses (including, without limitation, fees and expenses of counsel) incurred by the Agent or any Lender in enforcing any rights under this Guaranty. Without limiting the generality of the foregoing, each Guarantor's liability shall extend to all amounts that constitute part of the Guaranteed Obligations and would be owed by the Borrower to the Agent or any Lender under or in respect of the Credit Agreement and the Notes but for the fact that they are unenforceable or not allowable due to the existence of a bankruptcy, reorganization or similar proceeding involving the Borrower.

(b) Each Guarantor and, by its acceptance of this Guaranty, the Agent and each Lender, hereby confirms that it is the intention of all such Persons that this Guaranty and the obligations of each Guarantor hereunder not constitute a fraudulent transfer or conveyance

for purposes of Bankruptcy Law (as hereinafter defined), the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act or any similar foreign, federal or state law to the extent applicable to this Guaranty and the obligations of each Guarantor hereunder. To effectuate the foregoing intention, the Agent, the Lenders and the Guarantors hereby irrevocably agree that the obligations of each Guarantor under this Guaranty at any time shall be limited to the maximum amount as will result in the obligations of such Guarantor under this Guaranty not constituting a fraudulent transfer or conveyance. For purposes hereof, "Bankruptcy Law" means any proceeding of the type referred to in Section 6.01(f) of the Credit Agreement or Title 11, U.S. Code, or any similar foreign, federal or state law for the relief of debtors.

Section 2. Guaranty Absolute. Each Guarantor guarantees that the Guaranteed Obligations will be paid strictly in accordance with the terms of the Credit Agreement, regardless of any law, regulation or order now or hereafter in effect in any jurisdiction affecting any of such terms or the rights of the Agent or any Lender with respect thereto. The obligations of each Guarantor under or in respect of this Guaranty are independent of the Guaranteed Obligations or any other obligations of the Borrower or any other Guarantor under or in respect of the Credit Agreement, the Notes and the Guaranties, and a separate action or actions may be brought and prosecuted against each Guarantor to enforce this Guaranty, irrespective of whether any action is brought against the Borrower or any other Guarantor or whether the Borrower or any other Guarantor is joined in any such action or actions. The liability of each Guarantor under this Guaranty shall be irrevocable, absolute and unconditional irrespective of, and each Guarantor hereby irrevocably waives any defenses (other than payment) it may now have or hereafter acquire in any way relating to, any or all of the following:

(a) any lack of validity or enforceability of the Credit Agreement, the Notes or any agreement or instrument relating thereto;

(b) any change in the time, manner or place of payment of, or in any other term of, all or any of the Guaranteed Obligations or any other obligations of the Borrower or any other Guarantor under or in respect of the Credit Agreement, the Notes or the Guaranties, or any other amendment or waiver of or any consent to departure therefrom, including, without limitation, any increase in the Guaranteed Obligations resulting from the extension of additional credit to the Borrower or any of its Subsidiaries or otherwise;

(c) any taking, exchange, release or non-perfection of any collateral, or any taking, release or amendment or waiver of, or consent to departure from, any other guaranty, for all or any of the Guaranteed Obligations;

(d) any manner of application of any collateral, or proceeds thereof, to all or any of the Guaranteed Obligations, or any manner of sale or other disposition of any collateral for all or any of the Guaranteed Obligations or any other obligations of the Borrower or any other Guarantor under the Credit Agreement, the Notes, the Guaranties or any other assets of any the Borrower or any of its Subsidiaries;

(e) any change, restructuring or termination of the corporate structure or existence of the Borrower or any of its Subsidiaries;

(f) any failure of the Agent or any Lender to disclose to such Guarantor any information relating to the business, condition (financial or otherwise), operations, performance, properties or prospects of the Borrower any other Guarantor now or hereafter known to the Agent or such Lender (each Guarantor waiving any duty on the part of the Agent and the Lenders to disclose such information);

(g) the failure of any other Person to execute or deliver this Guaranty, any Guaranty Supplement (as hereinafter defined) or any other guaranty or agreement or the release or reduction of liability of any Guarantor or other guarantor or surety with respect to the Guaranteed Obligations; or

(h) any other circumstance (including, without limitation, any statute of limitations) or any existence of or reliance on any representation by the Agent or any Lender that might otherwise constitute a defense available to, or a discharge of, such Guarantor or any other guarantor or surety.

This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time any payment of any of the Guaranteed Obligations is rescinded or must otherwise be returned by any Lender or any other Person upon the insolvency, bankruptcy or reorganization of the Borrower or otherwise, all as though such payment had not been made.

Section 3. Waivers and Acknowledgments. (a) Each Guarantor hereby unconditionally and irrevocably waives promptness, diligence, notice of acceptance, presentment, demand for performance, notice of nonperformance, default, acceleration, protest or dishonor and any other notice with respect to any of the Guaranteed Obligations and this Guaranty and any requirement that the Agent or any Lender protect, secure, perfect or insure any lien or any property subject thereto or exhaust any right or take any action against the Borrower or any other Person or any collateral.

(b) Each Guarantor hereby unconditionally and irrevocably waives any right to revoke this Guaranty and acknowledges that this Guaranty is continuing in nature and applies to all Guaranteed Obligations, whether existing now or in the future.

(c) Each Guarantor hereby unconditionally and irrevocably waives (i) any defense arising by reason of any claim or defense based upon an election of remedies by the Agent or any Lender that in any manner impairs, reduces, releases or otherwise adversely affects the subrogation, reimbursement, exoneration, contribution or indemnification rights of such Guarantor or other rights of such Guarantor to proceed against the Borrower, any other guarantor or any other Person or any collateral and (ii) any defense based on any right of set-off or counterclaim against or in respect of the obligations of such Guarantor hereunder.

(d) Each Guarantor hereby unconditionally and irrevocably waives any duty on the part of the Agent or any Lender to disclose to such Guarantor any matter, fact or thing relating to the business, condition (financial or otherwise), operations, performance, properties or prospects of the Borrower or any of its Subsidiaries now or hereafter known by the Agent or such Lender.

(e) Each Guarantor acknowledges that it will receive substantial direct and indirect benefits from the financing arrangements contemplated by the Credit Agreement and that the waivers set forth in Section 2 and this Section 3 are knowingly made in contemplation of such benefits.

Section 4. Subrogation. Each Guarantor hereby unconditionally and irrevocably agrees not to exercise any rights that it may now have or hereafter acquire against the Borrower or any other insider guarantor that arise from the existence, payment, performance or enforcement of such Guarantor's obligations under or in respect of this Guaranty, including, without limitation, any right of subrogation, reimbursement, exoneration, contribution or indemnification and any right to participate in any claim or remedy of any Lender against the Borrower or any other insider guarantor or any collateral, whether or not such claim, remedy or right arises in equity or under contract, statute or common law, including, without limitation, the right to take or receive from the Borrower or any other insider guarantor, directly or indirectly, in cash or other property or by set-off or in any other manner, payment or security on account of such claim, remedy or right, in each case unless and until all of the Guaranteed Obligations and all other amounts payable under this Guaranty shall have been paid in full in cash and the Commitments shall have expired or been terminated. If any amount shall be paid to any Guarantor in violation of the immediately preceding sentence at any time prior to the later of (a) the payment in full in cash of the Guaranteed Obligations and all other amounts payable under this Guaranty and (b) the Termination Date, such amount shall be received and held in trust for the benefit of the Agent and the Lenders, shall be segregated from other property and funds of such Guarantor and shall forthwith be paid or delivered to the Agent in the same form as so received (with any necessary endorsement or assignment) to be credited and applied to the Guaranteed Obligations and all other amounts payable under this Guaranty, whether matured or unmatured, in accordance with the terms of the Credit Agreement, or to be held as collateral for any Guaranteed Obligations or other amounts payable under this Guaranty thereafter arising. If (i) any Guarantor shall make payment to the Agent or any Lender of all or any part of the Guaranteed Obligations, (ii) all of the Guaranteed Obligations and all other amounts payable under this Guaranty shall have been paid in full in cash and (iii) the Termination Date shall have occurred, the Agent and the Lenders will, at such Guarantor's request and expense, execute and deliver to such Guarantor appropriate documents, without recourse and without representation or warranty, necessary to evidence the transfer by subrogation to such Guarantor of an interest in the Guaranteed Obligations resulting from such payment made by such Guarantor pursuant to this Guaranty.

Section 5. Payments Free and Clear of Taxes, Etc. (a) Any and all payments made by any Guarantor under or in respect of this Guaranty shall be made, in accordance with Section 2.13 of the Credit Agreement, free and clear of and without deduction for any and all present or future Taxes. If any Guarantor shall be required by law to deduct any Taxes from or in respect of any sum payable under or in respect of this Guaranty to any Lender, (i) the sum payable by such Guarantor shall be increased as may be necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section 6), such Lender or the Agent (as the case may be) receives an amount equal to the sum it would have received had no such deductions been made, (ii) such Guarantor shall make all such deductions and (iii) such Guarantor shall pay the full amount deducted to the relevant taxation authority or other authority in accordance with applicable law.

(b) In addition, each Guarantor agrees to pay any present or future Other Taxes that arise from any payment made by or on behalf of such Guarantor under or in respect of this Guaranty or from the execution, delivery or registration of, performance under, or otherwise with respect to, this Guaranty.

(c) Each Guarantor will indemnify each Lender for and hold it harmless against the full amount of Taxes and Other Taxes imposed on or paid by such Lender and any liability (including penalties, additions to tax, interest and expenses but excluding any taxes imposed by any jurisdiction on amounts payable under this Section 6) arising therefrom or with respect thereto. This indemnification shall be made within 30 days from the date such Lender makes written demand therefor.

(d) The obligations of each Guarantor under this Section 6 are subject in all respects to the limitations, qualifications and satisfaction of conditions set forth in Section 2.14 of the Credit Agreement. Without limitation of the foregoing, the Lenders are subject to the obligations set forth in Section 2.14 of the Credit Agreement to the same extent as if set forth herein.

Section 6. Representations and Warranties. Each Guarantor hereby represents and warrants as follows:

(a) Such Guarantor is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation.

(b) The execution, delivery and performance by such Guarantor of this Guaranty, and the consummation of the transactions contemplated hereby, are within such Guarantor's corporate powers, have been duly authorized by all necessary corporate action, and do not contravene (i) such Guarantor's charter or by-laws (or other equivalent organizational documents) or (ii) any law or contractual restriction binding on or affecting such Guarantor.

(c) No authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body or any other third party is required for the due execution, delivery and performance by such Guarantor of this Guaranty.

(d) This Guaranty has been duly executed and delivered by such Guarantor. This Guaranty is the legal, valid and binding obligation of such Guarantor enforceable against such Guarantor in accordance with its terms, subject to (i) bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights and remedies of creditors and secured parties and (ii) general principles of equity, regardless of whether applied in equity or at law.

(e) Such Guarantor has, independently and without reliance upon the Agent or any Lender and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Guaranty.

(f) The obligations of such Guarantor hereunder are at least *pari passu* with all other Debt of such Guarantor and share equally and ratably in any collateral securing

such Debt (other than in respect of Debt comprised of capitalized leases or vendor financing or secured by Liens permitted under Section 5.02(a) of the Credit Agreement).

Section 7. Amendments, Guaranty Supplements, Etc. (a) No amendment or waiver of any provision of this Guaranty and no consent to any departure by any Guarantor therefrom shall in any event be effective unless the same shall be in writing and signed by the Guarantors, the Agent and the Required Lenders, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given; provided, however, that no amendment, waiver or consent shall, unless in writing and signed by the Guarantors and all of the Lenders, (a) reduce or limit the obligations of any Guarantor hereunder, release any Guarantor hereunder or otherwise limit any Guarantor's liability with respect to the obligations owing to the Agent and the Lenders hereunder except as provided in the next succeeding sentence, (b) postpone any date fixed for payment hereunder or (c) change the number of Lenders or the percentage of the Commitments or the aggregate unpaid principal amount of the Advances that, in each case, shall be required for the Lenders or any of them to take any action hereunder. Anything in this Guaranty to the contrary notwithstanding, if any Guarantor ceases to be (i) a Subsidiary of the Borrower as a result of any merger, consolidation, disposition of assets or other transaction permitted by the Credit Agreement or (ii) a Material Subsidiary then, in each such case, such Guarantor shall be automatically released from this Guaranty.

(b) Upon the execution and delivery by any Person of a guaranty supplement in substantially the form of Exhibit A hereto (each, a "Guaranty Supplement"), (i) such Person shall be referred to as an "Additional Guarantor" and shall become and be a Guarantor hereunder, and each reference in the Credit Agreement or this Guaranty to a "Guarantor" shall also mean and be a reference to such Additional Guarantor, and (ii) each reference herein to "this Guaranty", "hereunder", "hereof" or words of like import referring to this Guaranty, and each reference in the Credit Agreement to the "Guaranty", "thereunder", "thereof" or words of like import referring to this Guaranty, shall mean and be a reference to this Guaranty as supplemented by such Guaranty Supplement.

Section 8. Notices, Etc. All notices and other communications provided for hereunder shall be in writing (including telegraphic, telecopy or telex communication) and mailed, telegraphed, telecopied, telexed or delivered to it, if to any Guarantor, addressed to it in care of the Borrower at the Borrower's address specified in Section 8.02 of the Credit Agreement, if to the Agent or any Lender, addressed to it at its address specified in Section 8.02 of the Credit Agreement, or, as to any Guarantor, the Agent or any Lender, at such other address as shall be designated by such Person in a written notice to each such other Person. All such notices and other communications to any Person shall be effective (a) when actually delivered in fully legible form to such Person or (b) five days after being deposited in the United States mail, with first class postage prepaid and registered and certified. Delivery by telecopier of an executed counterpart of a signature page to any amendment or waiver of any provision of this Guaranty or of any Guaranty Supplement to be executed and delivered hereunder shall be effective as delivery of an original executed counterpart thereof.

Section 9. No Waiver; Remedies. No failure on the part of the Agent or any Lender to exercise, and no delay in exercising, any right hereunder shall operate as a waiver

thereof; nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

Section 10. Right of Set-off. Upon (a) the occurrence and during the continuance of any Event of Default and (b) the making of the request or the granting of the consent specified by Section 6.01 of the Credit Agreement to authorize the Agent to declare the Notes due and payable pursuant to the provisions of such Section 6.01 and notice to the Borrower as required under such Section 6.01, each Lender and each of its Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by such Lender or such Affiliate to or for the credit or the account of any Guarantor against any and all of the obligations of such Guarantor now or hereafter existing hereunder, whether or not such Lender shall have made any demand under this Guaranty and although such obligations may be unmatured. Each Lender agrees promptly to notify such Guarantor after any such set-off and application; provided, however, that the failure to give such notice shall not affect the validity of such set-off and application. The rights of the each Lender and its Affiliates under this Section 11 are in addition to other rights and remedies (including, without limitation, other rights of set-off) that such Lender and its Affiliates may have.

Section 11. Indemnification. (a) Without limitation on any other obligations of any Guarantor or remedies of the Agent and the Lenders under this Guaranty, each Guarantor shall, to the fullest extent permitted by law, indemnify, defend and save and hold harmless the Agent and each Lender and each of their Affiliates and their respective officers, directors, employees, agents and advisors (each, an "Indemnified Party") from and against, and shall pay in accordance with Section 8.04(a) of the Credit Agreement, any and all claims, damages, losses, liabilities and expenses (including, without limitation, reasonable fees and expenses of counsel) that may be incurred by or asserted or awarded against any Indemnified Party in connection with or as a result of any failure of any Guaranteed Obligations to be the legal, valid and binding obligations of the Borrower enforceable against the Borrower in accordance with their terms.

(b) Each Guarantor hereby also agrees that none of the Indemnified Parties shall have any liability (whether direct or indirect, in contract, tort or otherwise) to any of the Guarantors or any of their respective Affiliates or any of their respective officers, directors, employees, agents and advisors, and each Guarantor hereby agrees not to assert any claim against any Indemnified Party on any theory of liability, for special, indirect, consequential or punitive damages arising out of or otherwise relating to the Credit Agreement, the Notes, the actual or proposed use of the proceeds of the Advances or any of the transactions contemplated by the Credit Agreement.

(c) Without prejudice to the survival of any other agreement of any Guarantor under this Guaranty, the agreements and obligations of each Guarantor contained in Section 1(a) with respect to enforcement expenses, the last sentence of Section 2, Section 5 and this Section 12 shall survive the payment in full of the Guaranteed Obligations and all of the other amounts payable under this Guaranty.

Section 12. Continuing Guaranty; Assignments under the Credit Agreement. This Guaranty is a continuing guaranty and shall (a) remain in full force and effect until the later of (i) the payment in full in cash of the Guaranteed Obligations and all other amounts payable under this Guaranty and (ii) the Termination Date, (b) be binding upon the Guarantor, its successors and assigns and (c) inure to the benefit of and be enforceable by the Agent and the Lenders and their successors and permitted transferees and assigns. Without limiting the generality of clause (c) of the immediately preceding sentence, any Lender may assign or otherwise transfer all or any portion of its rights and obligations under the Credit Agreement (including, without limitation, all or any portion of its Commitment, the Advances owing to it and the Notes held by it) to any other Person, and such other Person shall thereupon become vested with all the benefits in respect thereof granted to such Lender herein or otherwise, in each case as and to the extent provided in Section 8.07 of the Credit Agreement. No Guarantor shall have the right to assign its rights hereunder or any interest herein without the prior written consent of the Lenders.

Section 13. Execution in Counterparts. This Guaranty and each amendment, waiver and consent with respect hereto may be executed in any number of counterparts and by different parties thereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Guaranty by telecopier shall be effective as delivery of an original executed counterpart of this Guaranty.

Section 14. Governing Law; Jurisdiction; Waiver of Jury Trial, Etc. (a) This Guaranty shall be governed by, and construed in accordance with, the laws of the State of New York.

(b) Each Guarantor hereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of any New York State court or federal court of the United States of America sitting in New York City, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Guaranty, or for recognition or enforcement of any judgment, and each Guarantor hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in any such New York State court or, to the extent permitted by law, in such federal court. Each Guarantor 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 Guaranty shall affect any right that any party may otherwise have to bring any action or proceeding relating to this Guaranty in the courts of any jurisdiction.

(c) Each Guarantor irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection that it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Guaranty in any New York State or federal court. Each Guarantor hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such suit, action or proceeding in any such court.

(d) EACH GUARANTOR HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM

(WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO ANY OF THIS GUARANTY, THE ADVANCES OR THE ACTIONS OF THE AGENT OR ANY LENDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT THEREOF.

IN WITNESS WHEREOF, each Guarantor has caused this Guaranty to be duly executed and delivered by its officer thereunto duly authorized as of the date first above written.

[NAME OF GUARANTOR]

By_____

Title:

[NAME OF GUARANTOR]

By_____

Title:

Etc.

Exhibit A
To the Guaranty

FORM OF GUARANTY SUPPLEMENT

_____ __, 200_

The Chase Manhattan Bank, as Agent
270 Park Avenue
New York, New York 10017

Attention: _____

Amended and Restated Credit Agreement dated as of September 24, 2001 among Genuity Inc., a Delaware corporation (the "Borrower"), the Lenders party to the Credit Agreement, The Chase Manhattan Bank, as Agent, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents

Ladies and Gentlemen:

Reference is made to the above-captioned Credit Agreement and to the Guaranty referred to therein (such Guaranty, as in effect on the date hereof and as it may hereafter be amended, supplemented or otherwise modified from time to time, together with this Guaranty Supplement, being the "Guaranty"). The capitalized terms defined in the Credit Agreement and not otherwise defined herein are used herein as therein defined.

Section 1. Guaranty; Limitation of Liability. (a) The undersigned hereby: (i) absolutely, unconditionally and irrevocably guarantees the punctual payment when due, whether at scheduled maturity or on any date of a required prepayment or by acceleration, demand or otherwise, of all obligations of the Borrower now or hereafter existing under or in respect of the Credit Agreement and the Notes (including, without limitation, any extensions, modifications, substitutions, amendments or renewals of any or all of the foregoing obligations), whether direct or indirect, absolute or contingent, and whether for principal, interest, premium, fees, indemnities, contract causes of action, costs, expenses or otherwise, provided that the liability of such Guarantor with respect to such obligations of the Borrower shall not exceed the aggregate Debt of the undersigned (other than Debt arising hereunder) (such obligations, as so limited, being the "Guaranteed Obligations"); and (ii) agrees to pay any and all expenses (including, without limitation, fees and expenses of counsel) incurred by the Agent or any Lender in enforcing any rights under this Guaranty Supplement or the Guaranty. Without limiting the generality of the foregoing, the undersigned's liability shall extend to all amounts that constitute part of the Guaranteed Obligations and would be owed by the Borrower to the Agent or any Lender under or in respect of the Credit Agreement and the Notes but for the fact that they are unenforceable or not allowable due to the existence of a bankruptcy, reorganization or similar proceeding involving the Borrower.

(b) The undersigned, and by its acceptance of this Guaranty Supplement, the Agent and each Lender, hereby confirms that it is the intention of all such Persons that this Guaranty Supplement, the Guaranty and the obligations of the undersigned hereunder and thereunder not constitute a fraudulent transfer or conveyance for purposes of Bankruptcy Law (as defined in the Guaranty), the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act or any similar foreign, federal or state law to the extent applicable to this Guaranty Supplement, the Guaranty and the obligations of the undersigned hereunder and thereunder. To effectuate the foregoing intention, the Agent, the Lenders and the undersigned hereby irrevocably agree that the obligations of the undersigned under this Guaranty Supplement and the Guaranty at any time shall be limited to the maximum amount as will result in the obligations of the undersigned under this Guaranty Supplement and the Guaranty not constituting a fraudulent transfer or conveyance.

Section 2. Obligations Under the Guaranty. The undersigned hereby agrees, as of the date first above written, to be bound as a Guarantor by all of the terms and conditions of the Guaranty to the same extent as each of the other Guarantors thereunder. The undersigned further agrees, as of the date first above written, that each reference in the Guaranty to an "Additional Guarantor" or a "Guarantor" shall also mean and be a reference to the undersigned, and each reference in the Credit Agreement to a "Guarantor" shall also mean and be a reference to the undersigned.

Section 3. Representations and Warranties. The undersigned hereby makes each representation and warranty set forth in Section 6 of the Guaranty to the same extent as each other Guarantor.

Section 4. Delivery by Telecopier. Delivery of an executed counterpart of a signature page to this Guaranty Supplement by telecopier shall be effective as delivery of an original executed counterpart of this Guaranty Supplement.

Section 5. Governing Law; Jurisdiction; Waiver of Jury Trial, Etc. (a) This Guaranty Supplement shall be governed by, and construed in accordance with, the laws of the State of New York.

(b) The undersigned hereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of any New York State court or any federal court of the United States of America sitting in New York City, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Guaranty Supplement or the Guaranty, or for recognition or enforcement of any judgment, and the undersigned hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in any such New York State court or, to the extent permitted by law, in such federal court. The undersigned 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 Guaranty Supplement or the Guaranty shall affect any right that any party may otherwise have to bring any action or proceeding relating to this Guaranty Supplement or the Guaranty in the courts of any other jurisdiction.

(c) The undersigned irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection that it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Guaranty Supplement or the Guaranty in any New York State or federal court. The undersigned hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such suit, action or proceeding in any such court.

(d) THE UNDERSIGNED HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS GUARANTY SUPPLEMENT, THE GUARANTY, THE ADVANCES OR THE ACTIONS OF THE AGENT OR ANY LENDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT THEREOF.

Very truly yours,

[NAME OF ADDITIONAL GUARANTOR]

By _____

Title:

GENUITY

235 Presidential Way
P.O. Box 4100
Woburn, MA 01888-4100
Tel 781-865-8800
www.genuity.com

The Chase Manhattan Bank, as Agent
for the Lender Parties party
to the Credit Agreement
referred to below
270 Park Avenue
New York, New York 10017

July 22, 2002

Attention: Constance Coleman - Fax 212-270-4584

Stephen McArdle - Fax 212-552-5700

Ladies and Gentlemen:

The undersigned, Genuity Inc., refers to the Amended and Restated Credit Agreement, dated as of September 24, 2001 (as amended or modified from time to time, the "<u>Credit Agreement</u>"), among the undersigned, certain Lender Parties party thereto, The Chase Manhattan Bank, as Agent for said Lender Parties, J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents. Terms defined in the Credit Agreement and not otherwise defined herein are used herein with the meanings so defined. Pursuant to Section 2.02 of the Credit Agreement, the undersigned hereby gives you notice, irrevocably, that the undersigned hereby requests a Revolving Credit Borrowing under the Credit Agreement, and in that connection sets forth below the information relating to such Revolving Credit Borrowing (the "<u>Proposed Revolving Credit Borrowing</u>") as required by Section 2.02(a) of the Credit Agreement:

(i) The Business Day of the Proposed Revolving Credit Borrowing is July 22, 2002.

(ii) The Type of Advance comprising the Proposed Revolving Credit Borrowing is a Base Rate Advance.

(iii) The aggregate amount of the Proposed Revolving Credit Borrowing is $850,000,000.00 (eight hundred and fifty million & 00/100 USD).

The undersigned hereby certifies that the following statements are true on the date hereof, and will be true on the date of the Proposed Revolving Credit Borrowing:

(A) the representations and warranties contained in Section 4.01 of the Credit Agreement and in each Guaranty are correct, before and after giving effect to the Proposed Revolving Credit Borrowing and to the application of the proceeds therefrom, as though made on and as of such date (except to the extent that any such representation or warranty relates to a specific earlier date); and

(B) no event has occurred and is continuing, or would result from such Proposed Revolving Credit Borrowing or from the application of the proceeds therefrom, that constitutes a Default.

Please note that we will provide you with wiring instructions later this morning under a separate facsimile.

Very truly yours,

GENUITY INC.

By Roger Kuebel
Title: Vice President and Treasurer

EXECUTION COPY

AMENDMENT NO. 1 TO THE AMENDED AND RESTATED CREDIT AGREEMENT

Dated as of November 12, 2002

AMENDMENT NO. 1 TO THE AMENDED AND RESTATED CREDIT AGREEMENT among GENUITY INC., a Delaware corporation (the "Borrower"), the FINANCIAL INSTITUTIONS AND OTHER INSTITUTIONAL LENDERS parties to the Credit Agreement referred to below (collectively, the "Lenders") and JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as administrative agent (the "Agent") for the Lenders.

PRELIMINARY STATEMENTS:

(1) The Borrower, the Lenders and the Agent have entered into an Amended and Restated Credit Agreement dated as of September 24, 2001, with J.P. Morgan Securities Inc., as arranger, Citibank, N.A., as syndication agent, and Credit Suisse First Boston and Deutsche Bank AG New York Branch, as co-documentation agents (such Credit Agreement, as amended, supplemented or otherwise modified from time to time, the "Credit Agreement"). Capitalized terms not otherwise defined in this Amendment have the same meanings as specified in the Credit Agreement.

(2) The Borrower and the Required Lenders have agreed to amend the Credit Agreement as hereinafter set forth.

SECTION 1. Amendments to Credit Agreement. The Credit Agreement is, effective as of the date hereof and subject to the satisfaction of the conditions precedent set forth in Section 2, hereby amended as follows:

(a) Section 1.01 is amended by adding the following definitions in the correct alphabetical order:

"Bankruptcy Proceeding" means any dissolution, winding up, liquidation, arrangement, reorganization, adjustment, protection, relief or composition with respect to the Borrower, any of its Subsidiaries or its or their debts, whether voluntary or involuntary, in any bankruptcy, insolvency, arrangement, reorganization, receivership, relief or other similar case or proceeding under any Federal or State bankruptcy or similar law or upon an assignment for the benefit of creditors or any other marshalling of the assets and liabilities of the Borrower or any of its Subsidiaries.

"Defaulting Lender" means, at any date of determination, any Lender that, at or prior to such time, has not made its ratable share of the July Advance made by the other Lenders to the Borrower pursuant to Section 2.01.

"July Advance" means the $850,000,000 Revolving Credit Advance requested by the Borrower on July 22, 2002.

"Standstill Agreements" means, collectively, Standstill Agreement dated as of July 29, 2002, Standstill Agreement No. 2 dated as of August 13, 2002, Standstill Agreement No. 3 dated as of September 12, 2002, Standstill Agreement No. 4 dated as of October 11, 2002, Standstill Agreement No. 5 dated as of October 26, 2002 and Standstill Agreement No. 6 dated as of November 12, 2002 in each case among the Agent, the Lenders party thereto, the Borrower and the Guarantors.

(b) The definition of "Letter of Credit Advance" in Section 1.01 is amended by adding to the end thereof the following new clause to read as follows:

", and all payments made to the Agent by any Lender for the account of the Issuing Bank as specified in the last sentence of Section 2.04(c)."

(c) Section 2.14(a) is amended by adding to the end of the second sentence thereof the following new clause to read as follows: ", including, without limitation, in accordance with Section 2.14(e)."

(d) Section 2.14 is further amended by adding to the end thereof the following new subsection "(e)" to read as follows:

"(e) Notwithstanding anything to the contrary contained in this Agreement, in the event that, at any time or from time to time, (i) any Lender shall be a Defaulting Lender and (ii) either (1) any payment is made by or on behalf of the Borrower or any of its Subsidiaries to the Agent or any Lender in respect of the July Advance (including, without limitation, amounts paid to the Agent pursuant to Section 4(a) of each Standstill Agreement, or similarly designated amounts paid pursuant to the comparable section of any comparable agreement) or (2) the Agent or any Lender shall receive any other payments, proceeds, property or other amounts, whether in cash or other property, or by way of setoff, purchase of participation or in any other manner, in each case by or on behalf of the Borrower or any of its Subsidiaries in payment of or in respect of any Advance, the Notes or the Guaranty, including, without limitation, whether made in the ordinary course, in connection with any Bankruptcy Proceeding, pursuant to an out of court restructuring or otherwise, then, in each case, such payments, proceeds, property or other amounts (other than amounts payable pursuant to Section 2.03, 2.05, 2.12, 2.15, 7.05, 8.04 or 8.07(a)) shall be applied in the following order of priority:

first, ratably to each Lender (other than any Defaulting Lender) in accordance with the respective aggregate outstanding principal amount of the July Advance then owing to such Lenders, until all amounts owing to such Lenders with respect to the July Advance (including principal of, all accrued and unpaid interest on, and fees in respect thereof) are paid in full in cash;

second, ratably to all Lenders in accordance with the respective aggregate outstanding principal amount of the Letter of Credit Advances then owing to such Lenders, until all amounts owing to such Lenders with respect to all Letter of Credit Advances (including principal of, all accrued and unpaid interest on, and fees in respect thereof) are paid in full in cash; and

third, ratably to all Lenders until all obligations of the Borrower and Guarantors then owing hereunder and under the Guaranty are paid in full in cash.

In the event that any Lender that is a Defaulting Lender shall, at any time, cease to be a Defaulting Lender, none of the payments previously made pursuant to this Section 2.14(e) shall, by operation of Section 2.16 or otherwise, be subject to reallocation or reapportionment at such later time."

(e) Section 2.16 is amended by adding at the beginning of such Section the clause "Subject to Section 2.14(e),".

SECTION 2. Conditions to Effectiveness. This Amendment shall become effective as of the date first above written when, and only when, the Agent shall have received counterparts of (i) this Amendment executed by the Borrower and the Required Lenders, or as to any of the Lenders, advice satisfactory to the Agent that such Lender has executed this Amendment and (ii) the consent attached hereto executed by the Guarantors. This Amendment is subject to the provisions of Section 8.01 of the Credit Agreement.

SECTION 3. Representations and Warranties of the Borrower. The Borrower hereby represents and warrants that this Amendment has been duly executed and delivered by it, and this Amendment is the legal, valid and binding obligation of the Borrower, enforceable against it in accordance with its terms, except as enforcement may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting creditors' rights generally and by general principles of equity (regardless of whether enforcement is sought in equity or at law).

SECTION 4. Severability. If any provision of this Amendment is held to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remaining provisions of this Amendment shall not be affected or impaired thereby. The invalidity of a provision in a particular jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

SECTION 5. Reference to and Effect on the Credit Agreement. (a) On and after the effectiveness of this Amendment, each reference in the Credit Agreement and all other documents and instruments delivered in connection therewith to "this Agreement", "the Credit Agreement", "hereunder", "hereof", "thereunder", "thereof" or words of like import referring to the Credit Agreement, shall mean and be a reference to the Credit Agreement, as amended by this Amendment.

(b) The Credit Agreement, as specifically amended by this Amendment, the Notes and each L/C Related Document are and shall continue to be in full force and effect and are hereby in all respects ratified and confirmed.

(c) The execution, delivery and effectiveness of this Amendment shall not, except as expressly provided herein, operate as a waiver of any right, power or remedy of any Lender Party or the Agent under the Credit Agreement, the Notes or the Guaranty, nor constitute a waiver of any provision of the Credit Agreement, the Notes or the Guaranty.

SECTION 6. Execution in Counterparts. This Amendment may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Amendment by telecopier shall be effective as delivery of a manually executed counterpart of this Amendment.

SECTION 7. Governing Law. This Amendment shall be governed by, and construed in accordance with, the laws of the State of New York.

SECTION 8. Standstill Agreement. The undersigned Agent and Lenders agree that, notwithstanding the effectiveness of this Amendment, the Standstill Agreement No. 6 dated as of the date hereof among the Borrower, the Guarantors, the Agent and the Lenders party thereto will continue to be in full force and effect and is hereby in all respects ratified and confirmed.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By [signature]
Name: D. O'Brien
Title: EVP - CFO

JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as Administrative Agent and as Lender

By______________________________
Name:
Title:

____
[Type or print name of Lender]

By______________________________
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By_____
Name:
Title:

JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as Administrative Agent and as Lender

By Mary Ellen Egbert
Name: Mary Ellen Egbert
Title: Managing Director

_____
[Type or print name of Lender]

By_____
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By_____
Name:
Title:

JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as Administrative Agent and as Lender

By_____
Name:
Title:

The Bank of New York
[Type or print name of Lender]

By_____
Name: George P. Malanga
Title: Senior Vice President

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By_____
Name:
Title:

JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as Administrative Agent and as Lender

By_____
Name:
Title:

CITIBANK USA INC.
[Type or print name of Lender]

By_____
Name:
Title:

PETER REYNOLDS
Director
IRM
250 West Street/6th Fl.
Phone (212) 723-3551
Fax (212) 723-3664

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By_____
Name:
Title:

JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as Administrative Agent and as Lender

By_____
Name:
Title:

CREDIT SUISSE FIRST BOSTON
[Type or print name of Lender]

By_____
Name: MARISA J. HARNEY
Title: MANAGING DIRECTOR

Sharon M. Meadows
Managing Director

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By_____
Name:
Title:

JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as Administrative Agent and as Lender

By_____
Name:
Title:

MIZUHO CORPORATE BANK, LTD.
[Type or print name of Lender]

By_____
Name: Atsushi Narikawa
Title: Deputy General Manager.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By_____
Name:
Title:

JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as Administrative Agent and as Lender

By_____
Name:
Title:

TORONTO DOMINION (TEXAS), INC.

By Jean K Pettit
Name: Jean K. Pettit
Title: Vice President

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their respective officers thereunto duly authorized, as of the date first above written.

GENUITY INC.

By_____
Name:
Title:

JPMORGAN CHASE BANK (formerly known as The Chase Manhattan Bank), as Administrative Agent and as Lender

By_____
Name:
Title:

Wachovia Bank, National Association (formerly know as First Union National Bank)

By_____
Name: C. Mark Hedrick
Title: Director

CONSENT

Dated as of November 12, 2002

The undersigned, GENUITY SOLUTIONS INC. and GENUITY TELECOM INC., each as Guarantors under the Guaranty dated as of September 5, 2000 (as amended, supplemented or otherwise modified from time to time, the "Guaranty") in favor of the Agent and the Lenders parties to the Credit Agreement referred to in the foregoing Amendment, hereby consents to such Amendment and hereby confirms and agrees that notwithstanding the effectiveness of such Amendment, the Guaranty is, and shall continue to be, in full force and effect and is hereby ratified and confirmed in all respects, except that, on and after the effectiveness of such Amendment, each reference in the Guaranty to the "Credit Agreement", "thereunder", "thereof" or words of like import shall mean and be a reference to the Credit Agreement, as amended by such Amendment.

GENUITY SOLUTIONS INC.

By _____
Name: DPO'BRIEN
Title: EVP-CFO

GENUITY TELECOM INC.

By _____
Name: DPO'BRIEN
Title: EVP-CFO

Exhibit C

EXHIBIT E

FORM OF NOTICE OF BORROWING

_____ __, 200_

Bank of America, N.A.,
as Administrative Agent
Mail Code: TX1-492-14-11
Bank of America Plaza
901 Main St.
Dallas, TX 75202-3714
Attention: Donna F. Kimbrough

Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC

Ladies and Gentlemen:

Pursuant to Section 2.4 of that certain Credit Agreement, dated as of June 6, 2007 (as amended, supplemented, replaced or otherwise modified from time to time, the "Credit Agreement"; capitalized terms used but not defined herein shall have the meanings given to them in the Credit Agreement or if not set forth therein the meanings given to them in the Disbursement Agreement, or, to the extent the Disbursement Agreement is then not in effect, the Disbursement Agreement as of the last day of its effectiveness), among Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (collectively, the "Borrowers"), each lender from time to time party thereto and Bank of America, N.A., as administrative agent (the "Administrative Agent"), the Borrowers hereby give the Administrative Agent irrevocable notice that the Borrowers hereby request a Loan under the Credit Agreement, and in that connection set forth below the information relating to such Loan:

1. The Banking Day of the proposed Loan is _____ ___, ____ (the "Borrowing Date").

2. The proposed Loan is a [Disbursement Agreement Loan] [Direct Loan].

3. The proposed Loan is [a Delay Draw Loan] [an Initial Term Loan] [a Revolving Loan].

4. The Type of the proposed Loan is a [Base Rate Loan] [Eurodollar Loan].

5. The aggregate amount of the proposed Loan is $_____.

[6. The initial Interest Period for each Eurodollar Loan made as part of the proposed Loan is __ month[s].]

[The Borrowers hereby certify that the following statements are true and correct on the date hereof, and will be true and correct on the Borrowing Date:

(a) Each of the representations and warranties made by each Loan Party in or pursuant to the Loan Documents is true and correct in all material respects on and as of the date hereof as if made on and as of the date hereof, except for representations and warranties expressly stated to relate to a specific earlier date, in which case such representations and warranties are true and correct in all material respects as of such earlier date.

(b) No Default or Event of Default has occurred and is continuing on the date hereof or will occur immediately after giving effect to the proposed Loan.][1]

The Borrowers agree that, if prior to the Borrowing Date any of the foregoing certifications shall cease to be true and correct, the Borrowers shall forthwith notify the Administrative Agent thereof in writing (any such notice, a "Non-Compliance Notice"). Except to the extent, if any, that prior to the Borrowing Date, the Borrowers shall deliver a Non-Compliance Notice to the Administrative Agent, each of the foregoing certifications shall be deemed to be made additionally on the Borrowing Date as if made on such date.

The undersigned is executing this Notice of Borrowing not in an individual capacity, but in the undersigned's capacity as a Responsible Officer of the Borrowers.

Very truly yours,

FONTAINEBLEAU LAS VEGAS, LLC,

and

FONTAINEBLEAU LAS VEGAS II, LLC

By: Fontainebleau Las Vegas Holdings, LLC, Managing Member of each of the foregoing

By: Fontainebleau Resort Properties I, LLC, its Managing Member

By: Fontainebleau Resort Holdings, LLC, its Managing Member

By: Fontainebleau Resorts, LLC, its Managing Member

By: _____
Name: _____
Title: _____

[1] Insert these sections if the proposed Loan is a Direct Loan.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/BANDSTRA

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to Case Nos:

09-CV-23835-ASG

10-CV-20236-ASG.

CORRECTED JOINT OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE TERM LENDERS' CLAIMS AGAINST THE REVOLVING LENDERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

On February 18, 2010, Defendants in the above-captioned cases (the "Revolving Lenders") moved jointly to dismiss Plaintiffs' claims. Plaintiffs (the "Term Lenders") oppose the motion, because the Second Amended Complaint in *Avenue CLO Fund, Ltd., et al v. Bank of America, N.A., et al*, No. 09-cv-23835-ASG (the "Avenue Complaint") and the Amended Complaint in *ACP Master, Ltd., et al v. Bank of America, N.A., et al*, No. 10-cv-20236-ASG (the "Aurelius Complaint" and, together with the Avenue Complaint, "the Complaints") state plausible claims for relief. The Term Lenders respond jointly as follows:

BACKGROUND

Plaintiffs are Term Lenders under a Credit Facility for the financing of the development and construction of the Fontainebleau Resort and Casino in Las Vegas (the "Project"). The facility was governed primarily by two agreements. The Credit Agreement established the circumstances under which the Lenders were required to deposit loan proceeds into a holding account known as the Bank Proceeds Account. The Disbursement Agreement established the conditions under which the Borrowers could access those proceeds. This motion involves the Term Lenders' claims against the Revolving Lenders for their wrongful refusal to remit loans to the Bank Proceeds Account when the Borrowers properly requested them to do so.

The Credit Agreement created three types of Lender commitment—a $700 million Initial Term Loan Facility, a $350 million Delay Draw Term Loan Facility, and an $800 million Revolving Loan Facility. (Aurelius Compl. ¶5; Avenue Compl. ¶115.) The Credit Agreement set out the obligations of the Revolving Lenders and Term Lenders to make loans. Some of those loans—the type at issue here—were known as "Disbursement Agreement Loans." C.A. §2.1.

Disbursement Agreement Loans involved a two-step borrowing procedure. In the first step, the Borrowers submitted a Notice of Borrowing to the Administrative Agent—Bank of

America ("BofA"), which was also a Revolving Lender but not a Term Lender—and in response the Lenders were to remit pro rata shares of the requested loans to the Administrative Agent. The Administrative Agent deposited those funds in the Bank Proceeds Account, completing the first step. (Aurelius Compl. ¶36; Avenue Compl. ¶119); C.A. §§ 2.1, 2.4. In the second step, the Borrowers submitted an Advance Request to the Disbursement Agent (also BofA). D.A. §2.4.1. The Disbursement Agreement set out the requirements to be met before the Disbursement Agent could approve the Borrowers' Advance Request, including the requirement that there not be any Defaults or Events of Default. D.A. §3.3.3. Unless those requirements were met, the Borrowers could not access the funds in the Bank Proceeds Account.

The Disbursement Agreement, not the Credit Agreement, was the primary check on the Borrowers' access to funds. For Disbursement Agreement Loans, the Form of Notice of Borrowing under the Credit Agreement does *not* include a representation by the Borrower that, as of the date of the Notice and the Borrowing Date, no Default or Event of Default has occurred and is continuing. (Heaton Decl. Ex. C at 1–2.) For another type of loan—"Direct Loans" that went directly to the Borrower rather than to the Bank Proceeds Account—the Notice of Borrowing included the representation by the Borrower that, as of the date of the Notice and the Borrowing Date, "No Default or Event of Default has occurred and is continuing on the date hereof or will occur immediately after giving effect to the proposed Loan." *Id*. For Disbursement Agreement Loans, the representation that no Default or Event of Default had occurred appeared in the Advance Request. D.A. Ex. C-1. The Credit Agreement and Disbursement Agreement are structured so that the existence of a Default or Event of Default stands in the way of disbursement to the Borrowers of cash *from* the Bank Proceeds Account, but does not stand in

the way of remitting funds for a Disbursement Agreement Loan from the Lenders *to* the Bank Proceeds Account.

On March 2, 2009, the Borrowers submitted a Notice of Borrowing for $350 million in Delay Draw Term Loans and $670 million in Revolving Loans. (Aurelius Compl. ¶44; Avenue Compl. ¶141.) On March 3, 2009, the Borrowers revised the Notice of Borrowing to reduce the Revolving Loans request to $656.5 million. (Aurelius Compl. ¶56; Avenue Compl. ¶141.) BofA told the Borrowers by letter that Section 2.1(c)(iii) of the Credit Agreement did not permit them to borrow more than $150 million from the Revolving Lenders until all of the Delay Draw Lenders had funded all of their commitments. (Aurelius Compl. ¶¶ 50–51; Avenue Compl. ¶¶ 144–45.) Some Delay Draw Lenders funded the loans, but BofA sent back the funds to those Lenders instead of depositing them in the Bank Proceeds Account. (Aurelius Compl. ¶52.) None of the Revolving Lenders funded. The Borrowers responded to BofA by letter that the Lenders were breaching the Credit Agreement. (Aurelius Compl. ¶¶ 54–55.) The March 2 Notice, the Borrowers contended, had "fully drawn" the Delay Draw Term Loan Facility, because the Notice had demanded all available Delay Draw Term Loans. (*Id*.)

On March 9, the Borrowers submitted another Notice of Borrowing, this one seeking only $350 million in Delay Draw Term Loans, while reserving their rights under the March 2 and 3 Notices that the Revolving Lenders refused to fund. (Aurelius Compl. ¶¶ 65–66, 68; Avenue Compl. ¶¶ 151, 154.) The Term Lenders funded this request. BofA used $68 million of the Term Lenders' loans to pay $68 million of then outstanding Revolving Loans, including its own Revolving Loans.

On April 20, 2009, the Revolving Lenders sent the Borrowers a letter purporting to terminate commitments because of the occurrence and continuance of Events of Default.

(Aurelius Compl. ¶¶ 71–73; Avenue Compl. ¶¶ 167–69.) But the Revolving Lenders' termination letter did not specify what Events of Default justified the termination. To this day, the Revolving Lenders have not identified the Events of Default that they claim gave them the right to terminate the Credit Facilities on April 20, 2009. The Borrowers sent another Notice of Borrowing on April 21, 2009. The Revolving Lenders refused to honor it. (*Id*.) The Project crumbled almost immediately. On June 9, 2009, the Borrowers filed a petition for bankruptcy.

ARGUMENT

The Term Lenders defeat the motion to dismiss by demonstrating that:

(i) the Term Lenders have standing to sue the Revolving Lenders for failure to fund;

(ii) it is reasonable to interpret "drawn" to mean "demanded;" and

(iii) it is reasonable to interpret the Credit Agreement to require the Revolving Lenders to remit loans to the Bank Proceeds Account even in the face of a Default or Event of Default.

In this memorandum, the Term Lenders make these demonstrations. The Term Lenders also show that their claim for breach of contract related to the April 21, 2009 Notice of Borrowing survives, as does the Nevada Term Lenders' claim for breach of the implied duty of good faith and fair dealing. Therefore, the Court should deny the Revolving Lenders' motion to dismiss.

I. THE TERM LENDERS HAVE STANDING TO SUE THE REVOLVING LENDERS FOR FAILURE TO MAKE THE REVOLVING LOANS.

The Revolving Lenders assert that "the Credit Agreement's unambiguous terms reflect *separate* promises between the various parties," Def. Mem. at 10 (emphasis added), as though the Credit Agreement is a series of individual Lender-Borrower agreements. But there are no

promises "between" only two of the parties to the Credit Agreement. The Credit Agreement is "among" Borrowers, Lenders, and Administrative Agent. C.A. Preamble. The Term Lenders have standing to sue the Revolving Lenders to enforce the mutual obligations of the Credit Agreement that, when breached, injure the Term Lenders.

Arguing that the Term Lenders do not have standing, the Revolving Lenders attempt an analogy to a 113 year-old case, *Berry Harvester Co. v. Walter A. Wood Mowing & Reaping Mach. Co.*, 46 N.E. 952 (N.Y. 1897), involving the licensing of nineteenth-century farm machinery. Yet they stay silent about a case that the Second Circuit affirmed in May 2009, which permits a lender-on-lender claim related to a failure to fund. See *Deutsche Bank AG v. JPMorgan Chase Bank*, 2007 U.S. Dist. LEXIS 71933 (S.D.N.Y. Sept. 27, 2007) ("Deutsche Bank"), aff'd, *Deutsche Bank AG v. JPMorgan Chase Bank*, 2009 U.S. App. LEXIS 11479, at *2 (2d Cir. May 29, 2009).

In *Deutsche Bank*, nine banks were parties to a syndicated loan agreement. Eight of the nine banks funded the borrower's draw. Deutsche Bank, a Revolving Lender here, refused. 2007 U.S. Dist. LEXIS 71933 at *2–3. The borrower under the loan agreement sued Deutsche Bank, but later settled that lawsuit. Deutsche Bank then sued JPMorgan Chase, also a Revolving Lender here, for declaratory relief from its disputes with the funding lenders. JPMorgan Chase, as administrative agent, counterclaimed on behalf of itself and the other funding banks. By failing to make good on its obligation to fund, JPMorgan Chase alleged, "Deutsche Bank has breached the Restated Credit Agreement," and "[t]he Funding Banks have suffered and will continue to suffer damages[.]" (Heaton Decl. Ex. B at 24.); 2007 U.S. Dist. LEXIS 71933 at *4 ("In its answer and counterclaims, JPMorgan Chase alleges that Deutsche Bank breached the amended credit agreement by refusing to fund the July Advance[.]")

The *Deutsche Bank* court granted summary judgment to JPMorgan Chase to "achieve [] the purpose of the banks' original agreement to share the risks and rewards of the [] transaction ratably, in proportion to each bank's original commitment." 2007 U.S. Dist. LEXIS 71933 at *72. To hold otherwise "would reward Deutsche Bank for failing to fund the July Advance, and it would do so at the expense of the other eight funding banks." *Id.* at *73.

The three-party licensing and employment contract at issue in *Berry Harvester* is far away and long ago. Even modern courts that cite *Berry Harvester* have rejected its outcome unless there is language that "evince[s] a manifest intention to exclude" a particular party from recovering. *See, e.g., CARs Receivables Corp. v. Bank One Trust Co., N.A.*, 2006 Ohio 6645, P11 (Ohio App. Dec. 14, 2006), *appeal not allowed* 864 N.E.2d 654 (Ohio 2007); *cf. Bykowsky v. Eskenazi*, 58 A.D.3d 405, 405 (N.Y. App. Div. 2009) (reversing trial court's decision that cited *Berry Harvester* favorably, and holding that the "[t]he various parties' obligations under the contract, which involved the creation of a chain of sports complexes, were interrelated"). The fact that one lender does not assume the obligations of another lender—that is, that the obligations are "several" and not "joint"—does not change this result. The obligations of the lenders in Deutsche Bank also were "several" and not "joint," (Heaton Decl. Ex. B at Cr. Agr. §2.01), but severability does not turn mutual obligations into non-obligations. To the contrary, severability makes it all the more important that each lender meets its obligations; no one else is meeting those obligations for it.

The Revolving Lenders also assert that the Term Lenders waived their right to enforce the Revolving Lenders' funding obligations when the Term Lenders agreed to make their own credit decisions. They cite *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 499 (S.D.N.Y. 2003), for the proposition that a "contract provision in which plaintiff

lenders agreed to 'make their own credit decisions and would not rely on the Defendant banks' barred plaintiffs from arguing they relied on the banks." Def. Mem. at 11 n.45. But *UniCredito* had nothing to do with the enforcement of funding obligations. Rather, the *UniCredito* court granted defendant JPMorgan Chase's motion to dismiss fraudulent-concealment and negligent-misrepresentation claims arising from its failure to disclose fraudulent dealings with Enron. The court held that although the complaint adequately alleged that JPMorgan Chase aided and abetted Enron's massive financial statement fraud, the plaintiffs had agreed to rely only on Enron's disclosures, not on disclosures by JPMorgan Chase. 288 F. Supp. 2d at 497–502.

The section of the Credit Agreement at issue here, Section 2.1(c), is not a representation. Section 2.1(c)(iii) is an affirmative contractual undertaking by the Revolving Lenders to make Revolving Loans. The Revolving Lenders injured the Term Lenders when they refused to make those loans. The Term Lenders have standing to pursue remedies for their injuries.

II. IT IS REASONABLE TO INTERPRET "DRAWN" TO MEAN "DEMANDED."

A. Plaintiffs need only demonstrate that it is reasonable to interpret "drawn" as "demanded."

The Revolving Lenders cannot prevail on their motion to dismiss on the ground that "drawn" means "funded" unless they can demonstrate that the Term Lenders' interpretation—under which "drawn" means "demanded"—is unreasonable as a matter of law. *See, e.g.*, *Novoneuron Inc. v. Addiction Research Institute, Inc.*, 326 Fed. Appx. 505, 2009 WL 1132344 at *508 (11th Cir. April 28, 2009) (Florida law) ("These reasonable, conflicting interpretations render the Agreement ambiguous."); *Canpartners Invs. IV, LLC v. Alliance Gaming Corp.*, 981 F. Supp. 820, 823 (S.D.N.Y. 1997) (New York law) ("As there are two reasonable interpretations of the break-up provision, the Court finds that the Letter is ambiguous and its interpretation is a

question of fact for the jury.").[1] New York law distinguishes an ambiguous contract provision such as Section 2.1(c)(iii) from one with a "definite and precise meaning, unattended by danger of misconception … and concerning which there is no reasonable basis for a difference of opinion." *Krystal Investigations & Sec. Bureau, Inc. v. United Parcel Serv., Inc.*, 35 A.D.3d 817, 826 (N.Y. App. Div. 2006).

The standard of judgment separates the present motion from the motion for partial summary judgment that the Borrowers filed in the related bankruptcy adversary proceeding on June 9, 2009, and which led to this Court's August 26 Decision. To prevail on that motion, the Borrowers needed to demonstrate both that the interpretation of "drawn" as "demanded" or "requested" was reasonable *and* that the Revolving Lenders' interpretation of "drawn" as "funded" was unreasonable.[2] Here, the Term Lenders have a much lower hurdle. The Term Lenders need only show that their interpretation is reasonable.

[1] See also, *Am. Bldg. Maint. Co. v. ACME Prop. Servs.*, 515 F. Supp. 2d 298, 311 (N.D.N.Y 2007) ("The Henneseys and ABM have both presented reasonable interpretations. These conflicting interpretations mean that ABM is entitled to present evidence to the fact finder regarding the parties' intentions with respect to which restrictive covenant applies, and if that covenant is reasonable. As a consequence, the Henneseys' Motion to dismiss Count One is denied."). The Court acknowledged the possibility of an ambiguity in its August 26 Decision. 417 B.R. 651, 659 ("I next address why even if this legal conclusion is erroneous, I conclude that Plaintiff's interpretation is at best a reasonable, but not conclusive one, and that the resulting ambiguity requires denial of partial summary judgment.").

[2] The Term Lenders have tried to avoid repeating arguments that the Borrowers made in its earlier motion. However, for purposes of preserving issues for appeal, the Term Lenders incorporate all arguments not set forth here that Fontainebleau made, and which the Court rejected, regarding the interpretation of "fully drawn" and the requirement that the Revolving Lenders fund Revolving Loans notwithstanding the existence of Events of Default.

B. Plaintiffs' interpretation is reasonable because it is consistent with ordinary legal usage.

New York law governs the Credit Agreement. C.A. §10.11. Both the statutory and case law of New York use the term "draw" to refer to a demand for money by a drawer, rather than a drawee's decision to honor such a request. This usage supports the Term Lenders' claim that it is reasonable to interpret "drawn" to mean "demanded." *Cf. Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617–18 (2d Cir. 2001) ("When interpreting a state law contract an established definition provided by state law or industry usage will serve as a default rule, and that definition will control unless the parties explicitly indicate, on the face of their agreement, that the term is to have some other meaning.").

Consider the Uniform Commercial Code. Article 3 indicates that "to draw" means "to order payment," not "to receive payment upon an order." Article 3 defines a "drawee" to be "a person *ordered* in a draft to make a payment." UCC 3-103(4) (emphasis added). A "drawer" is "a person who signs or is identified in a draft as a person *ordering* payment." UCC 3-103(5) (emphasis added). "An instrument is a 'draft' if it is an *order*," UCC 3-104(e) (emphasis added), an "order" being "a written instruction to pay money signed by the person giving the instruction." UCC 3-103(8). These definitions support an interpretation of the Credit Agreement under which an amount is "drawn" when it is demanded.

New York judicial decisions use "draw" similarly. A draft, which by statute is a written instruction to pay money, is "drawn" by a bank depositor, and the bank then decides whether to "honor" the draw. *See, e.g., Exchange Bank v. Hubbard*, 62 F. 112 (2d Cir. 1894); *Nassar v. Florida Fleet Sales Inc.*, 79 F. Supp. 2d 284 (S.D.N.Y. 1999) (discussing a bank's decision to dishonor a "draw"); *Self International v. La Salle National Bank*, 2002 U.S. Dist. LEXIS 5631

(S.D.N.Y. March 29, 2002) (describing a decision to "dishonor the draws"); *Bank of China v. Chan*, 937 F.2d 780 (2d Cir. 1991) (a demander "draws down" a letter of credit).

These ordinary legal uses of "draw" and "drawn" establish that it is reasonable to interpret "drawn" as meaning "demanded."

C. The Credit Agreement's use of the word "draw" (and its other forms) shows that it is reasonable to interpret "drawn" to mean "demanded."

The Credit Agreement's use of "draw' and its related word-forms supports the Term Lenders' claim that it is reasonable to interpret "drawn" to mean "demanded." Consider an Issuing Lenders' covenant "to honor drawings under the Letters of Credit." C.A. §3.1(a). "[D]rawings" are demands. To pay the demand is "to honor" the drawing. Were the Issuing Lender to "dishonor" a drawing, there would be a demand but no payment.

Or consider Section 3.3(a), which obligates an Issuing Lender to notify the Borrowers and the Administrative Agent "[u]pon receipt from the beneficiary of any Letter of Credit of any notice of a drawing under [a] Letter of Credit." The "notice of a drawing" is a notice of demand that the Issuing Lender pay the Letter of Credit's beneficiary for costs incurred on the Borrowers' behalf. It is not a notice that the beneficiary has already been paid.

Or take the agreement that an Issuing Lender need not "ascertain or inquire as to the validity or accuracy" of documentation "in paying any drawing under a Letter of Credit." *Id*. at §3.6. Once again, the drawing is separated from payment and used to refer to a demand or request of the Lenders.

Finally, consider the In Balance Test, the satisfaction of which was a condition precedent to disbursement of any proceeds to the Borrowers. D.A. § 3.3.8. The Term Lenders agree with the Revolving Lenders that the parties' course of dealing is not an appropriate consideration in

determining, on a motion to dismiss, whether it is reasonable to interpret "drawn" to mean "demanded." See Def. Mem. at 17. But it is telling that the Revolving Lenders do not dispute that the In Balance Test necessarily failed if "drawn" meant "funded." Instead, they argue that "available to be drawn on that date" did not mean the actual amount the Borrowers could demand under the Revolving Facility "on that date" but rather the maximum amount that the Borrowers might be able to demand someday. *Id*. at 18–19. But "on that date" is unambiguous. It means "*that* date"—the date of the Advance Request—not "some future date." The Revolving Lenders' interpretation cannot be reconciled with the clear language of the In Balance Test.

In light of these other usages in the Credit Agreement, it is reasonable to interpret Section 2.1(c)(iii) as meaning that the Revolving Lenders need not extend more than $150 million in loans until the Borrowers have demanded all of the Delay Draw commitment.[3]

[3] The Revolving Lenders' interpretation of Section 2.1(c)(iii) also has the commercially unreasonable consequence of permitting even the *de minimis* default of a single Delay Draw Lender to derail the entire project. The financing agreements operate in numerous ways to cut off funding from the Borrowers in the case of major Lender defaults—i.e., those that could jeopardize the commercial viability of the project. Most notably, a majority of Lenders may vote to terminate their commitments. C.A. §8(j). That drastic remedial consequence is deliberately tailored as a response to a drastic default. The financing agreements also provide safeguards, in the event of a Default by a Lender, for the Disbursement Agent to issue a Stop Funding Notice. D.A. §§ 2.5.1 and 3.3.3. That mechanism enables the Lenders to assess whether the Default "could reasonably be expected to result in a Material Adverse Effect," C.A. §8(j), and whether the Borrowers are able to obtain substitute financing in a timely manner. The provisions of the Credit Agreement and Disbursement Agreement operate together to achieve the basic principle of business that no molehill shall become a mountain. The Term Lenders' interpretation of Section 2.1(c)(iii), unlike that of the Revolving Lenders, would allow the project to go forward in the face of a minor lender default, without giving each individual Revolving Lender the unilateral ability to pull the plug on the Project. *See Outlet Embroidery Co. v. Derwent Mills, Ltd.*, 172 N.E. 462, 463 (N.Y. 1930) (Cardozo, J.) (commenting that in business, "sanity of end and aim is at least a presumption"). Much can go wrong in a project as complicated as a hotel and casino construction. The protections in the Credit Agreement and Disbursement Agreement, including that Material Adverse Effect provisions, take account of the important principle that small problems should not be allowed to derail big enterprises; one Delay Draw Lender's failure to fund one dollar should not be allowed by itself to abort the project.

D. The Revolving Lenders' reasoning (adopted by this Court in the August 26 Decision) does not establish that "fully drawn" unambiguously means "fully funded."

1. The Revolving Lenders' reasoning.

The Court previously agreed with the Revolving Lenders that "'fully drawn' must mean 'fully funded[,]'" 417 B.R. 651, 660, because the alternative view—that "fully drawn" means "fully requested"—would render Section 2.1(b)(iii) of the Credit Agreement without force and effect. *See* July 1, 2009 Defendants' Opposition to Fontainebleau's Motion for Partial Summary Judgment at 31–32. Section 2.1(b)(iii) provides that "the proceeds of each Delay Draw Term Loan will be applied first to repay in full any then outstanding Revolving Loans and Swing Line Loans (but without reducing the Total Revolving Commitments), and second, to the extent of any excess, be credited to the Bank Proceeds Account[.]" Under the March 3 Notice, the outstanding amount of Revolving Loans would have been in excess of $700 million (the sum of the $656.5 million requested and the $68 million that was already outstanding). The Court concluded that "[i]n order for section 2.1(b)(iii) to be given effect, all of the proceeds from the Delay Draw facility must *first* be made available and used to repay outstanding Revolving Loans, which would be under $150 million, before the rest of the Revolving Loan facility could be made available." 417 B.R. at 660.

2. The Revolving Lenders' reasoning hinged on interpreting "Delay Draw Term Loan" to refer to the aggregate amount of Delay Draw Term Loans.

The Court interpreted "Delay Draw Term Loan" to refer to the *aggregate* of all loans funded by Delay Draw Term Loan Lenders. The Court then concluded that "a simultaneous request that seeks a Revolving Loan in excess of $150 million, such as the March 2 Notice, is therefore not valid because the Delay Drawn [sic] Term Loan could not repay in full the

outstanding Revolving Loan [sic], which under the March 2 Notice would have been in excess of $700 million." 417 B.R. at 660.[4] But "Delay Draw Term Loan" does *not* refer to the aggregate of all loans funded by Delay Draw Term Lenders.

A Delay Draw Term Loan is an *individual* loan by an *individual* Delay Draw Term Lender. C.A. §§ 1.1, 2.1(b). Under the Credit Agreement's definition of "Delay Draw Term Loan," Section 2.1(b)(iii) does not require repayment of the outstanding Revolver Loans in full from any borrowing under the Delay Draw Term Loan Facility, but only provides for the flow of funds from *each* Delay Draw Term Loan: the proceeds of "*each* Delay Draw Term Loan" (emphasis added) have to be first applied to the then outstanding Revolving Loans, and second, "to the extent of any excess," the money goes into the Bank Proceeds Account. Section 2.1(b)(iii) is a flow of funds requirement for each individual Delay Draw Term Loan, nothing more.

E. Revolving Lenders Deutsche Bank and JPMorgan Chase interpreted "drawn" to mean "demanded" in the *Deutsche Bank* case, and distinguished it from "fully funded" in precisely the same way that the Term Lenders do.

The Term Lenders interpret "drawn" to mean "demanded." The Revolving Lenders call this interpretation "strained," Def. Mem. at 2, and argue that it is so unreasonable as to warrant

[4] Even under the Court's premises, including the interpretation of Delay Draw Term Loan as the aggregate of Delay Draw Term Loans, the Credit Agreement, contrary to the Court's conclusion, would have allowed the Borrowers to simultaneously borrow (i) the entire amount available under the Delay Draw Loan Facility and (ii) more than $150 million under the Revolving Loan Facility. Consider the situation on March 2, 2009. Taking the Court's premises as given, the Borrowers could have demanded $350 million under the Delay Draw Term Loan and simultaneously demanded $282 million under the Revolving Loans. The Borrowers could have used $68 million of the Delay Draw Term Loan to "repay in full" the Revolving Loans outstanding prior to the draw and could have used the balance of the Delay Draw Term Loan, $282 million, to "repay in full" the amount of Revolving Loans just borrowed. But $282 million is more than $150 million.

dismissal. But how have the Revolving Lenders used "drawn" and "fully funded" outside of this litigation? The Court need look no further than the *Deutsche Bank* case to answer that question.

In *Deutsche Bank*, discussed above, Revolving Lender Deutsche Bank made the following allegation against JPMorgan Chase in paragraph 27 of its complaint:

> 27. Subsequent to the improper amendment of the Credit Agreement (discussed in greater detail in subsection B), the Letter of Credit was *drawn* and, *as a result, each of the Lenders*, including Deutsche Bank, *was obligated to make and made a Letter of Credit Advance*. Deutsche Bank's Letter of Credit Advance was in the amount of $172,500,000, which Deutsche Bank *fully funded* on or about December 4, 2002, despite the improper amendment to the Credit Agreement.

(Heaton Decl. Ex. A at 5) (emphasis added).

In paragraph 27 of Revolving Lender JPMorgan Chase's Answer and Counterclaims, JPMorgan Chase wrote:

> 27. Denies the allegations in paragraph 27 of the Complaint, except admits that the Letter of Credit was *drawn* and, *as a result, each of the Lenders*, including Deutsche Bank, *was obligated to make and made a Letter of Credit Advance*, and Deutsche Bank's Letter of Credit Advance was in the amount of $172,500,000, which Deutsche Bank *fully funded* on or about December 4, 2002.

(Heaton Decl. Ex. B at 5) (emphasis added).

That two of the Revolving Lenders, in a similar context, used "drawn" and "fully funded" to have the same distinct meanings that the Term Lenders urge here is consistent with the reasonableness of the Term Lenders' interpretation.

III. IT IS REASONABLE TO INTERPRET THE CREDIT AGREEMENT TO REQUIRE THAT THE REVOLVING LENDERS REMIT LOANS TO THE BANK PROCEEDS ACCOUNT EVEN IN THE CIRCUMSTANCE OF A DEFAULT OR EVENT OF DEFAULT.

The Term Lenders need only demonstrate that it is reasonable to interpret the Credit Agreement to require the Revolving Lenders to make Revolving Loans to the Bank Proceeds Account even if there had been the occurrence of a Default or Event of Default.

A. The Complaints do not plead that the Borrowers breached the Credit Agreement.

The Revolving Lenders assert, citing this Court's August 26 Decision, that they had no obligation to fund Revolving Loans "if Fontainebleau materially breached the Credit Agreement prior to the March 2 and 3 Notices of Borrowing." Def. Mem. at 20. Even taking that assertion as true arguendo, the Complaints do not allege that "Fontainebleau materially breached the Credit Agreement prior to the March 2 and 3 Notices of Borrowing." Rather, the Complaints allege Defaults (not breaches) by Lehman Brothers and the First National Bank of Nevada (not the Borrowers or the Term Lenders). Defaults and Events of Default are not necessarily breaches of the Credit Agreement. Even if the Defaults and Events of Default were breaches, they are not necessarily breaches by the Borrowers. Nor are they breaches by the Term Lenders.

Therefore, to the extent the Revolving Lenders seek to rely on case law (including this Court's August 26 Decision) excusing performance on the basis of a material breach by the party seeking to enforce an agreement, that case law simply has no application here.[5]

[5] The Revolving Lenders half-heartedly assert that "[b]oth sets of Plaintiffs are precluded by their failure to perform their own obligations from seeking to pursue a contract claim for the same alleged breach against the Revolving Lenders." Def. Mem. at 22 n.89. But, as alleged in the Complaints, the Term Lenders cured their own default by funding the March 9, 2009 Notice. *See, e.g., Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 2009 WL 2163483 at *14 (N.Y. Sup. Ct., Onondaga County July 17, 2009) (concluding that plaintiff borrower showed, for purposes of preliminary injunction, probability of success on the merits of claim that defendant breached parties' construction loan agreement by refusing to fund draw requests, where plaintiff tendered to defendant outstanding unpaid interest, prior failure to pay which had excused its obligation to pay plaintiff's draw request), *aff'd as modified on other grounds by Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 889 N.Y.S.2d 793 (N.Y. App. Div., 4th Dep't Nov. 13, 2009). The Revolving Lenders, on the other hand, never cured their default, yet elected to continue the contractual relationship in order to take repayment of $68 million from the proceeds of the Term Lenders' funding on March 10. (Aurelius Compl. ¶¶ 67–68; Avenue Compl. ¶¶ 152–56.)

B. The Credit Agreement requires the Revolving Lenders to fund even if a Default or Event of Default has occurred.

To the extent that the Revolving Lenders try to rely on common law understandings without reference to this Credit Agreement, it is clear that the Credit Agreement's provisions govern. *See, e.g., Citicorp Leasing, Inc. v. Kusher Family LP*, 2006 U.S. Dist. LEXIS 50682, at *13 (S.D.N.Y. July 14, 2006) (parties may exclude or modify warranties implied by law); *cf. Boulevard Associates v. Sovereign Hotels, Inc.*, 72 F.3d 1029, 1035 (2d Cir. 1995) ("Since these are no more than default rules, the parties will in general be free to contract around them … ."). The Credit Agreement's provisions require the Revolving Lenders to fund even if there had occurred Defaults or Events of Default. It is the Disbursement Agreement, *not* the Credit Agreement, which protects the Revolving Lenders from having their funds disbursed to the Borrowers if Defaults or Events of Default were continuing at the time of an Advance Request.

We start with Section 2.4, move to Section 2.1(c), then to Section 5.2, and, finally, back to Section 2.1(c). Section 2.4 sets forth "Procedures for Borrowing; Where Disbursed." Section 2.4(b) states: "Upon receipt of each Notice of Borrowing which requests the making of Loans hereunder, the Administrative Agent shall promptly notify each Delay Draw Lender and/or Revolving Lender, as appropriate, thereof. Each such Lender will make the amount of its pro rata share of each borrowing available to the Administrative Agent at the Administrative Agent's Office prior to 10:00 A.M., on the Borrowing Date requested by Borrowers in funds immediately available to the Administrative Agent."[6] Section 2.4(b) requires the Administrative Agent to

[6] In a footnote, Defendants assert that the March 3 Notice of Borrowing was technically deficient because, while Section 2.4(d) says that requests from the Revolving Lenders should be in multiples of $5 million, the March 3 Notice sought $656.5 million. Def. Mem. at 13 n.51. Defendants do not suggest, however, that the deficiency is a basis on which this Court may grant judgment. A party cannot refuse to perform on one ground and then, in litigation, trot out a second and separate ground to defend its nonperformance—at least if the counterparty, had it

notify the Revolving Lenders of the borrowing request, and tells each Revolving Lender when its funds are due to the Administrative Agent.

Section 2.1(c) states: "The making of Revolving Loans which are Disbursement Agreement Loans to the Bank Proceeds Account shall be subject **only** to the fulfillment of the applicable conditions set forth in Section 5.2, and shall thereafter be disbursed from the Bank Proceeds Account subject only to the conditions set forth in Section 3.3 of the Disbursement Agreement" (emphasis in original). It is important to compare the bolding of "only" in Section 2.1(c) with the bolding of "both" in Section 2.1(a).[7] Under Section 2.1(a), "[t]he making of the Initial Term Loans on the Closing Date shall be subject to the fulfillment of **both** the applicable conditions precedent set forth in Section 5 and the applicable conditions set forth in Section 3 of the Disbursement Agreement." There is only one reasonable interpretation of Section 2.1(c)'s use of the bolded "only" in light of 2.1(a)'s use of the bolded "both": the making of Revolving Loans is *not* subject to the applicable conditions set forth in Section 3 of the Disbursement Agreement. Rather, Section 2.1(c) requires the Revolving Lenders to make Revolving Loans so long as the "applicable conditions" set forth in Section 5.2 are fulfilled.

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known, could have cured the deficiency. *See, e.g.*, *Daiwa Special Asset Corp. v. Desnick*, 2002 U.S. Dist. LEXIS 16164, at *14 (S.D.N.Y. Aug. 29, 2002) (explaining that New York law "precludes the assertion of added reasons for the termination of a contract if a party relied on the reasons articulated or could have cured its performance had the additional grounds been disclosed earlier"); *Cawley v. Weiner*, 140 N.E. 724, 725 (N.Y. 1923) (quoting Williston for the proposition that it is a question of fact whether "the specification of a single reason operated as a deception which being relied upon prevented the promisee from performing fully, as he would otherwise have done"). The Borrowers could have cured the technical noncompliance that Defendants mention by submitting, say, a March 4 Notice seeking $655 million. In addition, for the reasons discussed here, the technical noncompliance is not a reason that would have allowed the Revolving Lenders to refuse to fund in any event.

[7] Contrary to the Borrowers' suggestion during oral argument in the related adversary proceeding, there are two bolded words in Section 2.1, not one.

Section 5.2 is titled "Conditions to Extensions of Credit controlled by Disbursement Agreement." It states: "The agreement of each Lender to make Disbursement Agreement Loans and to issue Letters of Credit for the payment of Project Costs pursuant to Section 3.4 of the Disbursement Agreement, is subject only to the satisfaction of the following conditions precedent[.]" Relevant here is Section 5.2(a): "Notice of Borrowing. Borrowers shall have submitted a Notice of Borrowing specifying the amount and Type of the Loans requested, and the making thereof shall be in compliance with the *applicable* provisions of Section 2 of this Agreement" (emphasis added). Thus, the conditions precedent that must be satisfied are (i) that the "Borrowers shall have submitted a Notice of Borrowing specifying the amount and Type of the Loans requested" and (ii) that "the making [of the Loans] shall be in compliance with the applicable provisions of Section 2 of this Agreement."

What are the "applicable provisions of Section 2 of this Agreement"? For a Revolving Loan, the "applicable *provisions* of Section 2" are those requirements in Section 2.1(c) following the "*provided* that" (emphasis added) of the opening paragraph. In particular, the "applicable provisions" are that:

> (i) the aggregate outstanding principal amount of the Revolving Loans of each Lender, when added to such Lender's Revolving Credit Percentage of the sum of (i) the L/C Obligations then outstanding and (ii) the aggregate principal amount of the Swing Line Loans then outstanding, shall not exceed the amount of such Lender's Revolving Commitment;
>
> (ii) the Total Revolving Extensions of Credit shall not exceed the Total Revolving Commitments at any time; and

(iii) unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000.

C.A. §2.1(c).

So long as the making of the Revolving Loan is in compliance with these provisions, the Revolving Loan Lender, according to the opening sentence of Section 2.1, "shall make the Loans … for remittance to the Bank Proceeds Account under the Disbursement Agreement for disbursement in accordance with the Disbursement Agreement …." Nowhere in the Credit Agreement does the occurrence of a Default or Event of Default relieve the Revolving Lenders of their obligation to "remit[] [the Loan] to the Bank Proceeds Account under the Disbursement Agreement for disbursement in accordance with the Disbursement Agreement …." If the parties had intended for the occurrence of a Default or Event of Default to excuse the obligation to remit Revolving Loans to the Bank Proceeds Account, they (a) would have said so, and (b) would not have included language so specifically limiting the provisions that must be satisfied to trigger that obligation.

This establishes that it is reasonable to interpret the Credit Agreement as requiring the Revolving Lenders to remit loans to the Bank Proceeds Account even if there is a Default or Event of Default.

C. This Court's prior reasoning does not establish that it is unreasonable to interpret the Credit Agreement to require the Revolving Lenders to remit loans to the Bank Proceeds Account even when there is a Default or Event of Default.

Section 5.2(a) of the Credit Agreement requires that "the making [of Revolving Loans] shall be in compliance with the applicable provisions of Section 2 of [the Credit Agreement]." In

its August 26 Decision, the Court concluded that the "applicable provisions of Section 2" implicitly embrace fulfillment of all of the representations and warranties in the financing agreements. Section 2.1's plain statement that the making of Revolving Loans is subject *only* to Section 5.2 could not, as the Court saw it, "be read to disregard the requirement that the terms and conditions set forth in the Credit Agreement and representations and warranties under the Credit Agreement and Disbursement Agreement be satisfied." 417 B.R. at 664. "In short," the Court concluded, "each Revolver Bank had the specified right to ascertain if there was such compliance before making a Revolving Loan, including the representation that Fontainebleau was not in default." *Id*. (citing D.A. §§ 3.3.3, 4.9). "Defendants were therefore free to terminate their loan commitments if representations and warranties were determined to be false." *Id*. (citing D.A. §2.5.1(ii); C.A. §§ 2.4(e), 8(b)).

But the Court's prior interpretation is not sufficient to demonstrate that the Term Lenders' alternative explanation is unreasonable as a matter of law, because the Court's interpretation would render superfluous at least three parts of the Credit Agreement.

- The difference in the form of a Notice of Borrowing between Disbursement Agreement Loans and Direct Loans. For Disbursement Agreement Loans (the kind at issue here), the form of Notice of Borrowing does not include a representation by the Borrower that no Default or Event of Default has occurred and is continuing as of the date of the Notice and the Borrowing Date. (Heaton Decl. Ex. C at 1–2.) For "Direct Loans" that went directly to the Borrowers rather than to the Bank Proceeds Account, the Notice of Borrowing does include the representation by the Borrower that "No Default or Event of Default has occurred and is continuing on the date hereof or will occur immediately after giving effect to the proposed Loan." *Id*. Under the Court's

reasoning, the additional language applicable to a Notice of Borrowing for a Direct Loan would be superfluous.

- Section 5.2 versus Section 5.3. As mentioned, the Credit Agreement distinguishes Disbursement Agreement Loans, which are the kind of loans at issue in this case, from Direct Loans. The conditions precedent to Disbursement Agreement Loans are stated in Section 5.2. The conditions precedent to Direct Loans are specified in Section 5.3. Unlike Section 5.2, which says nothing about Defaults or Events of Default excusing performance, Section 5.3 expressly conditions the obligation to make Direct Loans on conditions precedent that include "(b) Representations and Warranties. … (c) No Default ...." Under the Court's reasoning, Section 5.3's language relieving the Lenders of the obligation to fund when the Borrower cannot make representations and warranties or where there are Defaults would be superfluous.
- Stop Funding Notices. The Disbursement Agreement requires the Disbursement Agent to issue a Stop Funding Notice if the conditions precedent to an Advance from the Bank Proceeds Account have not been satisfied, or if a Default or Event of Default has occurred and is continuing. D.A. §2.5.1. Section 2.4(e) of the Credit Agreement states: "In the event that the Administrative Agent receives a Stop Funding Notice from the Disbursement Agent, none of the Administrative Agent and the Lenders shall, or shall have any obligation to, make Loans until the circumstances associated with such Stop Funding Notice have been resolved …." Under the Court's reasoning, Section 2.4(s)'s language relieving the Lenders of the obligation to fund in the presence of a Stop Funding Notice would be superfluous.

The Court also cited Section 3.3 of the Disbursement Agreement in support of its conclusion that each Lender "had the specified right to ascertain if there was such compliance [with the representations and warranties in the Credit Agreement and Disbursement Agreement] before making a Revolving Loan, including the representation that Fontainebleau was not in default." 417 B.R. at 664. But Section 3.3 of the Disbursement Agreement outlines the conditions precedent to an Advance of funds to the Borrower from the Bank Proceeds Account, not conditions precedent to the obligations of the Lenders to make Revolving Loans. A Notice of Borrowing and the associated obligation to make loans are distinct in these agreements from an Advance Request and the associated obligation to approve of such a request. The Court's reasoning ignores this distinction and does not account for Section 3.3's placement in the Disbursement Agreement rather than the Credit Agreement. It also ignores the difference between Section 2.1(a) (where the making of Initial Term Loans is subject to Section 3 of the Disbursement Agreement) and 2.1(c) (where the making of Revolving Loans is not subject to Section 3 of the Disbursement Agreement).

IV. THE COMPLAINTS ALLEGE A WRONGFUL REFUSAL TO FUND THE APRIL 21, 2009 NOTICE.

Under a reasonable interpretation of Section 8 of the Credit Agreement, the requirement that Revolving Lenders terminate their Revolving Commitments "by notice to Borrowers" is a requirement that the Revolving Lenders specify the Event(s) of Default that support the termination. The Term Lenders allege that the Revolving Lenders "did not identify or set forth the Events of Default upon which they were relying to terminate their commitment." (Aurelius Compl. ¶73.) Therefore, the Revolving Lenders' purported termination on April 20, 2009 was invalid, and their failure to fund the April 21, 2009 Notice of Borrowing was a breach.

The Revolving Lenders not only failed on April 20, 2009 to specify the Event(s) of Default justifying termination; they still fail to do so. On reply, at minimum, the Revolving Lenders should specify what were the "numerous Events of Default" that allegedly justified their termination on April 20, 2009. In any case, it is reasonable to interpret the Credit Agreement to require that they have done so on April 20, 2009.

V. THE NEVADA TERM LENDERS HAVE PROPERLY ALLEGED A CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

In New York, the covenant of good faith and fair dealing is implied in every contract and encompasses a pledge by each party not to "do anything which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *JPMorgan Chase Bank, N.A. v. IDW Group, LLC*, 2009 U.S. Dist. LEXIS 9207, at *11–12 (S.D.N.Y. Feb. 9, 2009); *see also EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 22 (2005) (same). The implied covenant is intended to fill gaps in the express terms of a contract to ensure that the "parties' intent and reasonable expectations in entering the contract" are not frustrated. *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 502 (2d Cir. 1989); *see also* Restatement 2d of Contracts, §205, Comment a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party…."). The parties' "reasonable expectations" are shaped by what a "'reasonable person in the position of the promisee would be justified in understanding were included,'" *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002) (quoting *Roe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566 (N.Y. 1978)), and are informed by principles of sound commercial practice, *Components Direct, Inc. v. European American Bank & Trust Co.*, 175 A.D.2d 227, 229–230 (N.Y. App. Div. 1991) (finding breach of covenant of good faith and

fair dealing because sound commercial practice would require party to give notice prior to terminating contract despite the fact there was no express contract provision requiring such notice; court inferred notice requirement because "any other construction would make the contract unreasonable").

The Nevada Term Lenders reasonably expected that each Lender to the Credit Agreement would fund its pro rata share of loans requested pursuant to Notices of Borrowing in order to ensure that the risks of the transaction were shared ratably. The Revolving Lenders breached this obligation by refusing to fund the March 2 and 3 Notices of Borrowing under the pretext that the Notices were not properly issued. To the extent the Revolving Lenders contend that the Credit Agreement does not expressly require them to fund under these circumstances, the implied covenant of good faith does.

The Revolving Lenders argue that the Nevada Term Lenders' claim for breach of the implied covenant of good faith and fair dealing must be dismissed because it is duplicative of the (purportedly deficient) express contract claim. Def. Mem. at 26–27. The Revolving Lenders cannot have it both ways. If the express contract claim fails, there is no duplication of claims. Until that determination is made, however, the Nevada Term Lenders are entitled to pursue claims in the alternative. Fed. R. Civ. P. 8(d); *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1273 (11th Cir. 2009) ("*Rule 8(d) of the Federal Rules of Civil Procedure* expressly permits the pleading of both alternative and inconsistent claims") (emphasis in original). The Revolving Lenders have cited no authority to the contrary.

The Revolving Lenders further argue that they "simply exercised their contractual rights under the Credit Agreement when they declined to fund the March 2 and 3 Notices of Borrowing," and thus that an implied good faith obligation to fund would be inconsistent with

the express terms of the Credit Agreement. Def. Mem. at 27–28. As set forth in Sections II and III above, however, the Revolving Lenders were not contractually permitted to decline to fund these Notices. Accordingly, there is no inconsistency. The cases the Revolving Lenders cite do not hold otherwise. *M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134 (2d Cir. N.Y. 1990) (implied covenant did not preclude defendants from seeking to advance legitimate business interests in an unrelated transaction); *Bank of N.Y. v. Sasson*, 786 F.Supp. 349, 353 (S.D.N.Y. 1992) (implied covenant did not require Bank to agree to extend maturity date of personal loan after it became past due).

The motion to dismiss the Nevada Term Lenders' claim for breach of the implied covenant of good faith and fair dealing should be denied.

CONCLUSION

In this memorandum, the Term Lenders have demonstrated that (i) they have standing to sue the Revolving Lenders for failure to fund; (ii) it is reasonable to interpret "drawn" to mean "demanded;" and (iii) it is reasonable to interpret the Credit Agreement to require the Revolving Lenders to remit loans to the Bank Proceeds Account even in the face of a Default or Event of Default. The Term Lenders also have shown that their claim for breach of contract related to the April 21, 2009 Notice of Borrowing survives, as does the Nevada Term Lenders' claim for breach of the implied duty of good faith and fair dealing. Therefore, the Court should deny the Revolving Lenders' motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2010, I served a true and correct copy of Plaintiffs' Joint Memorandum of Law Opposing Defendants' Joint Motion to Dismiss, by first-class mail, upon the following:

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