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

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Form 10-Q

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

For the quarterly period ended December 29, 2002

OR

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

For the transition period from \_\_\_\_\_ to \_\_\_\_\_

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Commission File Number 1-13449

QUANTUM CORPORATION

Incorporated Pursuant to the Laws of the State of Delaware

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IRS Employer Identification Number 94-2665054

501 Sycamore Drive, Milpitas, California 95035

(408) 944-4000

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

As of the close of business on February 4, 2003, approximately 172.7 million shares of Quantum Corporation's common stock were issued and outstanding.

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QUANTUM CORPORATION

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## PART I—FINANCIAL INFORMATION

### Item 1. Financial Statements

#### QUANTUM CORPORATION CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS

(In thousands, except per-share data)  
(Unaudited)

|  | Three Months Ended   |                      | Nine Months Ended    |                      |
|--|----------------------|----------------------|----------------------|----------------------|
|  | December 29,<br>2002 | December 30,<br>2001 | December 29,<br>2002 | December 30,<br>2001 |
| Product revenue  | \$ 180,388           | \$ 214,460           | \$ 497,125           | \$ 640,400           |
| Royalty revenue  | 48,382               | 54,491               | 138,548              | 159,346              |
| Total revenue  | 228,770              | 268,951              | 635,673              | 799,746              |
| Cost of revenue  | 156,607              | 168,332              | 441,311              | 499,421              |
| Gross margin   | 72,163               | 100,619              | 194,362              | 300,325              |
| Operating expenses:  |                      |                      |                      |                      |
| Research and development                                   | 27,683               | 29,444               | 82,694               | 87,206               |
| Sales and marketing  | 24,400               | 26,095               | 77,535               | 84,790               |
| General and administrative                                 | 15,684               | 28,717               | 55,398               | 78,610               |
| Goodwill impairment  | —                    | —                    | 58,689               | —                    |
| Special charges  | 9,401                | (2,597)              | 24,121               | 59,387               |
| Purchased in-process research and development              | —                    | —                    | —                    | 13,200               |
|  | 77,168               | 81,659               | 298,437              | 323,193              |
| Income (loss) from operations                              | (5,005)              | 18,960               | (104,075)            | (22,868)             |
| Equity investment write-downs                              | —                    | (2,694)              | (17,061)             | (7,364)              |
| Interest and other expense, net                            | (2,110)              | (3,626)              | (9,346)              | (4,414)              |
| Income (loss) before income taxes                          | (7,115)              | 12,640               | (130,482)            | (34,646)             |
| Income tax provision (benefit)                             | (1,193)              | 6,067                | (5,159)              | (880)                |
| Income (loss) from continuing operations                   | (5,922)              | 6,573                | (125,323)            | (33,766)             |
| Discontinued operations:                                   |                      |                      |                      |                      |
| Loss from NAS discontinued operations, net of income taxes | (9,607)              | (7,221)              | (38,235)             | (26,689)             |
| Gain on disposition of HDD group, net of income taxes      | —                    | 1,240                | —                    | 124,112              |

|  |             |           |              |           |
|--|-------------|-----------|--------------|-----------|
| Income (loss) from discontinued operations                     | (9,607)     | (5,981)   | (38,235)     | 97,423    |
| Income (loss) before cumulative effect of an accounting change | (15,529)    | 592       | (163,558)    | 63,657    |
| Cumulative effect of an accounting change                      | —           | —         | (94,298)     | —         |
| Net income (loss)  | \$ (15,529) | \$ 592    | \$ (257,856) | \$ 63,657 |
| Income (loss) per share from continuing operations             |             |           |              |           |
| Basic  | \$ (0.04)   | \$ 0.04   | \$ (0.79)    | \$ (0.22) |
| Diluted  | \$ (0.04)   | \$ 0.04   | \$ (0.79)    | \$ (0.22) |
| Income (loss) per share from discontinued operations           |             |           |              |           |
| Basic  | \$ (0.06)   | \$ (0.04) | \$ (0.24)    | \$ 0.63   |
| Diluted  | \$ (0.06)   | \$ (0.04) | \$ (0.24)    | \$ 0.63   |
| Cumulative effect per share of an accounting change            |             |           |              |           |
| Basic  | \$ —        | \$ —      | \$ (0.59)    | \$ —      |
| Diluted  | \$ —        | \$ —      | \$ (0.59)    | \$ —      |
| Net income (loss) per share                                    |             |           |              |           |
| Basic  | \$ (0.09)   | \$ 0.00   | \$ (1.62)    | \$ 0.41   |
| Diluted  | \$ (0.09)   | \$ 0.00   | \$ (1.62)    | \$ 0.41   |
| Weighted average common and common equivalent shares           |             |           |              |           |
| Basic  | 163,907     | 154,496   | 159,094      | 155,087   |
| Diluted  | 163,907     | 158,486   | 159,094      | 155,087   |

See accompanying notes to condensed consolidated financial statements.

**QUANTUM CORPORATION**  
**CONDENSED CONSOLIDATED BALANCE SHEETS**

(In thousands)

|  | December 29, 2002<br>(Unaudited) | March 31, 2002<br>(1) |
|--|----------------------------------|-----------------------|
| <b>Assets</b>  |                                  |                       |
| Current assets:  |                                  |                       |
| Cash and investments   | \$ 316,278                       | \$ 344,433            |
| Accounts receivable, net of allowance for doubtful accounts of \$6,580 and \$6,233 | 136,705                          | 149,424               |
| Inventories  | 74,503                           | 98,801                |
| Deferred income taxes  | 46,823                           | 42,038                |
| Service inventories  | 51,387                           | 48,287                |
| Other current assets   | 37,945                           | 36,842                |
| Current assets of discontinued operations  | —                                | 59,220                |
| Total current assets   | 663,641                          | 779,045               |
| Long-term assets:  |                                  |                       |
| Property and equipment, net  | 61,348                           | 76,405                |
| Goodwill, net  | 36,720                           | 135,817               |
| Intangible assets, net   | 81,427                           | 64,305                |
| Other assets   | 11,947                           | 42,367                |
| Receivable from Maxtor Corporation   | 95,833                           | 95,833                |
| Total long-term assets   | 287,275                          | 414,727               |

|  | \$                | \$                  |
|--|-------------------|---------------------|
| <b>Liabilities and Stockholders' Equity</b>    |                   |                     |
| Current liabilities:                           |                   |                     |
| Accounts payable                               | 97,103            | 65,503              |
| Accrued warranty                               | 46,307            | 42,176              |
| Short-term debt                                | 443               | 41,363              |
| Other accrued liabilities                      | 147,210           | 147,059             |
| Current liabilities of discontinued operations | —                 | 9,615               |
| <b>Total current liabilities</b>               | <b>291,063</b>    | <b>305,716</b>      |
| Long-term liabilities:                         |                   |                     |
| Deferred income taxes                          | 26,795            | 40,055              |
| Convertible subordinated debt                  | 287,500           | 287,500             |
| <b>Total long-term liabilities</b>             | <b>314,295</b>    | <b>327,555</b>      |
| Stockholders' equity:                          |                   |                     |
| Common stock                                   | 231,892           | 190,477             |
| Retained earnings                              | 113,666           | 370,024             |
| <b>Total stockholders' equity</b>              | <b>345,558</b>    | <b>560,501</b>      |
|  | <b>\$ 950,916</b> | <b>\$ 1,193,772</b> |

(1) Derived from the March 31, 2002 audited consolidated financial statements included in the Annual Report on Form 10-K of Quantum Corporation for fiscal year 2002.

See accompanying notes to condensed consolidated financial statements.

**QUANTUM CORPORATION**  
**CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS**

(In thousands)  
(Unaudited)

|  | Nine Months Ended,   |                      |
|--|----------------------|----------------------|
|  | December 29,<br>2002 | December 30,<br>2001 |
| Cash flows from operating activities:  |                      |                      |
| Loss from continuing operations including cumulative effect of an accounting change                    | \$ (219,621)         | \$ (33,766)          |
| Adjustments to reconcile loss from continuing operations to net cash provided by operating activities: |                      |                      |
| Cumulative effect of an accounting change (SFAS No. 142 adjustment)                                    | 94,298               | —                    |
| Purchased in-process research and development  | —                    | 13,200               |
| Depreciation   | 27,955               | 28,911               |
| Amortization   | 10,449               | 24,036               |
| Goodwill impairment  | 58,689               | —                    |
| Deferred income taxes  | (15,091)             | 21,232               |
| Compensation related to stock incentive plans  | 1,154                | 17,487               |
| Equity investment write-down   | 17,061               | 8,087                |
| Changes in assets and liabilities:   |                      |                      |
| Accounts receivable  | 15,245               | 28,801               |
| Inventories  | 33,463               | 14,891               |
| Accounts payable   | 25,940               | 23,206               |

|  |            |            |
|--|------------|------------|
| Income taxes payable   | (11,755)   | 1,299      |
| Accrued warranty   | (2,213)    | (11,525)   |
| Other assets and liabilities   | (11,856)   | (74,818)   |
| Net cash provided by operating activities of continuing operations                                   | 23,718     | 61,041     |
| Net cash used in operating activities of discontinued operations                                     | (13,140)   | (14,106)   |
| Net cash provided by operating activities  | 10,578     | 46,935     |
| Cash flows from investing activities:  |            |            |
| Purchases of equity securities   | (776)      | (25,550)   |
| Proceeds from sale of equity securities  | 11,000     | —          |
| Investment in Benchmark Storage Innovations Inc. (net of cash acquired)                              | (3,020)    | —          |
| Investment in M4 Data (Holdings) Ltd.  | —          | (14,852)   |
| Investment in Connex   | —          | (452)      |
| Proceeds from disposition of property and equipment  | —          | 2,666      |
| Purchases of property and equipment  | (12,444)   | (27,604)   |
| Net cash used in investing activities of continuing operations                                       | (5,240)    | (65,792)   |
| Net cash provided by (used in) investing activities of discontinued operations                       | 4,709      | (12,142)   |
| Net cash used in investing activities  | (531)      | (77,934)   |
| Cash flows from financing activities:  |            |            |
| Repurchases of common stock  | —          | (43,719)   |
| Principle payments of short-term debt  | (41,363)   | —          |
| Proceeds from issuance of common stock, net  | 3,064      | 38,327     |
| Net cash used in financing activities of continuing operations                                       | (38,299)   | (5,392)    |
| Net cash provided by financing activities of discontinued operations                                 | 97         | 1,969      |
| Net cash used in financing activities  | (38,202)   | (3,423)    |
| Decrease in cash and investments from continuing operations  | (19,821)   | (10,143)   |
| Decrease in cash and investments from discontinued operations  | (8,334)    | (24,279)   |
| Net decrease in cash and investments   | (28,155)   | (34,422)   |
| Cash and investments at beginning of period  | 344,433    | 397,537    |
| Cash and investments at end of period  | \$ 316,278 | \$ 363,115 |
| Supplemental disclosure of cash flow information:  |            |            |
| Cash paid (received) during the year for:  |            |            |
| Interest   | \$ 9,336   | \$ 7,818   |
| Income taxes, net of refunds   | \$ 21,549  | \$ (853)   |
| Notes payable issued in respect of M4 Data (Holdings) Ltd. acquisition                               | \$ 443     | \$ 41,363  |
| Value of common stock tendered in satisfaction of taxes payable on vesting of employee stock options | \$ 4,868   | \$ 9,481   |

See accompanying notes to condensed consolidated financial statements.

**QUANTUM CORPORATION**  
**NOTES TO CONDENSED CONSOLIDATED FINANCIAL STATEMENTS**

(Unaudited)

**Note 1: Basis of Presentation**

The accompanying unaudited condensed consolidated financial statements include the accounts of Quantum Corporation (“Quantum” or the “Company”) (NYSE: DSS) and its majority-owned subsidiaries. All material intercompany balances and transactions have been eliminated. The interim financial statements reflect all adjustments, consisting only of normal recurring adjustments that, in the opinion of management, are necessary for a fair presentation of the results for the periods shown. The results of operations for such periods are not necessarily indicative of the results expected for the full fiscal year. Certain items previously reported in specific financial statement captions have been reclassified. Such reclassifications have not impacted previously reported net income (loss) amounts. The condensed consolidated balance sheet as of March 31, 2002, has been derived from the audited financial statements at that date but does not include all of the information and notes required by accounting principles generally accepted in the United States for complete financial statements. The accompanying financial statements should be read in conjunction with the audited financial statements of Quantum for the fiscal year ended March 31, 2002, included in its Annual Report on Form 10-K.

**Disposition of HDD group.** Until the beginning of fiscal year 2002, Quantum operated its business through two separate business groups: the DLT & Storage Systems group (“DSS”) and the Hard Disk Drive group (“HDD”). On March 30, 2001, Quantum’s stockholders approved the disposition of the HDD group to Maxtor Corporation (“Maxtor”). On April 2, 2001, each authorized share of HDD common stock was exchanged for 1.52 shares of Maxtor common stock. In the consolidated statements of operations, the results of the disposition of the HDD group in the three and nine-month periods ended December 30, 2001 have been classified as “Gain on disposition of HDD group, net of income taxes”.

**Disposition of NAS business.** The Network Attached Storage (“NAS”) business was sold on October 28, 2002. Quantum engaged in the NAS business following the acquisition of Meridian Data, Inc. in September 1999 and of certain assets of Connex in August 2001. As a result of this disposition, the condensed consolidated financial statements and related footnotes have been restated to present the results of the NAS business as discontinued operations. Accordingly, in the condensed consolidated statements of operations, the operating results of the NAS business have been classified as “Loss from NAS discontinued operations, net of income taxes”, for the three and nine-month periods ended December 29, 2002 and for the comparable periods. In the condensed consolidated balance sheet, the assets and liabilities of the NAS business were classified as “Current assets of discontinued operations” and “Current liabilities of discontinued operations” as of March 31, 2002.

The cash flows from the NAS business have been presented as net cash flows from discontinued operations in the operating, investing and financing sections of the condensed consolidated statements of cash flows. There were no cash flows from the HDD group in the periods presented.

## **Note 2: Discontinued Operations**

### Disposition of the HDD group

On March 30, 2001, Quantum’s stockholders approved the disposition of the HDD group to Maxtor. On April 2, 2001, each authorized share of HDD common stock was exchanged for 1.52 shares of Maxtor common stock.

The HDD group produced two primary product lines, desktop hard disk drives and high-end hard disk drives. HDD had two separate business units that supported these two product lines. The desktop business unit designed, developed and marketed desktop hard disk drives designed to meet the storage requirements of entry-level to high-end desktop personal computers in home and business environments. The high-end business unit designed, developed and marketed high-end hard disk drives designed to meet the storage requirements of network servers, workstations and storage subsystems.

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In the nine months ended December 30, 2001, Quantum recorded a non-cash gain of \$124.1 million on the disposition of the HDD group to Maxtor. This gain, net of tax, is comprised of the proceeds recorded for the exchange of HDD shares for Maxtor shares, less the disposal of the assets and liabilities in conjunction with the disposition of the HDD group to Maxtor, and stock compensation charges for the conversion of unvested DSS options to DSS restricted stock for employees who transferred to Maxtor.

Quantum has recorded a receivable of \$95.8 million from Maxtor for the principle portion of the convertible subordinated debt principle amount previously attributed to the HDD group and for which Maxtor has agreed to reimburse Quantum for both principal and associated interest payments.

Tax allocations under a tax sharing and indemnity agreement with Maxtor are the subject of a dispute. This agreement between Quantum and Maxtor entered into in connection with the disposition of the HDD group to Maxtor, provided for the allocation of certain liabilities related to taxes between Quantum and Maxtor and the indemnification by Maxtor of Quantum with respect to certain liabilities relating to taxes and attributable to the HDD group’s conduct of business prior to the disposition of the HDD group. Maxtor and Quantum presently disagree as to the amounts owed under this agreement. The parties are in negotiations to resolve this matter, and no litigation has been initiated to date. However, there can be no assurance that Quantum will be successful in asserting its position. If disputes under this agreement cannot be resolved favorably, Quantum may incur significant liabilities and costs to litigate or settle these disputes, which could have a material adverse

effect on its results of operations and financial condition.

### Disposition of the NAS Business

Quantum was previously engaged in the business of developing, manufacturing, and selling network attached storage solutions for the desktop and workgroups. These NAS products consist primarily of server appliances that incorporate hard disk drives and an operating system designed to meet the requirements of entry, workgroup, and more recently, enterprise computing environments, where multiple computer users access shared data files over a local area network.

On October 7, 2002, Quantum entered into an agreement with a privately held third party to sell certain assets and assign certain contract rights related to its NAS business. The NAS assets that were sold included inventories for resale to customers, service inventories, fixed assets and intellectual property. The proceeds from the sale included approximately \$4.7 million in cash, \$3.9 million in restricted equity securities of the buyer (with an option to acquire an additional \$1.8 million of such equity securities), a secured promissory note for \$2.4 million issued by the buyer and the assumption by the buyer of \$1.6 million of warranty liability in connection with the prior installed base of NAS products. The sale was completed on October 28, 2002.

The following table summarizes the results of the NAS business (unaudited):

| (In thousands)           | Three Months Ended |                   | Nine Months Ended |                   |
|--------------------------|--------------------|-------------------|-------------------|-------------------|
|                          | December 29, 2002  | December 30, 2001 | December 29, 2002 | December 30, 2001 |
| Revenue                  | \$ 190             | \$ 15,043         | \$ 19,899         | \$ 45,407         |
| Gross margin             | (3,935)            | 2,379             | (3,075)           | 6,574             |
| Operating expenses       | 10,838             | 13,425            | 46,209            | 47,540            |
| Loss from operations     | (14,773)           | (11,046)          | (49,284)          | (40,966)          |
| Loss before income taxes | (14,620)           | (11,025)          | (49,156)          | (40,914)          |
| Income tax benefit       | (5,013)            | (3,804)           | (10,921)          | (14,225)          |
| Net loss                 | (9,607)            | (7,221)           | (38,235)          | (26,689)          |

The loss from operations in the nine-month period ended December 29, 2002 includes an impairment charge of \$16.4 million and special charges of \$12.2 million. In the second quarter of fiscal year 2003, Quantum determined that the sale of the NAS business was probable and wrote down the assets held for sale to fair value less cost to sell. The fair value of the assets held for sale was determined to be the proceeds from the sale. The resulting impairment charge related mainly to completed technology arising from the acquisitions of Meridian Data Inc. and certain assets of Connex. In the first quarter of fiscal year 2003, a charge of \$4.3 million was recorded related to the integration of sales and marketing activities within Quantum's Storage Solutions group. The charge primarily relates to severance benefits for approximately 60 employees who were terminated as a result of this restructuring plan. In the third quarter of fiscal year 2003, a charge of \$7.9 million was recorded related to the severance of 45 employees and for vacant facilities charges associated with the disposition of the NAS business.

The following table summarizes the current assets and current liabilities of discontinued operations (there were no balances at December 29, 2002 as a result of the disposition):

| (In thousands)                                  | March 31, 2002<br>(Unaudited) |
|---|-------------------------------|
| Current assets of discontinued operations:      |                               |
| Inventories                                     | \$ 2,837                      |
| Service inventories                             | 2,016                         |
| Property and equipment, net                     | 2,123                         |
| Goodwill, net                                   | 25,340                        |
| Intangible assets, net                          | 26,904                        |
|   | <u>\$ 59,220</u>              |
| Current liabilities of discontinued operations: |                               |
| Accrued warranty                                | \$ 1,034                      |
| Deferred income taxes                           | 8,581                         |
|   | <u>\$ 9,615</u>               |

**Note 3: Business Combinations**Benchmark Storage Innovations Inc.

On November 13, 2002, Quantum completed the acquisition of Benchmark Storage Innovations, Inc. ("Benchmark"), a privately held company. The acquisition was accounted for as a purchase at a total cost of approximately \$67.5 million. The acquisition enables Quantum to expand its tape business by leveraging Benchmark's complementary products to serve the data protection needs of both new and existing customers in the value segment of the market, which was not part of Quantum's existing offerings. Goodwill from the acquisition of \$26.8 million resulted from Quantum's belief that it was economically beneficial to acquire the technology rather than develop it internally, and further, Quantum believes that the acquisition will enable it to achieve a higher rate of revenue growth than Benchmark would be able to achieve as an independent company.

Under the terms of the agreement, Quantum, which held a minority interest in Benchmark, acquired all the outstanding Benchmark common stock, preferred stock, options and warrants in consideration for approximately \$67.5 million. The consideration consisted of \$11.0 million in cash and 13.1 million shares of common stock given to the former shareholders of Benchmark. The agreement requires Quantum to issue up to an additional 1.9 million shares of common stock under the purchase agreement if certain performance milestones are achieved in the first year after the completion of the acquisition. As of December 29, 2002, 0.4 million shares were issued as a result of the achievement of quarterly milestones. There were no employee stock options or warrants assumed as a result of the acquisition.

Benchmark's results of operations are included in Quantum's financial statements from the date of acquisition, and the assets and liabilities were recorded based on their fair values as of the date of acquisition. Quantum assigned Benchmark's tape drive and media products into the DLTape group operating segment and Benchmark's autoloader product into the Storage Solutions group operating segment.

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The purchase price has been allocated based on the estimated fair value of net tangible and intangible assets acquired, and liabilities assumed, to the following assets and liabilities:

| <b>(In thousands)</b>    | <b>Purchase Price Allocation</b> |          |
|--------------------------|----------------------------------|----------|
| Deferred tax assets      | \$                               | 4,599    |
| Other current assets     |                                  | 33,698   |
| Fixed assets             |                                  | 3,505    |
| Current liabilities      |                                  | (24,159) |
| Deferred tax liabilities |                                  | (5,082)  |
| Intangible assets:       |                                  |          |
| Completed technology     |                                  | 25,600   |
| Trademarks               |                                  | 2,560    |
| Goodwill                 |                                  | 26,762   |
|                          | \$                               | 67,483   |

The intangible assets are being amortized on a straight-line basis over estimated useful lives ranging from four to five years.

The following unaudited pro forma information presents the results of operations of Quantum as if the Benchmark acquisition had occurred on April 1, 2001.

| <b>(In thousands, except per-share data)</b> | <b>Three Months Ended</b> |                          | <b>Nine Months Ended</b> |                          |
|--|---------------------------|--------------------------|--------------------------|--------------------------|
|  | <b>December 29, 2002</b>  | <b>December 30, 2001</b> | <b>December 29, 2002</b> | <b>December 30, 2001</b> |
| Revenue                                      | \$ 244,414                | \$ 286,828               | \$ 697,280               | \$ 851,001               |
| Income (loss) from continuing operations     | (8,785)                   | 4,412                    | (128,880)                | (37,618)                 |
| Cumulative effect of an accounting change    | —                         | —                        | (94,298)                 | —                        |
| Net income (loss)                            | (18,392)                  | (1,569)                  | (264,679)                | 59,805                   |
| Basic net income (loss) per share            | \$ (0.11)                 | \$ (0.01)                | \$ (0.78)                | \$ 0.36                  |
| Diluted net income (loss) per share          | \$ (0.11)                 | \$ (0.01)                | \$ (0.78)                | \$ 0.36                  |

The unaudited pro forma information is presented for illustrative purposes only and is not necessarily indicative of the operating results that would have occurred had the transaction been completed at the beginning of the period indicated, nor is it necessarily indicative of future operating results.



#### M4 Data (Holdings) Ltd

On April 12, 2001, Quantum completed the acquisition of M4 Data (Holdings) Ltd. ("M4 Data"), a privately held data storage company based in the United Kingdom. M4 Data provided high performance and scalable tape automation products for the data storage market. The acquisition was accounted for as a purchase at a total cost of approximately \$58.0 million.

Under the terms of the agreement, Quantum acquired all the outstanding stock of M4 Data in consideration for approximately \$58.0 million, which consisted of \$15.2 million in cash proceeds, the assumption by Quantum of \$41.4 million in debentures and \$1.4 million in acquisition-related costs. In the first quarter of fiscal year 2003, the holders called and received payment from Quantum for \$38.7 million of the debentures, and an additional \$2.7 million of the debentures in the third quarter of fiscal year 2003. The purchase agreement also includes additional contingent consideration to be paid annually by Quantum from 2002 through 2005 based on future revenues, which may result in additional debentures being issued. Additional debentures of \$0.4 million were issued in the second quarter of fiscal year 2003 based on fiscal year 2002 revenues.

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M4 Data's results of operations are included in the financial statements from the date of acquisition, and the assets and liabilities acquired were recorded based on their fair values as of the date of acquisition. Pro forma results of operations have not been presented because the effect of the acquisition was not material to Quantum's financial position or results of operations.

The purchase price has been allocated based on the estimated fair value of net tangible and intangible assets acquired, assumed liabilities, and in-process research and development. As of the acquisition date, the in-process technology was deemed to have no alternative future use. Therefore, Quantum expensed \$13.2 million of the purchase price as in-process research and development in fiscal year 2002. The intangible assets are being amortized on a straight-line basis over periods ranging from three to six years.

The amount of the purchase price allocated to in-process research and development was determined based on the estimated stage of development of each in-process research and development project at the date of acquisition and estimated cash flows resulting from the expected revenue generated from such projects, with the net cash flows discounted to present value at a discount rate of 34%, which represented a premium to Quantum's cost of capital.

#### Connex Inc.

On August 8, 2001, Quantum completed the acquisition of certain assets of Connex Inc., a wholly owned subsidiary of Western Digital Corporation. Connex was a provider of network attached storage products. The acquisition has been accounted for as a purchase at a total cost of approximately \$11.6 million.

Under the terms of the agreement, Quantum acquired complementary technology, intellectual property and other assets of Connex for approximately \$11.6 million in cash.

Connex's results of operations are included in the financial statements from the date of acquisition, and the assets and liabilities acquired were recorded based on their fair values as of the date of acquisition. Pro forma results of operations have not been presented because the effect of the acquisition was not material to Quantum's financial position or results of operations.

The purchase price was allocated based on the estimated fair value of net tangible and intangible assets acquired and assumed liabilities as well as in-process research and development costs. As of the acquisition date, technological feasibility of the in-process technology had not been established and the technology had no alternative future use. Therefore, Quantum expensed approximately \$3.3 million of the purchase price as in-process research and development in the second quarter of fiscal year 2002.

The amount of the purchase price allocated to in-process research and development was determined by estimating the stage of development of each in-process research and development project at the date of acquisition, estimating cash flows resulting from the expected revenue generated from such projects, and discounting the net cash flows back to their present value using a 25% discount rate, which represented a premium to Quantum's cost of capital. The expected revenue assumed a six-year compound annual growth rate of 59.8% during fiscal years 2003 through 2008. Expected revenue from the purchased in-process projects was projected to grow from approximately \$18 million in 2003 to \$24 million in 2005, and then, as other new products and technologies were expected to enter the market, declined to \$5 million in 2008. These projections were based on management's estimates of market size and growth, expected trends in technology and the expected timing of new product introductions.

Connex's results of operations from the date of acquisition and the assets and liabilities acquired were part of Quantum's NAS business, which was sold on October 28, 2002 and were accounted for in discontinued operations.

#### **Note 4: Cumulative Effect of an Accounting Change**

On April 1, 2002, Quantum adopted SFAS No. 142, *Goodwill and Other Intangible Assets*, which required companies to discontinue the

amortization of goodwill and certain intangible assets with an indefinite useful life. Instead, goodwill and intangible assets deemed to have an indefinite useful life must be reviewed for impairment upon adoption of SFAS No. 142 and annually thereafter, or more frequently when indicators of impairment exist.

The assessment of impairment conducted in the first quarter of fiscal year 2003, the quarter Quantum adopted SFAS No. 142, required Quantum to identify its reporting units and determine the carrying value of each reporting unit by assigning the assets and liabilities, including the existing goodwill and intangible assets, to those reporting units. The fair values of the reporting units underlying the Storage Solutions group were estimated using both a discounted cash flow and market approach methodology. The reporting units' carrying amounts exceeded their fair values, indicating that the reporting units' goodwill was impaired, therefore requiring Quantum to perform the second step of the transitional impairment test. In the second step, Quantum compared the implied fair values of the reporting units' goodwill, determined by allocating the reporting units' fair values to all of its assets (recognized and unrecognized) and liabilities in a manner similar to a purchase price allocation in accordance with SFAS No. 141, *Business Combinations*.

Upon adoption of SFAS No. 142 in the first quarter of fiscal year 2003, Quantum recorded a non-cash accounting change adjustment of \$94.3 million, reflecting a reduction to the carrying value of its goodwill, as a cumulative effect of an accounting change in the accompanying condensed consolidated statements of operations.

Note 5, '*Goodwill and Intangible Assets*', provides additional discussion on the impact to Quantum's financial statements as a result of applying SFAS No. 141 and SFAS No. 142.

**Note 5: Goodwill and Intangible Assets**

As a result of adopting SFAS No. 142, *Goodwill and Other Intangible Assets*, on April 1, 2002, Quantum recorded an accounting change adjustment of \$94.3 million in the first quarter of fiscal year 2003 and a goodwill impairment charge of \$58.7 million in the second quarter of fiscal year 2003 related to the Storage Solutions group. The impairment charge recorded in the second quarter of fiscal year 2003 was attributable to the Storage Solutions group and was primarily caused by the deterioration in the market values of comparable companies, and to a lesser extent, by a reduction in anticipated future cash flows. The fair value of the Storage Solutions group was calculated using a combination of a discounted cash flow analysis involving projected data and a comparable market approach, which involved a comparison with companies also in the tape automation business.

As required by SFAS No. 142, intangible assets that do not meet the criteria for recognition apart from goodwill must be reclassified. In applying this criteria, Quantum transferred \$1.8 million of net assembled workforce from intangible assets to goodwill in the first quarter of fiscal year 2003, consisting of \$2.9 million of assembled workforce, partially offset by an associated deferred tax amount of \$1.1 million. Also in accordance with SFAS No. 142, Quantum discontinued the amortization of goodwill effective April 1, 2002 and instead will test it for impairment annually or whenever events or changes in circumstances suggest that the carrying amount may not be recoverable, such as what occurred in the second quarter of fiscal year 2003.

On November 13, 2002, Quantum acquired Benchmark (refer to note 3 '*Business Combinations*'), resulting in an additional \$28.2 million of intangible assets and \$26.8 million of goodwill.

The following financial information reflects consolidated results adjusted as though the accounting for goodwill and intangible assets was consistent in the periods presented:

|  | <b>Year Ended March 31,</b> |                   |                  |
|--|-----------------------------|-------------------|------------------|
|  | <b>2002</b>                 | <b>2001</b>       | <b>2000</b>      |
| <b>(In thousands, except per-share data)</b>   |                             |                   |                  |
| Reported net income before cumulative effect of an accounting change                   | \$ 42,502                   | \$ 160,686        | \$ 40,844        |
| Add back goodwill (including assembled workforce) amortization, net of tax             | 16,053                      | 10,812            | 10,730           |
| Adjusted net income  | <u>\$ 58,555</u>            | <u>\$ 171,498</u> | <u>\$ 51,574</u> |
| Adjusted basic net income per share:   |                             |                   |                  |
| Reported basic net income per share before cumulative effect of an accounting change   | \$ 0.27                     | \$ 1.08           | \$ 0.25          |
| Add back goodwill (including assembled workforce) amortization, net of tax             | 0.10                        | 0.07              | 0.06             |
| Adjusted basic net income per share  | <u>\$ 0.37</u>              | <u>\$ 1.15</u>    | <u>\$ 0.31</u>   |
| Adjusted diluted net income per share:   |                             |                   |                  |
| Reported diluted net income per share before cumulative effect of an accounting change | \$ 0.27                     | \$ 1.03           | \$ 0.24          |

|  |         |         |         |
|--|---------|---------|---------|
| Add back goodwill (including assembled workforce) amortization, net of tax | 0.10    | 0.07    | 0.06    |
| Adjusted diluted net income per share                                      | \$ 0.37 | \$ 1.10 | \$ 0.30 |

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| (In thousands, except per-share data)   | Three Months Ended |                   | Nine Months Ended |                   |
|---|--------------------|-------------------|-------------------|-------------------|
|   | December 29, 2002  | December 30, 2001 | December 29, 2002 | December 30, 2001 |
| Reported net income (loss) before cumulative effect of an accounting change                   | \$ (15,529)        | \$ 592            | \$ (163,558)      | \$ 63,657         |
| Add back goodwill (including assembled workforce) amortization, net of tax                    | —                  | 4,012             | —                 | 12,042            |
| Adjusted income (loss) before cumulative effect of an accounting change                       | (15,529)           | 4,604             | (163,558)         | 75,699            |
| Cumulative effect of an accounting change   | —                  | —                 | (94,298)          | —                 |
| Adjusted net income (loss)  | \$ (15,529)        | \$ 4,604          | \$ (257,856)      | \$ 75,699         |
| Adjusted basic net income (loss) per share:   |                    |                   |                   |                   |
| Reported basic net income (loss) per share before cumulative effect of an accounting change   | \$ (0.09)          | \$ 0.00           | \$ (1.03)         | \$ 0.41           |
| Add back goodwill (including assembled workforce) amortization, net of tax                    | —                  | 0.03              | —                 | 0.08              |
| Cumulative effect of an accounting change   | —                  | —                 | (0.59)            | —                 |
| Adjusted basic net income (loss) per share  | \$ (0.09)          | \$ 0.03           | \$ (1.62)         | \$ 0.49           |
| Adjusted diluted net income (loss) per share:   |                    |                   |                   |                   |
| Reported diluted net income (loss) per share before cumulative effect of an accounting change | \$ (0.09)          | \$ 0.00           | \$ (1.03)         | \$ 0.41           |
| Add back goodwill (including assembled workforce) amortization, net of tax                    | —                  | 0.03              | —                 | 0.08              |
| Cumulative effect of an accounting change   | —                  | —                 | (0.59)            | —                 |
| Adjusted diluted net income (loss) per share  | \$ (0.09)          | \$ 0.03           | \$ (1.62)         | \$ 0.49           |

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The following table provides a summary of the carrying amount of goodwill and includes amounts originally allocated to an intangible asset representing the value of the assembled workforce:

| (In thousands)  | Goodwill   |
|---|------------|
| Balance as of March 31, 2002                          | \$ 135,817 |
| Assembled workforce reclassified to goodwill, net (1) | 730        |
| Cumulative effect of an accounting change (2)         | (67,900)   |
| Balance as of June 30, 2002                           | 68,647     |
| Goodwill impairment                                   | (58,689)   |
| Balance as of September 29, 2002                      | \$ 9,958   |
| Benchmark acquisition                                 | 26,762     |
| Balance as of December 29, 2002                       | \$ 36,720  |

(1) Excludes \$1.057 million related to the NAS business, which has been classified as discontinued operations.

(2) Excludes \$26.398 million related to the NAS business, which has been classified as discontinued operations.

The following tables provide a summary of the carrying amount of intangible assets that will continue to be amortized and excludes \$1.3 million originally allocated to an intangible asset representing the value of the assembled workforce:

| <b>December 29, 2002</b> |                     |                                 |                   |
|--------------------------|---------------------|---------------------------------|-------------------|
| <b>(In thousands)</b>    | <b>Gross Amount</b> | <b>Accumulated Amortization</b> | <b>Net Amount</b> |
| Purchased technology     | \$ 84,600           | \$ (23,926)                     | \$ 60,674         |
| Trademarks               | 22,560              | (6,172)                         | 16,388            |
| Non-compete agreements   | 1,500               | (1,500)                         | —                 |
| Customer lists           | 14,100              | (9,735)                         | 4,365             |
| Other                    | 2,500               | (2,500)                         | —                 |
|                          | <b>\$ 125,260</b>   | <b>\$ (43,833)</b>              | <b>\$ 81,427</b>  |

  

| <b>March 31, 2002</b>  |                     |                                 |                   |
|------------------------|---------------------|---------------------------------|-------------------|
| <b>(In thousands)</b>  | <b>Gross Amount</b> | <b>Accumulated Amortization</b> | <b>Net Amount</b> |
| Purchased technology   | \$ 59,000           | \$ (17,780)                     | \$ 41,220         |
| Trademarks             | 20,000              | (4,667)                         | 15,333            |
| Non-compete agreements | 1,500               | (1,500)                         | —                 |
| Customer lists         | 14,100              | (8,015)                         | 6,085             |
| Other                  | 2,500               | (2,153)                         | 347               |
|                        | <b>\$ 97,100</b>    | <b>\$ (34,115)</b>              | <b>\$ 62,985</b>  |

The total amortization expense related to goodwill and intangible assets is provided in the table below:

| <b>(In thousands)</b> | <b>Three Months Ended</b> |                          | <b>Nine Months Ended</b> |                          | <b>Amortized by</b> |
|-----------------------|---------------------------|--------------------------|--------------------------|--------------------------|---------------------|
|                       | <b>December 29, 2002</b>  | <b>December 30, 2001</b> | <b>December 29, 2002</b> | <b>December 30, 2001</b> |                     |
| Goodwill              | \$ —                      | \$ 3,792                 | \$ —                     | \$ 11,378                |                     |
| Purchased technology  | 2,505                     | 1,822                    | 6,146                    | 5,458                    | September 2008      |
| Trademarks            | 673                       | 333                      | 1,506                    | 995                      | September 2008      |
| Assembled workforce   | —                         | 220                      | —                        | 664                      |                     |
| Customer lists        | 573                       | 573                      | 1,720                    | 1,719                    | September 2008      |
| Other                 | —                         | 208                      | 347                      | 625                      | August 2002         |
|                       | <b>\$ 3,751</b>           | <b>\$ 6,948</b>          | <b>\$ 9,719</b>          | <b>\$ 20,839</b>         |                     |

The total expected future amortization related to intangible assets is provided in the table below:

| <b>(In thousands)</b>             | <b>Amortization</b> |
|-----------------------------------|---------------------|
| Three months ended March 31, 2003 | \$ 4,503            |
| Fiscal year 2004                  | 17,133              |
| Fiscal year 2005                  | 16,253              |
| Fiscal year 2006                  | 16,253              |

|                  |    |        |
|------------------|----|--------|
| Fiscal year 2007 |    | 14,026 |
| Fiscal year 2008 |    | 9,699  |
| Fiscal year 2009 |    | 3,561  |
| Total            | \$ | 81,427 |

**Note 6: Inventories**

Inventories consisted of the following:

| (In thousands)                | December 29, 2002 | March 31, 2002 |
|-------------------------------|-------------------|----------------|
| Materials and purchased parts | \$ 41,627         | \$ 55,745      |
| Work in process               | 3,170             | 19,374         |
| Finished goods                | 29,706            | 23,682         |
|                               | \$ 74,503         | \$ 98,801      |

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**Note 7: Service Inventories**

Service inventories consisted of the following:

| (In thousands)  | December 29, 2002 | March 31, 2002 |
|-----------------|-------------------|----------------|
| Component parts | \$ 16,468         | \$ 16,330      |
| Finished units  | 34,919            | 31,957         |
|                 | \$ 51,387         | \$ 48,287      |

**Note 8: Accrued Warranty**

The following table details the quarterly change in the accrued warranty balance:

| (In thousands)                  | Accrued Warranty |          |
|---------------------------------|------------------|----------|
| Balance as at March 31, 2002    | \$               | 42,176   |
| Accruals for warranties issued  |                  | 30,688   |
| Settlements made in cash        |                  | (33,417) |
| Benchmark balance acquired      |                  | 6,860    |
| Balance as at December 29, 2002 | \$               | 46,307   |

Quantum warrants its products against defects for periods ranging from one to three years. A provision for estimated future costs and estimated returns for credit relating to warranty is recorded when products are shipped and revenue recognized. Quantum's estimate of future costs to satisfy warranty obligations is primarily based on estimates of future failure rates and its estimates of future costs of repair including materials consumed in the repair, and labor and overhead amounts necessary to perform the repair.

The estimates of future product failure rates are based on both historical product failure data and anticipated future failure rates. If future actual failure rates differ from its estimates, Quantum records the impact in subsequent periods. Similarly, the estimates of future costs of repair are based on both historical data and anticipated future costs. If future actual costs to repair were to differ significantly from its estimates, Quantum would record the impact of these unforeseen cost differences in subsequent periods.

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**Note 9: Net Income (Loss) Per Share**

The following tables set forth the computation of basic and diluted net income (loss) per share:

| (In thousands, except per-share data)  | Three Months Ended |                   | Nine Months Ended |                   |
|--|--------------------|-------------------|-------------------|-------------------|
|  | December 29, 2002  | December 30, 2001 | December 29, 2002 | December 30, 2001 |
| Income (loss) from continuing operations   | \$ (5,922)         | \$ 6,573          | \$ (125,323)      | \$ (33,766)       |
| Income (loss) from discontinued operations   | (9,607)            | (5,981)           | (38,235)          | 97,423            |
| Cumulative effect of an accounting change  | —                  | —                 | (94,298)          | —                 |
| Net income (loss)  | \$ (15,529)        | \$ 592            | \$ (257,856)      | \$ 63,657         |
| Income (loss) per share from continuing operations                                 | \$ (0.04)          | \$ 0.04           | \$ (0.79)         | \$ (0.22)         |
| Income (loss) per share from discontinued operations                               | (0.06)             | (0.04)            | (0.24)            | 0.63              |
| Cumulative effect per share of an accounting change                                | —                  | —                 | (0.59)            | —                 |
| Basic net income (loss) per share  | \$ (0.09)          | \$ 0.00           | \$ (1.62)         | \$ 0.41           |
| Weighted average shares outstanding used in computing basic net income per share   | 163,907            | 154,496           | 159,094           | 155,087           |
| Income (loss) per share from continuing operations                                 | \$ (0.04)          | \$ 0.04           | \$ (0.79)         | \$ (0.22)         |
| Income (loss) per share from discontinued operations                               | (0.06)             | (0.04)            | (0.24)            | 0.63              |
| Cumulative effect per share of an accounting change                                | —                  | —                 | (0.59)            | —                 |
| Diluted net income (loss) per share  | \$ (0.09)          | \$ 0.00           | \$ (1.62)         | \$ 0.41           |
| Weighted average shares outstanding used in computing diluted net income per share | 163,907            | 158,496           | 159,094           | 155,087           |

The computation of basic and diluted net loss per share for the three and nine month-periods ended December 29, 2002 includes 13.5 million shares issued in connection with the acquisition of Benchmark, including 0.4 million shares issued due to the achievement of performance milestones during the third quarter of fiscal year 2003. An additional 1.5 million shares that Quantum may be required to issue if certain performance milestones are achieved in the remainder of first year after the completion of the acquisition have been excluded from the computation of basic and diluted net loss per share for the three and nine month-periods ending December 29, 2002 because none of these performance milestones had been achieved as of December 29, 2002.

The computations of diluted net income (loss) per share for the periods presented excluded the effect of the 7% convertible subordinated notes issued in July 1997, which are convertible into 6,206,152 shares of Quantum common stock (21.587 shares per \$1,000 note), because the effect would have been antidilutive.

Options to purchase 34.8 million shares and 27.0 million shares of Quantum common stock were outstanding at December 29, 2002, and December 30, 2001, respectively, but were not included in the computation of diluted net income (loss) per share for the three and nine month-periods ending December 29, 2002, and the nine months ended December 30, 2001, respectively, because the effect would have been antidilutive.

**Note 10: Common Stock Repurchase**

During fiscal year 2000, the Board of Directors authorized Quantum to repurchase up to \$700 million of its common stock in open market or private transactions. Of the total repurchase authorization, \$600 million was authorized for repurchase of Quantum, DSS or the previously outstanding HDD common stock. An additional \$100 million was authorized solely for repurchase of the previously outstanding HDD common stock.

There were no shares of Quantum common stock repurchased in the nine months ended December 29, 2002. Since the beginning of the stock repurchase authorization through December 29, 2002, Quantum has repurchased a total of 8.6 million shares of Quantum common stock (including 3.9 million shares that were outstanding prior to the issuance of the DSS and HDD common stocks), 29.2 million shares of DSS common stock and 13.5 million shares of HDD common stock for an aggregate total of \$612.1 million. At December 29, 2002, there

was approximately \$87.9 million remaining authorized to repurchase Quantum common stock.

**Note 11: Credit Agreements, Short-Term Debt and Convertible Subordinated Debt**

Quantum's debt includes the following:

| <b>(In thousands)</b>                                | <b>December 29, 2002</b> | <b>March 31, 2002</b> |
|--|--------------------------|-----------------------|
| Convertible subordinated debt                        | \$ 287,500               | \$ 287,500            |
| Short-term debt (M4 Data (Holdings) Ltd. debentures) | 443                      | 41,363                |
|  | <u>\$ 287,943</u>        | <u>\$ 328,863</u>     |
| Weighted average interest rate                       | 7.00%                    | 6.75%                 |

Convertible subordinated debt

In July 1997, Quantum issued \$287.5 million of 7% convertible subordinated notes. The notes mature on August 1, 2004, and are convertible at the option of the holder at any time prior to maturity, unless previously redeemed, into shares of Quantum common stock and Maxtor common stock. The notes are classified as long-term. The notes are convertible into 6,206,152 shares of Quantum common stock (or 21.587 shares per \$1,000 note), and 4,716,676 shares of Maxtor common stock (or 16.405 shares per \$1,000 note). Quantum recorded a receivable from Maxtor of \$95.8 million for the principle portion of the debt previously attributed to the HDD group and for which Maxtor has agreed to reimburse Quantum for both principal and associated interest payments. In the event of certain changes involving all or substantially all of Quantum's common stock, the holder would have the option to require Quantum to redeem the notes. Redemption prices range from 101% of the principal to 100% at maturity.

The notes are unsecured obligations subordinated in right of payment to all of Quantum's existing and future senior indebtedness. The notes do not contain financial covenants or cross default provisions.

Short-term debt (M4 Data (Holdings) Ltd. debentures)

Quantum acquired all the outstanding stock of M4 Data (Holdings) Ltd. on April 12, 2001, for approximately \$58.0 million in consideration, including \$41.4 million in debentures. The debenture holders called and received payment from Quantum for \$38.7 million in the first quarter of fiscal year 2003 and \$2.7 million in the third quarter of fiscal year 2003. The purchase agreement also included additional contingent consideration to be paid annually from 2002 through 2005 based on future revenues, which may result in additional debentures being issued. Additional debentures of \$0.4 million were issued in the second quarter of fiscal year 2003 based on fiscal year 2002 revenues.

The notes are unsecured obligations subordinated in right of payment to all of Quantum's existing and future senior indebtedness. The debentures do not contain financial covenants, reporting covenants or cross default provisions.

Credit line

In April 2000, Quantum entered into an unsecured senior credit facility with a group of nine banks, providing a \$187.5 million revolving credit line that would have expired in April 2003. In December 2002, Quantum terminated this facility and entered into a secured senior credit facility with a group of five banks, providing a \$100 million revolving credit line that expires in June 2004. As of December 29, 2002, \$89 million is committed to standby letters of credit and there were no borrowings from the remaining \$11 million available under this credit facility. Borrowings under the revolving credit line bear interest at either the London interbank offering rate or a base rate, plus a margin determined by a leverage ratio with option periods of one to six months. The credit facility is secured by a blanket lien on all of the assets of Quantum and contains certain financial and reporting covenants, which Quantum is required to satisfy as a condition of the credit line. There is also a cross default provision between this facility and the operating lease facility (see note 18, '*Commitments and Contingencies*') such that a default on one facility constitutes a default on the other facility. If in future quarters Quantum is in violation of any financial or reporting covenant and receives a notice of default letter from the bank group, the credit line could become unavailable, and any amounts outstanding could become immediately due and payable. In addition, if Quantum was unsuccessful in securing a waiver in subsequent quarters, it would also lose access to the \$89 million standby letters of credit contained within its credit line facility and have to restrict \$89 million of its cash to cover these existing letters of credit.

**Note 12: Litigation**

On August 7, 1998, Quantum was named as one of several defendants in a patent infringement lawsuit filed in the U.S. District Court for the Northern District of Illinois, Eastern Division. The plaintiff, Papst Licensing GmbH, owns numerous United States patents, which Papst alleges are infringed by hard disk drive products that were sold by HDD. In October 1999 the case was transferred to a federal district court in New Orleans, Louisiana, where it has been joined with other lawsuits involving Papst for purposes of coordinated discovery under multi-district litigation rules. The other lawsuits have Maxtor, Minebea Limited, and IBM as parties.

Quantum currently cannot estimate the extent of the potential damages in the Papst dispute against it because the complaint by Papst asserts an unspecified amount of damages. As part of Quantum's disposition of HDD to Maxtor, Maxtor has agreed to assume defense of Papst claims against HDD and has also agreed to indemnify Quantum in this litigation going forward. Nevertheless, if Maxtor were unable for any reason to indemnify Quantum in accordance with the merger agreement, the outcome of this litigation would be uncertain, not estimable and Quantum's liability, if Papst prevails and Maxtor cannot indemnify Quantum, could have a materially adverse impact on Quantum's results of operations and financial position.

**Note 13: Special Charges**

Fiscal year 2003 special charges

*DLT group ("DLTG") cost reductions*

In the second quarter of fiscal year 2003, a charge of \$3.2 million was recorded to reduce DLTG's costs through a headcount reduction. The charge relates to severance benefits for approximately 75 employees.

In the third quarter of fiscal year 2003, the following special charges were recorded by DLTG:

- A charge of \$3.8 million related to severance for the 870 employees who were terminated as a result of Quantum outsourcing its tape drive manufacturing and certain tape automation manufacturing to Jabil Circuit Inc. ("Jabil").
- A charge of \$2.3 million was recorded in order to reduce future DLTG operating costs through a headcount reduction. The charge related to severance benefits for approximately 44 employees.
- A charge of \$1.3 million reflects vacant facilities' costs associated with the renegotiation of an operating lease (refer to note 18, 'Commitments and Contingencies').

*Storage Solutions group ("SSG") cost reductions*

In the first quarter of fiscal year 2003, a charge of \$1.1 million was recorded to reduce SSG's costs with the integration of sales and marketing activities within Quantum's Storage Solutions group. The charge primarily relates to severance benefits for approximately 30 employees who were terminated as a result of this restructuring plan.

In the second quarter of fiscal year 2003, a charge of \$7.2 million was recorded to reduce SSG's costs and the actions include outsourcing sub-assembly manufacturing of Quantum's P-Series enterprise tape libraries, consolidating the number of research and development sites for disk-based backup and tape automation, and centralizing sales and marketing support functions. The charge reflects severance benefits for approximately 140 employees, fixed asset write-offs and vacant facility charges.

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In the third quarter of fiscal year 2003, the following amounts were recorded by SSG:

- A special charge of \$2.6 million related to severance costs for 41 employees.
- A special charge of \$0.7 million was reversed on Quantum's statement of operations related to special charges recorded in the second quarter of fiscal year 2003 for vacant facilities due to a renegotiation of the terms with the lessor.

*Corporate severance*

In the second quarter of fiscal year 2003, a charge of \$3.7 million was recorded primarily for separation costs related to Quantum's former Chief Executive Officer, who remains an employee as Quantum's Chairman of the Board of Directors.

In the third quarter of fiscal year 2003, a charge of \$0.1 million was recorded for additional costs relating to severance for three corporate employees.

*European operations reorganization*

In the first quarter of fiscal year 2003, Quantum reversed a charge of \$0.4 million on its statement of operations related to special charges



recorded in the second quarter of fiscal year 2002 for the closure of its Geneva, Switzerland sales office. Quantum reversed the special charge because the landlord was able to sublease the space to a new tenant on terms more favorable than originally anticipated.

#### Fiscal year 2002 special charges

In the first quarter of fiscal year 2002, Quantum recorded \$45.0 million of special charges related to its overall operations. These charges consisted of stock compensation and severance charges related to the disposition of HDD, restructuring costs incurred in order to align resources with ongoing operations, and other cost reduction activities.

The charges are described in more detail below.

#### *Stock Compensation Charges*

Stock compensation charges of \$16.4 million were incurred in the first quarter of fiscal year 2002. Of this \$16.4 million, Quantum expensed stock compensation of \$13.9 million related to the conversion of vested HDD options into vested DSS options for employees remaining with Quantum. In addition, Quantum recorded \$2.5 million of stock compensation in connection with certain corporate employees who were terminated at the HDD disposition date and whose unvested HDD and DSS stock options and HDD restricted stock converted into shares of DSS restricted stock. The classification of these stock compensation charges as special charges rather than cost of revenue or operating expenses was based on two factors: the unusual and non-recurring nature of the event (i.e., the disposition of the HDD business) that gave rise to stock awards and stock award modifications; and the fact that the stock award was vested and did not have to be earned over a future service period.

#### *Corporate Severance Charges*

Severance charges of \$8.7 million were incurred in the first quarter of fiscal year 2002 for the termination of corporate employees as a result of the disposition of HDD.

#### *Restructuring and Other Costs*

Approximately \$19.9 million of special charges were incurred in the first quarter of fiscal year 2002 related to:

- Staff reductions and other costs associated with cost saving actions in tape automation system activities (\$13.6 million), which were comprised of severance costs of \$2.3 million; vacant facilities costs of \$3.9 million for facilities in Irvine, California; sales and marketing demonstration equipment of \$6.3 million; and contract cancellation fees of \$1.1 million.
- Vacant facilities costs in Shrewsbury, Massachusetts, and Boulder, Colorado (\$3.4 million);
- Costs associated with discontinuing solid state storage systems, product development and marketing, comprised primarily of severance costs and fixed asset write-offs (\$2.2 million); and
- Other costs (\$0.7 million).

In July 2001, Quantum announced a restructuring of its DLTtape business. This restructuring resulted in the transfer of the remaining tape drive production in Colorado Springs, Colorado, to Penang, Malaysia. Additional special charges were recorded related to the closure of European distributor operations based in Geneva, Switzerland. As a result of these restructurings, Quantum recorded a combined special charge of \$17.0 million in the second quarter of fiscal year 2002.

The special charge of \$16.4 million that was recorded related to the transfer of tape drive production from Colorado Springs, Colorado, to Penang, Malaysia, consisted of the following:

- Severance and benefits costs of \$8.7 million representing severance for 350 employees;
- Vacant facilities costs of \$4.3 million in Colorado Springs, Colorado; and
- Write-off of fixed assets and leasehold improvements of \$3.4 million.

A special charge of \$0.6 million was recorded related to the closure of Quantum's Geneva, Switzerland sales office, reflecting vacant facilities costs.

In the third quarter of fiscal year 2002, a special charge of \$2.1 million was recorded for severance costs and the write-off of fixed assets related to the closure of European distributor operations.

Severance charges of \$4.6 million were reversed on Quantum's statement of operations in the third quarter of fiscal year 2002 as a result of a

reduction in estimated severance costs related mainly to the disposition of the HDD group.

The following two tables show the activity for the nine-month period ended December 29, 2002 and the estimated timing of future payouts for the following major cost reduction projects (for a complete discussion of Quantum's special charge activity, refer to note 10 in Quantum's Annual Report on Form 10-K for the year ended March 31, 2002):

- Discontinuation of Manufacturing in Colorado Springs;  
and
- Other Restructuring Programs.

Discontinuation of Manufacturing in Colorado Springs

| (In thousands)                      | Severance | Facilities | Total     |
|-------------------------------------|-----------|------------|-----------|
| <b>Balance March 31, 2002</b>       | \$ 2,210  | \$ 16,240  | \$ 18,450 |
| Cash payments                       | (1,397)   | (1,155)    | (2,552)   |
| <b>Balance June 30, 2002</b>        | 813       | 15,085     | 15,898    |
| Cash payments                       | (813)     | (1,155)    | (1,968)   |
| <b>Balance September 29, 2002</b>   | \$ —      | \$ 13,930  | \$ 13,930 |
| Outsourcing of manufacturing        | 3,770     | —          | 3,770     |
| Renegotiation of operating lease    | —         | 1,334      | 1,334     |
| Cash payments                       | (3,770)   | (12,574)   | (16,344)  |
| <b>Balance December 29, 2002</b>    | \$ —      | \$ 2,690   | \$ 2,690  |
| Estimated timing of future payouts: |           |            |           |
| 4th Quarter of Fiscal Year 2003     | —         | 110        | 110       |
| Fiscal Year 2004                    | —         | 440        | 440       |
| Fiscal Year 2005 onward             | —         | 2,140      | 2,140     |
| <b>Total</b>                        | \$ —      | \$ 2,690   | \$ 2,690  |

The cash payments in the three months ended December 29, 2002 represented severance payments of \$3.8 million and lease payments of \$12.6 million related to facilities. Of the \$12.6 million payments related to facilities, \$11.2 million reflected a payment for the difference between the current estimated market value of vacant facilities in Colorado Springs and the value guaranteed by Quantum to the lessor at the end of the lease term. The remaining special charge accrual reflects a vacant space accrual of \$2.7 million, which will be paid over the respective lease terms through the third quarter of fiscal year 2008.

Other Restructuring Programs

| (In thousands)                   | Severance | Fixed assets | Facilities | Other    | Total    |
|----------------------------------|-----------|--------------|------------|----------|----------|
| <b>Balance at March 31, 2002</b> | \$ 2,127  | \$ —         | \$ 2,395   | \$ 1,255 | \$ 5,777 |
| SSG Provision                    | 963       | 106          | —          | —        | 1,069    |
| Cash payments                    | (1,710)   | —            | (116)      | (150)    | (1,976)  |
| Non-cash charges                 | —         | (106)        | —          | —        | (106)    |
| Restructuring charge benefit     | —         | —            | (445)      | —        | (445)    |
| <b>Balance at June 30, 2002</b>  | 1,380     | —            | 1,834      | 1,105    | 4,319    |
| DLTG cost reduction              | 3,238     | —            | —          | —        | 3,238    |
| Corporate separation             | 3,700     | —            | —          | —        | 3,700    |
| SSG cost reduction               | 4,965     | 824          | 1,369      | —        | 7,158    |
| Cash payments                    | (1,090)   | —            | (173)      | —        | (1,263)  |

|                                      |                  |             |                 |                 |                  |
|--------------------------------------|------------------|-------------|-----------------|-----------------|------------------|
| Non-cash charges                     | —                | (824)       | —               | —               | (824)            |
| <b>Balance at September 29, 2002</b> | <b>\$ 12,193</b> | <b>\$ —</b> | <b>\$ 3,030</b> | <b>\$ 1,105</b> | <b>\$ 16,328</b> |
| DLTG cost reduction                  | 2,304            | —           | —               | —               | 2,304            |
| SSG cost reduction                   | 2,518            | —           | 49              | —               | 2,567            |
| Corporate separation                 | 105              | —           | —               | —               | 105              |
| Cash payments                        | (6,593)          | —           | (153)           | —               | (6,746)          |
| Special charge reversal              | —                | —           | (679)           | —               | (679)            |
| <b>Balance at December 29, 2002</b>  | <b>\$ 10,527</b> | <b>\$ —</b> | <b>\$ 2,247</b> | <b>\$ 1,105</b> | <b>\$ 13,879</b> |
| Estimated timing of future payouts:  |                  |             |                 |                 |                  |
| 4th Quarter of Fiscal Year 2003      | 10,048           | —           | 519             | 1,105           | 11,672           |
| Fiscal Year 2004                     | 479              | —           | 791             | —               | 1,270            |
| Fiscal Year 2005 onward              | —                | —           | 937             | —               | 937              |
| <b>Total</b>                         | <b>\$ 10,527</b> | <b>\$ —</b> | <b>\$ 2,247</b> | <b>\$ 1,105</b> | <b>\$ 13,879</b> |

The cash payments in the three months ended December 29, 2002 represented severance payments of \$6.6 million and lease payments of \$0.2 million for vacant facilities. The \$13.9 million remaining special charge accrual at December 29, 2002 is comprised mainly of obligations for severance, vacant facilities and contract cancellation fees. The severance charges will mainly be paid during the fourth quarter of fiscal year 2003. The facilities charges relating to vacant facilities in Irvine, California, will be paid over the respective lease term through the third quarter of fiscal year 2006. The contract cancellation fees are expected to be paid by the fourth quarter of fiscal year 2003.

**Note 14: Comprehensive Income (Loss)**

Total comprehensive income (loss), net of tax, for the three and nine-month periods ended December 29, 2002, and December 30, 2001, is presented in the following table:

| (In thousands)                                      | Three Months Ended |                   | Nine Months Ended |                   |
|---|--------------------|-------------------|-------------------|-------------------|
|   | December 29, 2002  | December 30, 2001 | December 29, 2002 | December 30, 2001 |
| Net income (loss)                                   | \$ (15,529)        | \$ 592            | \$ (257,856)      | \$ 63,657         |
| Foreign currency translation adjustment             | 285                | (343)             | 1,499             | 505               |
| Total accumulated other comprehensive income (loss) | \$ (15,244)        | \$ 249            | \$ (256,357)      | \$ 64,162         |

**Note 15: Business Segment Information**

Quantum's reportable segments are DLTG and SSG. These reportable segments are managed separately and they manufacture and distribute distinct products with different production processes. DLTG consists of tape drives and media. SSG consists of tape automation systems, service and more recently, enhanced data protection. Quantum assigned Benchmark's tape drive and media products into the DLTG operating segment and the Benchmark autoloader product into the SSG operating segment. The financial information of Quantum's NAS business, a discontinued operation, has been removed from SSG's segment information in the table below. Quantum directly markets its products to computer manufacturers and through a broad range of distributors, resellers and systems integrators.

The accounting policies for the reportable segments are the same as those described in the summary of significant accounting policies in Quantum's Annual Report on Form 10-K for the fiscal year ended March 31, 2002. Quantum evaluates segment performance based on operating income (loss) excluding special charges, write-downs and gains or losses that are considered to be unusual or non-recurring. For segment reporting purposes, intangible amortization expense and inter-segment eliminations are included, even though these items are excluded from management's evaluation of the segments. Quantum does not allocate interest income or interest expense, other income, or

taxes to operating segments. Additionally, Quantum does not allocate all assets by operating segment, only the assets included in the table below.

| <b>(In thousands)</b>                  | <b>Three Months Ended</b> |             |              |                          |            |              |
|--|---------------------------|-------------|--------------|--------------------------|------------|--------------|
|  | <b>December 29, 2002</b>  |             |              | <b>December 30, 2001</b> |            |              |
|  | <b>DLTG</b>               | <b>SSG</b>  | <b>Total</b> | <b>DLTG</b>              | <b>SSG</b> | <b>Total</b> |
| Total Revenue                          | \$ 173,365                | \$ 64,313   | \$ 237,678   | \$ 217,580               | \$ 60,917  | \$ 278,497   |
| Inter-segment revenue                  | (8,908)                   | —           | (8,908)      | (9,546)                  | —          | (9,546)      |
| Revenue from external customers        | 164,457                   | 64,313      | 228,770      | 208,034                  | 60,917     | 268,951      |
| Cost of revenue                        | 111,098                   | 45,509      | 156,607      | 127,779                  | 40,553     | 168,332      |
| Gross margin                           | 53,359                    | 18,804      | 72,163       | 80,255                   | 20,364     | 100,619      |
| Research and development               | 18,615                    | 9,068       | 27,683       | 22,342                   | 7,102      | 29,444       |
| Sales and marketing                    | 10,478                    | 13,922      | 24,400       | 14,401                   | 11,694     | 26,095       |
| General and administrative             | 8,700                     | 6,984       | 15,684       | 17,642                   | 11,075     | 28,717       |
| Total operating expenses               | 37,793                    | 29,974      | 67,767       | 54,385                   | 29,871     | 84,256       |
| Operating income (loss)                | \$ 15,566                 | \$ (11,170) | 4,396        | \$ 25,870                | \$ (9,507) | 16,363       |
| Special Charges                        |                           |             | (9,401)      |                          |            | 2,597        |
| Reported income (loss) from operations |                           |             | \$ (5,005)   |                          |            | \$ 18,960    |

| <b>(In thousands)</b>                         | <b>Nine Months Ended</b> |             |              |                          |             |              |
|---|--------------------------|-------------|--------------|--------------------------|-------------|--------------|
|   | <b>December 29, 2002</b> |             |              | <b>December 30, 2001</b> |             |              |
|   | <b>DLTG</b>              | <b>SSG</b>  | <b>Total</b> | <b>DLTG</b>              | <b>SSG</b>  | <b>Total</b> |
| Total Revenue                                 | \$ 495,935               | \$ 165,457  | \$ 661,392   | \$ 653,607               | \$ 179,692  | \$ 833,299   |
| Inter-segment revenue                         | (25,719)                 | —           | (25,719)     | (33,553)                 | —           | (33,553)     |
| Revenue from external customers               | 470,216                  | 165,457     | 635,673      | 620,054                  | 179,692     | 799,746      |
| Cost of revenue                               | 324,594                  | 116,717     | 441,311      | 383,336                  | 116,085     | 499,421      |
| Gross margin                                  | 145,622                  | 48,740      | 194,362      | 236,718                  | 63,607      | 300,325      |
| Research and development                      | 56,149                   | 26,545      | 82,694       | 65,773                   | 21,433      | 87,206       |
| Sales and marketing                           | 35,589                   | 41,946      | 77,535       | 48,215                   | 36,575      | 84,790       |
| General and administrative                    | 34,643                   | 20,755      | 55,398       | 47,231                   | 31,379      | 78,610       |
| Total operating expenses                      | 126,381                  | 89,246      | 215,627      | 161,219                  | 89,387      | 250,606      |
| Operating income (loss)                       | \$ 19,241                | \$ (40,506) | (21,265)     | \$ 75,499                | \$ (25,780) | \$ 49,719    |
| Goodwill impairment                           |                          |             | (58,689)     |                          |             | —            |
| Special Charges                               |                          |             | (24,121)     |                          |             | (59,387)     |
| Purchased in-process research and development |                          |             | —            |                          |             | (13,200)     |
| Reported loss from operations                 |                          |             | \$ (104,075) |                          |             | \$ (22,868)  |

As of

| <b>(In thousands)</b> | <b>December 29, 2002</b> | <b>March 31, 2002</b> |
|-----------------------|--------------------------|-----------------------|
|-----------------------|--------------------------|-----------------------|

|                                    | <u>DLTG</u> | <u>SSG</u> | <u>Total</u> | <u>DLTG</u> | <u>SSG</u> | <u>Total</u> |
|------------------------------------|-------------|------------|--------------|-------------|------------|--------------|
| Accounts receivable, net           | \$ 91,375   | \$ 45,330  | \$ 136,705   | \$ 94,351   | \$ 55,073  | \$ 149,424   |
| Inventories                        | 32,131      | 42,372     | 74,503       | 71,410      | 27,391     | 98,801       |
| Service inventories                | 38,607      | 12,780     | 51,387       | 37,096      | 11,191     | 48,287       |
| Property, plant and equipment, net | 45,115      | 16,233     | 61,348       | 57,942      | 18,463     | 76,405       |
| Goodwill and intangibles, net      | 39,292      | 78,855     | 118,147      | —           | 200,122    | 200,122      |

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**Note 16: Stock Incentive Plans**

Quantum has Stock Option Plans (the “Plans”) under which 9.5 million options of Quantum stock were reserved for future issuance at December 29, 2002, to employees, officers and directors of Quantum. Options under the Plans are granted at prices determined by the Board of Directors, but at prices not less than the fair market value of the underlying common stock on the date of grant. Options currently expire no later than ten years from the date of grant and generally vest ratably over one to four years.

A summary of activity relating to Quantum’s stock incentive plans follows:

|                                  | <u>Options (000s)</u> |    | <u>Weighted Average Exercise Price</u> |
|----------------------------------|-----------------------|----|--|
| Outstanding at March 31, 2002    | 27,590                | \$ | 10.51                                  |
| Granted                          | 15,788                | \$ | 4.47                                   |
| Canceled                         | (7,994)               | \$ | 10.68                                  |
| Exercised                        | (632)                 | \$ | 2.21                                   |
| Outstanding at December 29, 2002 | 34,752                | \$ | 7.86                                   |
| Exercisable at December 29, 2002 | 16,978                | \$ | 9.86                                   |

The following tables summarize information about options outstanding and exercisable at December 29, 2002:

| <u>Range of Exercise Prices</u> | <u>Options Outstanding at<br/>December 29, 2002<br/>(000s)</u> |    | <u>Weighted Average<br/>Exercise Price</u> |  | <u>Weighted Average<br/>Remaining Contractual Life</u> |
|---------------------------------|--|----|--|--|--|
| \$ 0.96 – \$ 2.97               | 7,425  | \$ | 2.33                                       |  | 9.33   |
| \$ 2.98 – \$ 6.70               | 8,470  | \$ | 6.23                                       |  | 8.74   |
| \$ 6.75 – \$ 9.56               | 8,295  | \$ | 8.74                                       |  | 6.25   |
| \$ 9.60 – \$12.50               | 7,031  | \$ | 10.69                                      |  | 7.79   |
| \$12.50 – \$24.11               | 3,531  | \$ | 15.68                                      |  | 5.76   |
|                                 | 34,752   | \$ | 7.86                                       |  | 7.78   |
| <u>Range of Exercise Prices</u> | <u>Options Exercisable at<br/>December 29, 2002<br/>(000s)</u> |    | <u>Weighted Average<br/>Exercise Price</u> |  |  |
| \$ 0.96 – \$ 2.97               | 884  | \$ | 2.13                                       |  |  |
| \$ 2.98 – \$ 6.70               | 2,249  | \$ | 6.07                                       |  |  |
| \$ 6.75 – \$ 9.56               | 6,762  | \$ | 8.72                                       |  |  |
| \$ 9.60 – \$12.50               | 3,879  | \$ | 10.85                                      |  |  |
| \$ 12.50 – \$24.11              | 3,204  | \$ | 15.89                                      |  |  |
|                                 | 16,978   | \$ | 9.86                                       |  |  |

**Note 17: Investments in Other Entities**

| <b>(In thousands)</b>              | <b>December 29, 2002</b> | <b>March 31, 2002</b> |
|------------------------------------|--------------------------|-----------------------|
| Venture capital equity investments | \$ —                     | \$ 28,383             |
| Other equity investments           | 4,772                    | 11,805                |
|                                    | <u>\$ 4,772</u>          | <u>\$ 40,188</u>      |

Investments in those entities in which Quantum owns less than 20%, or is unable to exert significant influence, are carried at cost less write-downs for declines in value that are judged to be other-than-temporary. Investments in entities in which Quantum owns more than 20%, or is able to exert significant influence, are accounted for under the equity method.

During the three months ended June 30, 2002, Quantum recorded a loss of \$17.1 million to write-down its venture capital equity investments to a net realizable value of \$11.0 million, based on other than temporary declines in the estimated value of these investments. During the second quarter of fiscal year 2003, Quantum sold its entire portfolio of venture capital equity investments for \$11.0 million. In determining net realizable value in previously reported periods, Quantum utilized all information available regarding the entities in which it held an interest. This information included knowledge of each company's business model, management team, competition, progress against technical and operational milestones, financial statements and financing requirements, and independent valuations. In addition, when a portfolio investment completed a financing transaction that provided an indication of the company's value, Quantum wrote-down the carrying value of its investment to the lower of carrying value or the value indicated by the financing. Similarly, if an investment in one of Quantum's portfolio companies were to be sold in the secondary market rather than held until the investment could be traded on a public exchange or acquired, the investment would be marked to a value that was estimated to be realizable in the secondary market.

An investment in Benchmark accounted for \$11.3 million of the \$11.8 million of other equity investments as at March 31, 2002. The acquisition by Quantum on November 13, 2002 of the outstanding shares of Benchmark that it did not already own resulted in the Benchmark investment being reported on a consolidated basis (refer to note 3, '*Business Combinations*'). The remaining balance as at December 29, 2002 in other equity investments consists mainly of a \$3.9 million investment in Snap Appliances, which was received as part consideration for the disposition of the NAS business (refer to note 2, '*Discontinued Operations*').

**Note 18: Commitments and Contingencies****Commitments**

In August 1997, Quantum entered into a five-year synthetic lease agreement with a group of financial institutions (the "lessor") for the construction and lease of a campus facility in Colorado Springs, Colorado, comprised of three buildings. The campus was the center of the DLT group's operations until the transfer in fiscal year 2002 of tape drive production to Penang, Malaysia. The Colorado Springs facility now houses only administrative and procurement resources and testing operations within one of the three buildings. The lease has been accounted for as an operating lease in accordance with SFAS No. 13, *Accounting for Leases*.

In December 2002, Quantum renegotiated this lease, which now expires in December 2007. The total minimum lease payments from the third quarter of fiscal year 2003 until the scheduled expiration date in December 2007 are estimated to be approximately \$5.5 million and approximate the lessor's debt interest service costs. The minimum lease payments will fluctuate depending on short-term interest rates.

The lease is secured by a standby letter of credit issued under Quantum's revolving line of credit and a blanket lien on all of the assets of Quantum. The revolving line of credit expires in June 2004 and at that time Quantum will be required to post cash collateral to secure the lease, unless other financial arrangements are made that are acceptable to the lessor.

The lease commitment requires Quantum to maintain specified financial covenants. If in future quarters Quantum were to fail to comply with these financial covenants and was unable to obtain a waiver, or amend the lease, for such non-compliance, the lessor could terminate the lease. This could result in Quantum having to purchase and re-sell the facilities promptly and potentially at a substantial discount to their current appraised value. There is a cross default provision between this facility and the credit line facility (refer to note 11, '*Credit Agreements, Short-Term Debt and Convertible Subordinated Debt*') such that a default on one facility constitutes a default on the other facility.

At the end of the lease term, Quantum has the following options and obligations:

- (1) Quantum may renew the lease if the lessor accepts a renewal at its discretion;
- (2) Quantum may purchase the facility for approximately \$50 million (the "stipulated sales price"); or

- (3) If Quantum has paid all sums owing under the lease and is not otherwise in default under the lease or the credit line facility at the end of the stated lease term, Quantum may find a third party to purchase the facility. In such event, Quantum has guaranteed any shortfall between the net proceeds from the sale of the property to the third party and the stipulated sales price, up to a maximum amount payable equal to 87.7% of the stipulated sales price, or \$43.9 million.

At any time during the lease term, Quantum may purchase (or cause a third party to purchase) the facility for the stipulated sales price. If Quantum defaults under the lease, its only option is to purchase the facility for the stipulated sales price.

Quantum shares contingently issuable in connection with the acquisition of Benchmark Storage Innovations, Inc.

Under the agreement to acquire Benchmark, as of December 29, 2002, Quantum may be required to issue additional shares of common stock up to a maximum of 1.5 million shares. The issuance of these additional shares is contingent upon the achievement of performance milestones related to post-acquisition unit shipment and warranty expense targets within the first year after the completion of the acquisition. An assessment of the extent to which the performance milestones have been achieved, if at all, and the related number of additional shares of Quantum stock to be issued, if any, will be made at the end of each of the next three fiscal quarters

Other operating lease commitments

In addition to the lease for the Colorado Springs facility described above, Quantum has entered into various other lease commitments for facilities and equipment. The lease terms range to a maximum of 17 years and have been accounted for as operating leases. The following table shows the minimum amount committed under these leases:

**(In thousands)**

|                             | <u>&lt;1 year</u> | <u>&gt; 1 year and &lt;2 years</u> | <u>2 years and beyond</u> | <u>Total</u> |
|-----------------------------|-------------------|------------------------------------|---------------------------|--------------|
| Operating lease obligations | 14,761            | 12,175                             | 27,717                    | 54,653       |

Commitments to purchase inventory

Quantum outsourced tape drive manufacturing to a contract manufacturer, Jabil, during the third quarter of fiscal year 2003. The Storage Solutions Group has increased its use of contract manufacturers for certain manufacturing functions during the same period. Under these arrangements, the contract manufacturer procures inventory to manufacture products based upon a forecast of customer demand provided by Quantum. Quantum is responsible for the financial impact on the contract manufacturer of any reduction or product mix shift in the forecast relative to materials that the contract manufacturer had already purchased under a prior forecast. Such a variance in forecasted demand could require a cash payment for finished goods in excess of current customer demand or for costs for excess or obsolete inventory.

At December 29, 2002, Quantum had issued non-cancelable purchase orders for \$12.8 million to purchase finished goods from its contract manufacturers, and had not incurred any significant liability for finished goods in excess of current customer demand or for costs of excess or obsolete inventory.

Contingencies

Tax allocations under a tax sharing and indemnity agreement with Maxtor are the subject of a dispute. This agreement between Quantum and Maxtor entered into in connection with the disposition of HDD, provided for the allocation of certain liabilities related to taxes and the indemnification by Maxtor of Quantum with respect to certain liabilities relating to taxes and attributable to the conduct of business prior to the disposition of HDD. Maxtor and Quantum presently disagree as to the amounts owed under this agreement. The parties are in negotiations to resolve this matter, and no litigation has been initiated to date. However, there can be no assurance that Quantum will be successful in asserting its position. If disputes under this agreement cannot be resolved favorably, Quantum may incur significant liabilities and costs to litigate and/or settle these disputes, which could have a material and adverse effect on its results of operations and financial condition.

Quantum has recorded a receivable of \$95.8 million from Maxtor for the portion of the convertible subordinated debt previously attributed to HDD and for which Maxtor has agreed to reimburse Quantum for both principal and associated interest payments under the agreement. If Maxtor were for any reason unable or unwilling to pay such amount, Quantum is obligated to pay this amount and would record a loss with respect to this amount in a future period, which would have a material adverse effect on its results of operations and financial condition.

Quantum has signed an agreement to outsource its manufacturing operations in Malaysia to Jabil, which has the potential to affect Quantum's tax status in Malaysia. Quantum was granted strategic pioneer tax status beginning in December 2000 contingent on Quantum meeting five separate conditions linked to investments in the Malaysian economy. While Quantum has actively worked to meet each of these conditions, changes in the business environment have meant that Quantum has not yet fully met these conditions as these conditions assumed a five-year profile of investment. Were the Malaysian government to revoke Quantum's strategic pioneer tax status in its entirety, then the maximum potential tax liability that could be assessed would be \$15 million.

**Note 19: Recent Accounting Pronouncements**Accounting for Costs Associated with Exit or Disposal Activities

In June 2002, the Financial Accounting Standards Board issued SFAS No. 146, "*Accounting for Costs Associated with Exit or Disposal Activities*". This statement supercedes EITF Issue No. 94-3 and requires that a liability for a cost associated with an exit or disposal activity be recognized when the liability is incurred rather than at the date of an entity's commitment to an exit plan. The statement further establishes fair value as the objective for initial measurement of the liability and that employee benefit arrangements requiring future service beyond a "minimum retention period" be recognized over the future service period. This statement is effective prospectively for exit or disposal activities initiated after December 31, 2002. Quantum is in the process of the evaluating the financial statement impact, if any, of adoption of SFAS No. 146.

Guarantor's Disclosure Requirements for Guarantees

In November 2002, the Financial Accounting Standards Board issued FASB Interpretation (FIN) No. 45, "*Guarantor's Disclosure Requirements for Guarantees, Including Indirect Guarantees of Others*". FIN No. 45 clarifies the guarantor's requirements relating to the guarantor's accounting for, and disclosure of, the issuance of certain types of guarantees and requires the guarantor to recognize at the inception of a guarantee a liability for the fair value of the lease obligation. The provisions for the initial recognition and measurement of guarantees are effective on a prospective basis for guarantees that are issued or modified after December 31, 2002 and Quantum does not believe these provisions will have a material impact on its results of operations or financial position. The provisions for disclosures of product warranties are included in note 8, '*Accrued Warranty*'. The disclosures required for operating lease guaranteed value and for shares contingently issuable in connection with business combinations are included in note 18, "*Guarantees, Commitments and Contingencies*".

Accounting for Stock-Based Compensation

In December 2002, the Financial Accounting Standards Board issued SFAS No. 148, "*Accounting for Stock-Based Compensation, Transition and Disclosure*." SFAS No. 148 provides alternative methods of transition for a voluntary change to the fair value based method of accounting for stock-based employee compensation. SFAS No. 148 also requires that disclosures of the pro forma effect of using the fair value method of accounting for stock-based employee compensation be displayed more prominently and in a tabular format. Additionally, SFAS No. 148 requires disclosure of the pro forma effect in interim financial statements. The additional disclosure requirements of SFAS No. 148 are effective for fiscal years ended after December 15, 2002. Quantum does not intend to adopt the fair value based method of accounting for stock-based employee compensation, but will provide the additional disclosures required by SFAS No. 148.

Consolidation of Variable Interest Entities

In January 2003, the Financial Accounting Standards Board issued FASB Interpretation (FIN) No. 46, "*Consolidation of Variable Interest Entities*". FIN No. 46 requires that if a business enterprise has a controlling interest in a variable interest entity (a.k.a. special purpose entity), the assets, liabilities and results of operations of the variable interest entity should be included in the consolidated financial statements of the business enterprise. FIN No. 46 applies immediately to variable interest entities created after January 31, 2003, and to variable interest entities in which an enterprise obtains an interest after that date. It applies in the first fiscal year or interim period beginning after June 15, 2003, to variable interest entities in which an enterprise holds a variable interest that it acquired before February 1, 2003. Quantum believes that the operating lease disclosed in note 18, '*Commitments and Contingencies*' could be subject to FIN 46. Quantum is in the process of evaluating the financial statement impact, if any, of adoption of FIN No. 46.

**Note 20: Subsequent Events**Acquisition of SanLight

On February 4, 2003, Quantum entered into a definitive agreement to acquire the remaining outstanding shares of SANlight Inc., which it did not already own. SANlight Inc. is a development stage enterprise in storage solution technology. The purchase price is approximately \$9 million, consisting of \$8 million of Quantum common stock and acquisition costs of approximately \$1 million. Quantum expects to finalize the acquisition during the fourth quarter of fiscal year 2003.

**Item 2: Management's Discussion and Analysis of Financial Condition and Results of Operations**

This report contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended. Forward-looking statements in this report contain the words "will," "estimate,"



“anticipate,” “expect”, “believe” or similar expressions and include, but are not limited to, projections or estimates concerning our business, such as demand for our products, anticipated revenues, gross margins, operating results and expenses, mix of revenue streams, expected revenue from purchased in-process projects, cost savings, stock compensation, the performance of our media business and the sufficiency of cash to meet planned expenditures, the likelihood of certain tax liabilities being assessed, the anticipated impact of third party infringement claims, and foreign exchange rate exposure. In particular, such forward-looking statements include, but are not limited to: our expectation that the \$95.8 million due from Maxtor in connection with the convertible subordinated debt previously attributed to the HDD group will ultimately be realized; and our belief that, if required, we would have sufficient financial resources to satisfy the guaranteed value of the Colorado Springs facility. All forward-looking statements are inherently uncertain as they are based on various expectations and assumptions concerning future events, and they are subject to numerous known and unknown risks and uncertainties. Readers are cautioned not to place undue reliance on these forward-looking statements, which speak only as of the date hereof. These forward-looking statements are based on management's current expectations and are subject to certain risks and uncertainties. As a result, our actual results may differ materially from the forward-looking statements contained herein. Factors that could cause actual results to differ materially from those described herein include, but are not limited to, (1) the amount of orders received in future periods; (2) our ability to timely ship our products; (3) uncertainty regarding the continued slowdown in IT spending and the corresponding reduction in the demand for tape drives and tape automation products; (4) our continued receipt of media royalties from Maxell, Fuji and other media manufacturers at or above historical levels; (5) a continued trend toward centralization of storage; (6) our ability to achieve anticipated pricing, cost and gross margin levels, particularly on tape drives, given lower volumes and continuing price and cost pressures; (7) the successful execution of our strategy to expand our businesses into new directions; (8) our ability to successfully introduce new products; (9) our ability to achieve and capitalize on changes in market demand; (10) acceptance of, and demand for, our products; (11) our ability to maintain supplier relationships; (12) our ability to work with industry leaders to deliver integrated business solutions to customers; (13) the ability of our competitors to introduce new products that compete successfully with our products, which could be magnified given the consolidation of our customer base as a result of the Hewlett-Packard and Compaq merger and Hewlett-Packard's participation in the LTO consortium, a tape drive and media format competing with Quantum's Super DLT products; (14) our ability to obtain significant market share with our Super DLT product, given the combined Hewlett-Packard and Compaq's decision to market both the LTO and Super DLT platforms versus Compaq's historical approach of exclusively marketing Super DLT; (15) the general economic environment and the continued growth of the storage industry; (16) our ability to sustain and/or improve our cash and overall financial position; (17) our ability to lower costs, (18) our ability to integrate acquisitions, such as the Benchmark and SANlight acquisitions and (19) those factors discussed under “Trends and Uncertainties” elsewhere in this Quarterly Report on Form 10-Q. We disclaim any obligation to update information in any forward-looking statement.

## **BUSINESS DESCRIPTION**

Quantum Corporation (“Quantum”, the “Company”, “us” or “we”) (NYSE:DSS), founded in 1980, is a global leader in data protection, meeting the needs of business customers with enterprise-wide storage solutions and services. Quantum is the world's largest supplier of tape drives, and its DLTtape™ technology is the standard for backup, archiving, and recovery of mission-critical data. Quantum is also a leader in the design, manufacture and service of automated tape libraries used to manage, store and transfer data. This fiscal year, the company expanded into the area of disk-based backup, with a solution that emulates a tape library and is optimized for data protection.

On August 1, 2002, Quantum named Richard Belluzo as the new chief executive officer of the company effective September 3, 2002. Mr. Belluzo succeeded Michael Brown, who retained the position of chairman of Quantum's board of directors.

Until the beginning of fiscal year 2002, we operated our business through two separate business groups: the DLT & Storage Systems group (“DSS”) and the Hard Disk Drive group (“HDD”), which were represented by two classes of Quantum common stock, DSS common stock and HDD common stock, which were intended to track separately the respective businesses of the Company. Our stockholders approved the tracking stock structure on July 23, 1999, and on August 3, 1999, each authorized share of Quantum common stock was exchanged for one share of DSS common stock and one-half share of HDD common stock. On March 30, 2001, our stockholders approved the disposition of HDD to Maxtor Corporation (“Maxtor”). On April 2, 2001, each authorized share of HDD common stock was exchanged for 1.52 shares of Maxtor common stock. The DSS business now represents Quantum, and as such, DSS is no longer a tracking stock, but is now the only common stock for Quantum Corporation.

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## **Business Summary**

Quantum consists of two main business segments: the DLT group and the Storage Solutions group. Our DLT group consists principally of the DLT business. Our Storage Solutions group includes tape automation systems and solutions.

Both business groups experienced declining revenues and lower gross margins in fiscal year 2002 and in the first nine months of fiscal year 2003, compared to the previous fiscal year periods. In addition, we incurred losses from continuing operations in fiscal year 2002 and in the first nine months of fiscal year 2003. The primary factors driving this trend were the generally weak economic conditions that have persisted for the last two years, resulting in reduced spending on Information Technology (“IT”), and increased competition from other computer equipment manufacturers. Because of these trends and the reduced corporate infrastructure that we required following the disposition of

HDD to Maxtor, which represented a major corporate realignment for Quantum, we have taken numerous cost reduction actions. We can make no assurances that these actions and any future actions we may take will be sufficient to return our operations to profitability.

We sold our Network Attached Storage (“NAS”) business, which was part of our Storage Solutions group, in October 2002. We engaged in the NAS business following the acquisition of Meridian Data Inc., in September 1999 and of certain assets of Connex in August 2001. As a result of this disposition, our financial statements and related notes to the accounts have been restated to present the results of the NAS business as a discontinued operation.

#### DLT Group (DLTG)

In DLTG, we design, develop, license, service, and market DLTtape and Super DLTtape drives (collectively referred to as “tape drives”), as well as DLTtape and Super DLTtape media cartridges (collectively referred to as “tape media cartridges”). We earn most of our revenue by selling tape drives and the tape media cartridges used by those drives. In addition, we also earn a significant portion of our revenue from royalties paid to us by manufacturers who license the tape media cartridge technology from us. Super DLTtape technology has a higher storage capacity and transfer rate than DLTtape technology. Both DLTtape and Super DLTtape products are used to back up large amounts of data stored on network servers. Digital Linear Tape, or DLTtape and Super DLTtape, is our half-inch tape technology that is the leader in mid-range UNIX and NT system backup and archive applications.

DLTtape and Super DLTtape drives store data on DLTtape and Super DLTtape media cartridges, respectively. Historical use of tape drives has shown that drives use many tape media cartridges per year in archival and back-up processes. This historical use suggests that the installed base of tape drives will result in continued demand for tape media cartridges. Our tape media cartridges are manufactured and sold by licensed third-party manufacturers and sold directly by us.

We receive a royalty on tape media cartridges sold by our licensees, which, while resulting in lower revenue per unit than media sold directly by Quantum, generates relatively comparable gross margin dollars. We prefer to have a substantial portion of tape media cartridge sales occur through this license model because this minimizes our operational risks and expenses and provides an efficient distribution channel. Currently, approximately 83% of media unit sales that contribute to our media revenue occur through this license model. We believe that the large installed base of tape drives, and our licensing of tape media cartridges, are of strategic importance to us because they contribute to both our direct sales of tape media cartridges and also provide us with royalty income from our licensing partners. Media royalties have been a primary source of our gross margins, and this trend is expected to continue.

On August 29, 2002, we signed a definitive agreement to outsource tape drive manufacturing and certain tape automation manufacturing to Jabil Circuit Inc. (“Jabil”). Under the terms of the agreement, Jabil will utilize our manufacturing facility in Penang, Malaysia, and purchase raw materials, work-in-process inventories and production fixed assets from us. This transaction was completed in December 2002, at which time Jabil began production under the terms of the agreement. Jabil paid Quantum \$17 million during the quarter ended December 29, 2002, mainly for inventory transferred from Quantum to Jabil. Refer to the risk factor “*We began outsourcing tape drive manufacturing to Jabil during the third quarter of fiscal year 2003*”.

On November 13, 2002, we completed the acquisition of Benchmark Storage Innovations, Inc. (“Benchmark”), a privately held company. The acquisition will enable us to expand our tape business by leveraging Benchmark’s complementary products to serve the data protection needs of both new and existing customers in a part of the market not part of our current offerings. It combines our leadership in providing high-performance, high-capacity tape drives with Benchmark’s expertise in delivering high-quality tape products at a lower price for more value-oriented customers.

#### Storage Solutions Group (SSG)

In SSG, we design, develop, manufacture, service, and market tape automation systems and solutions. Our tape automation systems, tape libraries and autoloaders, serve the entire tape library data storage market from desktop computers to enterprise class computers. We offer a broad line of tape automation systems, which are used to manage, store and transfer data in enterprise networked computing environments.

The completion of the Benchmark acquisition will enable us to expand our tape automation business by leveraging Benchmark’s complementary automation product to serve the data protection needs of both new and existing customers in a part of the market not part of our current offerings.

In April 2001, we completed the acquisition of M4 Data (Holdings) Ltd., (“M4 Data”) a privately-held data storage company based in the United Kingdom, to leverage M4 Data’s complementary products and technologies to enhance the range of storage solutions offered to customers. M4 Data provides high performance and scalable tape automation products for the data storage market.

On February 4, 2003, we entered into a definitive agreement to acquire the remaining outstanding shares of SANlight Inc., which we did not already own. The acquisition will provide us with software technology and expertise we can leverage in our enhanced data protection solutions, such as the Quantum DX30. The acquisition will also help augment our enhanced data protection offerings by enabling solutions that incorporate our own technologies and those of our software partners.

## Products

Our products include:

### DLTG:

- **Super DLTtape drives.** We offer tape drive products based on Super DLTtape technology, which are targeted to serve workgroup, mid-range and enterprise business needs. The Super DLT tape drives have a native capacity of up to 160GB (320GB compressed) and a transfer rate of 16MB per second (32MB compressed).
- **DLTtape drives.** The family of DLTtape drives includes drives with up to 40GB of native capacity (80GB compressed) and a sustained data transfer rate of 6MB per second (12MB compressed).
- **Super DLTtape media cartridges.** The Super DLTtape media cartridges are designed and formulated specifically for use with Super DLTtape drives. The capacity of a Super DLTtape media cartridge is up to 160GB (320GB compressed).
- **DLTtape media cartridges.** The DLTtape family of half-inch tape media cartridges is designed and formulated specifically for use with DLTtape drives. The capacity of a DLTtape media cartridge is up to 40GB (80GB compressed).
- **Benchmark tape drives.** The family of Benchmark tape drives – the DLT VS80 and DLT VS160 - includes drives with up to 80GB of native capacity (160GB compressed) and a sustained data transfer rate of 8MB per second (16MB compressed). These tape drives are compatible with DLTtape media cartridges.

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### SSG:

- **Tape automation systems.** We offer a broad line of DLTtape automation systems, tape libraries and autoloaders that support a wide range of back-up and archival needs from workgroup servers to enterprise-class servers. Our tape automation systems range from our tape autoloaders, which accommodate a single DLTtape or Super DLTtape drive, to the ATL P7000 series library, which features Prism Library Architecture™ and can be configured in multiple units to scale up to 245 terabytes of storage capacity. In addition, we offer WebAdmin™, the industry's first Internet browser-based tape library management system, allowing system administrators to monitor widely distributed storage systems at remote locations with point-and-click ease. Within our automation line are modular automation systems with the ATL M1500 and ATL M2500. The ATL M1500 is a modular library that is rack mountable and available in increments of two drives and 20 cartridges that easily scale up to 20 drives and 200 cartridges. The ATL M2500 is stackable with up to three modules in a standard rack, and utilizing a Stacklink™ feature, it can provide compressed storage capacity of up to 60 terabytes per rack. We offer an ATL SuperLoader™ tape library. The ATL SuperLoader is a scalable tape autoloader that provides up to 3.5 terabytes of capacity in a 2U rack-mount form factor and is a modular, high-density tape automation solution designed for the workgroup environment. It contains one or two removable active magazines and is available with up to 16 cartridges and a bar code reader for high performance inventory management. The ValueLoader™ DLT VS80 was added to our product portfolio through the acquisition of Benchmark in the third quarter of fiscal year 2003 and is the first Quantum 2U (3.5-inch tall), rack-optimized autoloader to utilize the Quantum DLT VS80. The Rack-optimized ValueLoader product uses a single DLT VS80 tape drive with an eight-cartridge capacity and up to 640GB of data storage and 21.6GB/hour throughput.
- **Disk Drive Back-up System.** In the second quarter of fiscal year 2003, Quantum introduced the Quantum DX30, an Enhanced Back up Solution (EBS). EBS utilizes disk-based technology to complement tape libraries. The Quantum DX30 offers data transfer rates in excess of 216GB/hr, 3TB capacity in 4U, and RAID 5 or RAID 10 protected disks. EBS integrates easily with most tape libraries and is universally rack mountable.

For more information about our products, please visit our website at [www.quantum.com](http://www.quantum.com).

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Our discussion and analysis of the financial condition and results of operations is based on the condensed consolidated financial statements, which have been prepared in accordance with accounting principles generally accepted in the United States. The preparation of these statements requires us to make significant estimates and judgments about future uncertainties that affect reported assets, liabilities, revenues and expenses and related disclosures. We base our estimates on historical experience and on various other assumptions believed to be reasonable under the circumstances. Our reported financial position or results of operations may be materially different under different conditions or when using different estimates and assumptions. In the event that estimates or assumptions prove to be different from actual results, adjustments are made in subsequent periods to reflect more current information. We believe that the following accounting policies require our most difficult, subjective or complex judgments, because of the need to make estimates about the effect of matters that are inherently uncertain. The judgments and uncertainties that affect the application of those policies in particular, could result in materially different amounts being reported under different conditions or using different assumptions.

### **Revenue Recognition**

Revenue from sales of products to original equipment manufacturers (“OEMs”) and distributors is recognized when passage of title and risk of ownership are transferred to customers, when persuasive evidence of an arrangement exists, the price to the buyer is fixed or determinable and collection is reasonably assured. In the period when the revenue is recognized, allowances are provided for estimated future price adjustments, such as volume rebates and price protection, and future product returns. Since we have historically been able to reliably estimate the amount of allowances required for future price adjustments and product returns, we recognize revenue, net of projected allowances, upon shipment to our customers.

These allowances are based on the OEMs’ and distributors’ master agreements, programs in existence at the time the revenue is recognized, historical information, contractual limits and plans regarding price adjustments and product returns. Revenue from distributor arrangements was a significant portion of our total revenue. If we were unable to reliably estimate the amount of future price adjustments and product returns in any specific reporting period, then we would be required to defer recognition of the revenue until the right to future price adjustments and product returns lapsed and we were no longer under any obligation to reduce the price or accept the return of the product.

Royalty revenue is recognized based on licensee sales where such sales incorporate technology licensed from Quantum. Revenue from separately priced extended warranty and product service contracts is deferred and recognized as revenue ratably over the contract period.

Service revenue, earned primarily from on site service and extended warranty contracts, is recognized ratably over the life of the service contract.

### **Warranty expense and liability**

We warrant our products against defects for periods ranging from one to three years. A provision for estimated future costs and estimated returns for credit relating to warranty is recorded when products are shipped and revenue recognized. Our estimate of future costs to satisfy warranty obligations is primarily based on our estimates of future failure rates and our estimates of future costs of repair including materials consumed in the repair, and labor and overhead amounts necessary to perform the repair.

The estimates of future product failure rates are based on both historical product failure data and anticipated future failure rates. If future actual failure rates differ from our estimates, we will record the impact in subsequent periods. Similarly, the estimates of future costs of repair are based on both historical data and anticipated future costs. If future actual costs to repair were to differ significantly from our estimates, we would record the impact of these unforeseen costs in subsequent periods.

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### **Inventory Valuation**

We value our inventories that are held for resale to customers at the lower of cost or market. Cost is determined by the first-in, first-out (FIFO) method and includes direct material, direct labor, factory overhead and other direct costs. Market is “net realizable value”, which, for finished goods and goods in process, is the estimated selling price, less costs to complete and dispose of the inventory. For raw materials, it is replacement cost or the cost of acquiring similar products from our vendors. While cost is readily determinable, estimates of market value involve significant estimates and judgments about the future.

We initially record our inventory at cost and each quarter evaluate the difference, if any, between cost and market. The determination of the market value of inventories is primarily dependent on estimates of future demand for our products, which in turn is based on other market estimates such as technological change, competitor actions and estimates of future selling prices.

We record write-downs for the amount that cost of inventory exceeds our estimated market value. No adjustment is required when market value exceeds cost.

## Service Inventories

We value our service inventories at the lower of cost or market. Service inventories consist of both component parts, which are primarily used to repair defective units, and finished units, which are provided for customer use on a temporary or permanent basis while the defective unit is being repaired. Cost is determined by the FIFO method and includes direct material, direct labor, factory overhead and other direct costs. Market is "net realizable value", which, for components, is replacement cost or the cost of acquiring similar products from our vendors. For finished goods, market value is the estimated selling price less costs to complete and dispose of the inventories. While cost is readily determinable, the estimates of market involve significant estimates and judgments about the future.

We carry service inventories because we provide product warranty for one to three years and earn revenue by providing repair service outside this warranty period. We initially record our service inventories at cost and each quarter evaluate the difference, if any, between cost and market. The determination of the market value of service inventories is dependent on estimates, including the estimated amount of component parts expected to be consumed in the future warranty and out of warranty service, the estimated number of units required to meet future customer needs, the estimated selling prices of the finished units, and the estimated useful lives of finished units.

We record write-downs for the amount that cost of service inventories exceeds our estimated market value. No adjustment is required when market value exceeds cost.

## Goodwill and Intangible Assets

We have a significant amount of goodwill and intangible assets on our balance sheet related to acquisitions. At December 29, 2002 the net amount of \$118.1 million represented 12% of total assets.

As a result of adopting SFAS No. 142, *Goodwill and Other Intangible Assets*, on April 1, 2002, we discontinued the amortization of goodwill. Instead, goodwill was reviewed for impairment upon adoption of SFAS No. 142 and will be reviewed annually thereafter, or more frequently when indicators of impairment are present. Refer to note 4 and note 5 of the condensed consolidated financial statements for a discussion of the impact of adopting and applying SFAS No. 142.

Intangible assets are carried and reported at acquisition cost, net of accumulated amortization subsequent to acquisition. The acquisition cost is amortized over estimated useful lives, which range from three to ten years. Intangible assets are reviewed for impairment whenever events or circumstances indicate impairment might exist, or at least annually, in accordance with SFAS No. 144, *Accounting for the Impairment or Disposal of Long-lived Assets*. Projected undiscounted net cash flows expected to be derived from the use of those assets are compared to the respective net carrying amounts to determine whether an impairment exists. Impairment, if any, is based on the excess of the carrying amount over the fair value of those assets.

The determination of the net carrying value of goodwill and intangible assets and the extent to which, if any, there is impairment are dependent on material estimates and judgments on our part, including the useful life over which the intangible assets are to be amortized, and the estimates of the value of future net cash flows, which are based upon further estimates of future revenues, expenses and operating margins.

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## Special Charges

From fiscal year 2000 through the first nine months of fiscal year 2003, we recorded significant special charges related to unusual or non-recurring events and the realignment and restructuring of our business operations. These charges represent expenses incurred in connection with certain cost reduction programs that we have undertaken and consist of the cost of involuntary termination benefits, separation benefits, stock compensation charges, facilities charges and other costs of exiting activities. We will record a liability in the period in which management approves a restructuring plan if:

- Management having the appropriate level of authority approves and commits Quantum to the specific exit plan;
- The period of time to complete the plan indicates that significant changes to the plan of termination are not likely; and
- The plan, if it involves terminations, identifies the number of employees and positions to be terminated, and the benefit arrangements are communicated to affected employees.

Only costs resulting from an exit plan that are not associated with, or that do not benefit activities that will be continued, are eligible for recognition as liabilities at the commitment date.

These charges, for both severance and exit costs, require the extensive use of estimates, primarily related to the number of employees paid severance, the amount of severance and related benefits to be paid, and the cost of exiting facilities, including estimates and assumptions related to future maintenance costs, our ability to secure a sub-tenant (if applicable) and any sublease income to be received in the future. If we fail to make accurate estimates regarding these costs or to the timing of the completion of planned activities, we may record additional charges in the future, and may not be permitted to accrue such charges at the time a restructuring plan is approved, but may have to recognize such costs as incurred.

In July 2002, the Financial Accounting Standards Board issued Statement No. 146, "*Accounting for Costs Associated with Exit or Disposal*

*Activities.*” This statement supersedes EITF Issue No. 94-3 and requires that a liability for a cost associated with an exit or disposal activity be recognized when the liability is incurred rather than at the date of an entity’s commitment to an exit plan. The statement further establishes fair value as the objective for initial measurement of the liability and that employee benefit arrangements requiring future service beyond a “minimum retention period” be recognized over the future service period. This statement is effective prospectively for exit or disposal activities initiated after December 31, 2002, and will result in a refinement to our Special Charges accounting policy.

## RESULTS OF OPERATIONS

The results of DLTG and SSG, the two segments that now represent Quantum, are presented as “Results of Continuing Operations”. The gain on the disposition of the HDD group to Maxtor on April 2, 2001 and the results of operations of the NAS business, sold on October 28, 2002, are separately presented as “Results of Discontinued Operations”.

### Results of Continuing Operations

#### Revenue

| (In thousands)           | Three Months Ended   |                      |                         |                           |
|--------------------------|----------------------|----------------------|-------------------------|---------------------------|
|                          | December 29,<br>2002 | December 30,<br>2001 | Increase,<br>(decrease) | % increase,<br>(decrease) |
| Tape drives              | \$ 92,476            | \$ 101,460           | \$ (8,984)              | (8.9)%                    |
| Tape media               | 32,507               | 61,624               | (29,117)                | (47.2)%                   |
| Tape royalty             | 48,382               | 54,496               | (6,114)                 | (11.2)%                   |
| DLT group                | 173,365              | 217,580              | (44,215)                | (20.3)%                   |
| Storage solutions group  | 64,313               | 60,917               | 3,396                   | 5.6%                      |
| Inter-group elimination* | (8,908)              | (9,546)              | 638                     | 6.7%                      |
|                          | \$ 228,770           | \$ 268,951           | \$ (40,181)             | (14.9)%                   |

  

| (In thousands)           | Nine Months Ended    |                      |                         |                           |
|--------------------------|----------------------|----------------------|-------------------------|---------------------------|
|                          | December 29,<br>2002 | December 30,<br>2001 | Increase,<br>(decrease) | % increase,<br>(decrease) |
| Tape drives              | \$ 231,265           | \$ 364,046           | \$ (132,781)            | (36.5)%                   |
| Tape media               | 126,122              | 130,210              | (4,088)                 | (3.1)%                    |
| Tape royalty             | 138,548              | 159,351              | (20,803)                | (13.1)%                   |
| DLT group                | 495,935              | 653,607              | (157,672)               | (24.1)%                   |
| Storage solutions group  | 165,457              | 179,692              | (14,235)                | (7.9)%                    |
| Inter-group elimination* | (25,719)             | (33,553)             | 7,834                   | 23.3%                     |
|                          | \$ 635,673           | \$ 799,746           | \$ (164,073)            | (20.5)%                   |

\* Represents inter-group sales of tape drives for incorporation into tape automation systems, for which the sales are included in storage solutions revenue.

Revenue in the three months ended December 29, 2002 was \$228.8 million compared to \$269.0 million in the three months ended December 30, 2001. Revenue in the nine months ended December 29, 2002 was \$635.7 million compared to \$799.7 million in the nine months ended December 30, 2001. The overall decrease of 14.9% for the three-month comparison reflects decreased revenue in DLTG, slightly offset by a 5.6% increase in SSG revenue. The overall decrease in revenue of 20.5% for the nine-month comparison reflects decreased revenue in both DLTG and SSG.

## DLTG Revenue

Revenue related to DLTG for the three months ended December 29, 2002 was \$173.4 million compared to \$217.6 million in the three months ended December 30, 2001, a decrease of \$44.2 million. Revenue related to DLTG for the nine months ended December 29, 2002 was \$495.9 million compared to \$653.6 million in the nine months ended December 30, 2001, a decrease of \$157.7 million. The largest component of the DLTG revenue decrease in the three-month comparison was a decrease in tape media revenue of \$29.1 million and the largest component of the DLTG revenue decrease in the nine-month comparison was a decrease of \$132.8 million in tape drive revenue.

In the three-month comparison, the vast majority of the decline in tape drive revenue was due to lower average unit prices, slightly offset by the higher tape drive unit sales volume, including the increase in tape drive unit volume contributed by the sales of tape drives acquired from Benchmark. In the nine-month comparison, the vast majority of the decline in tape drive revenue was due to lower tape drive unit sales volume, and to a lesser extent, due to lower average unit prices.

The decrease in tape drive revenue was affected by several major trends, including:

- A weak IT spending environment particularly in the mid-range server market, which includes servers priced from approximately \$5,000 to \$100,000. Our tape drives are commonly included as a back-up component to servers and, accordingly, changes in server demand directly impact the demand for our tape products;
- Increased price competition from alternative tape drive vendors and platforms that require Quantum to lower its selling prices to remain competitive; and
- A long-term trend toward networked storage, which enables centralization of storage resources and results in fewer tape drives consumed per server sold.

The decrease in tape media revenue in the three-month comparison reflects a sales mix shift from Quantum branded media to media produced by licensed manufacturers who are qualified to produce such media and pay us a royalty. Sales of Super DLT media units were sold primarily by Quantum in fiscal year 2002. During fiscal year 2003, Fujitsu and Maxell were both qualified as licensed media manufacturers for Super DLT tape media units, resulting in higher royalty revenue and lower tape media revenue. In both the three and nine-month comparisons, the vast majority of the decline in tape media revenue was due to lower unit sales volume, slightly offset by higher average unit prices. The increases in average unit selling prices reflect the shift towards the higher-priced Super DLT media units.

The decrease in tape media royalties in both the three and nine-month comparisons mainly reflect a decrease in prices and unit sales volume of tape media cartridges sold by licensed media manufacturers for which we earn a royalty based on price. The decrease in the average tape media royalty in both the three and nine-month comparisons was due to declining unit prices of DLT tape media units.

## SSG Revenue

The increase in storage solutions revenue of \$3.4 million in the three-month comparison primarily reflects revenue from ValueLoader sales, following the acquisition of Benchmark on November 13, 2002, and revenue from some of our recently introduced tape automation products, offset by a decrease in revenue from older products. The decrease in revenue of \$14.2 million for the nine-month comparison reflects decreased revenue in tape automation systems, caused primarily by a decrease in unit shipments. Unit shipments, in particular unit shipments of high-end tape automation systems, were affected by weak IT spending primarily and increased competition secondarily.

## Revenue Outlook

The continued sluggishness in customer buying behavior and overall uncertainty that has characterized the broader IT environment for some time will continue to affect both DLTG and SSG. Several new products that we introduced and the Benchmark products we acquired are intended to help us improve the price/performance, as well as expand our markets into segments in which we had not previously participated. We expect these products, including the SDLT320, a relatively new tape drive with higher capacity and transfer rate relative to competitive offerings, and the Benchmark tape drive and tape automation products to generate roughly flat to increased revenue over the medium term.

In addition to the potential impact that weak IT spending, increased competition and storage centralization may continue to have on us throughout the medium term, there is an additional risk factor that could affect our subsequent quarterly revenues - the merger of Hewlett-Packard and Compaq. This merger increases the concentration of our sales and dependency on a single customer. Approximately 25% of our revenue is concentrated in this new merged entity, and therefore could be materially and adversely affected if Hewlett-Packard were to experience a significant decline in storage revenue, whether such loss is due to customer loss, merger integration issues or otherwise. This concentration of revenue in one customer creates additional risk since the combined entity owns a competing brand, LTO, of tape drive and media. The combined Hewlett-Packard and Compaq entity has decided to market both the LTO and Super DLT platforms, whereas Compaq

had exclusively marketed Super DLT for tape backup and archiving. To the extent that the combined Hewlett-Packard and Compaq entity significantly reduces its purchases of DLT and Super DLT products in favor of LTO products, our tape drive and media revenues, operating results and financial condition would be materially and adversely affected. Conversely, to the extent that the combined Hewlett-Packard and Compaq increases purchases of DLT and Super DLT products, our tape drive and media revenues, operating results and financial condition would be positively affected.

We expect Quantum revenue in the fourth quarter of fiscal year 2003 to be approximately the same level or to increase slightly compared to the third quarter of fiscal year 2003. We will benefit from the inclusion of a complete quarter of Benchmark tape drive and tape automation revenue in our aggregate revenues in the fourth quarter of fiscal year 2003, whereas the third quarter of fiscal year 2003 only included Benchmark revenue subsequent to the November 13, 2002 acquisition date. Given all the risk factors and opportunities mentioned above, we remain cautious about our revenue outlook beyond our fiscal fourth quarter, but believe that, because of our new products, we are well positioned to take advantage of the opportunities offered by an economic recovery, when it eventually occurs.

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## Gross Margin and Gross Margin Rate

| (In thousands)            | Three Months Ended   |                      |                         |
|---------------------------|----------------------|----------------------|-------------------------|
|                           | December 29,<br>2002 | December 30,<br>2001 | increase,<br>(decrease) |
| DLTG gross margin         | \$ 53,359            | \$ 80,255            | \$ (26,896)             |
| SSG gross margin          | 18,804               | 20,364               | (1,560)                 |
| Quantum gross margin      | \$ 72,163            | \$ 100,619           | \$ (28,456)             |
| DLTG gross margin rate    | 32.4%                | 38.6%                | (6.2)%                  |
| SSG gross margin rate     | 29.2%                | 33.4%                | (4.2)%                  |
| Quantum gross margin rate | 31.5%                | 37.4%                | (5.9)%                  |

  

| (In thousands)            | Nine Months Ended    |                      |                         |
|---------------------------|----------------------|----------------------|-------------------------|
|                           | December 29,<br>2002 | December 30,<br>2001 | increase,<br>(decrease) |
| DLTG gross margin         | \$ 145,622           | \$ 236,718           | \$ (91,096)             |
| SSG gross margin          | 48,740               | 63,607               | (14,867)                |
| Quantum gross margin      | \$ 194,362           | \$ 300,325           | \$ (105,963)            |
| DLTG gross margin rate    | 31.0%                | 38.2%                | (7.2)%                  |
| SSG gross margin rate     | 29.5%                | 35.4%                | (5.9)%                  |
| Quantum gross margin rate | 30.6%                | 37.6%                | (7.0)%                  |

### DLTG Gross Margin Rate

The DLTG gross margin rate in the three months ended December 29, 2002, decreased to 32.4% from 38.6% in the three months ended December 30, 2001, an overall decrease of 6.2 percentage points. This gross margin rate decrease for the three-month comparison mainly reflects lower tape drive prices and increased unit costs as a result of lower unit sales, partially offset by increased shipments of the higher-margin SDLT products.

The DLTG gross margin rate in the nine months ended December 29, 2002, decreased to 31.0% from 38.2% in the nine months ended December 30, 2001, an overall decrease of 7.2 percentage points. Excluding an inventory write-down of \$7.0 million and transition expenses incurred related to the disposition of HDD of \$4.6 million in the nine months ended December 30, 2001, the decrease in gross margin rate was 9.1 percentage points. This gross margin rate decrease for the nine-month comparison mainly reflects lower tape drive unit sales prices and increased unit costs as a result of lower unit sales, partially offset by a favorable sales mix with an increase in media revenue as a proportion of sales and increased shipments of the higher-margin SDLT products.

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## SSG Gross Margin Rate

The SSG gross margin rate in the three months ended December 29, 2002, decreased to 29.2% from 33.4% in the three months ended December 30, 2001. The SSG gross margin rate in the nine months ended December 29, 2002, decreased to 29.5% from 35.4% in the nine months ended December 30, 2001. Lower average unit prices accounted for most of the lower gross margin rates in the three and nine-month periods, slightly offset by higher unit sales volumes primarily contributed by the sales of the ValueLoader, subsequent to the acquisition of Benchmark in the third quarter of the fiscal year 2003.

Increased competition in the markets in which our Storage Solutions group business competes may further reduce our SSG gross margins. We are actively managing our cost structure, vendor base and product designs to achieve cost reductions in an effort to improve margin trends.

## Gross Margin Rate Outlook

Given the recent trend of declining revenues and margins which, in light of continued economic uncertainty, could continue at least for the remainder of fiscal year 2003, and the fact that we do not expect a rapid recovery in IT spending, we have recognized the need to further reduce our cost structure beyond what we have done in the last year. In addition, industry trends toward centralization and continued or accelerating price-based competition in the tape drive and media markets have the potential to lower volumes and revenue for both tape drives and media, including Quantum branded media and licensee media royalties. In the third quarter of fiscal year 2003, we implemented a cost reduction program that took a significant step towards improving our underlying cost structure by outsourcing the manufacturing of our tape drives to Jabil. The acquisition of Benchmark in the third quarter of fiscal year 2003 had a favorable impact on our tape drive margins and we expect this trend to continue.

We will continue to analyze ways to improve further our underlying cost structure. In the near term, in an attempt to offset negative trends, we will continue efforts to reduce our tape drive bill of material and parts costs through more efficient vendor management. Over the medium term, we are actively working on cost savings activities, including a redesign of our Super DLTape drives, to further reduce costs and possibly improve gross margins relative to current levels. We cannot give assurance that we can reduce costs soon enough or by a sufficient amount to offset any impact of decreasing unit sales prices or volumes. We expect Quantum's overall gross margin rate to remain flat or improve slightly in the fourth quarter of fiscal year 2003 and to migrate back towards the mid-30% range over the course of fiscal year 2004.

## **Operating Expenses**

| <b>(dollars in thousands)</b> | <b>Three Months Ended</b> |                     |                          |                     |                            |                     |
|-------------------------------|---------------------------|---------------------|--------------------------|---------------------|----------------------------|---------------------|
|                               | <b>December 29, 2002</b>  |                     | <b>December 30, 2001</b> |                     | <b>Increase/(decrease)</b> |                     |
|                               |                           | <b>% of revenue</b> |                          | <b>% of revenue</b> |                            | <b>% of revenue</b> |
| DLTG                          | \$ 37,793                 | 23.0%               | \$ 54,385                | 26.1%               | \$ (16,592)                | (3.1)%              |
| SSG                           | 29,974                    | 46.6%               | 29,871                   | 49.0%               | 103                        | (2.4)%              |
| Total Quantum                 | \$ 67,767                 | 29.6%               | \$ 84,256                | 31.3%               | \$ (16,489)                | (1.7)%              |

  

| <b>(dollars in thousands)</b> | <b>Nine Months Ended</b> |                     |                          |                     |                            |                     |
|-------------------------------|--------------------------|---------------------|--------------------------|---------------------|----------------------------|---------------------|
|                               | <b>December 29, 2002</b> |                     | <b>December 30, 2001</b> |                     | <b>Increase/(decrease)</b> |                     |
|                               |                          | <b>% of revenue</b> |                          | <b>% of revenue</b> |                            | <b>% of revenue</b> |
| DLTG                          | \$ 126,381               | 26.9%               | \$ 161,219               | 26.0%               | \$ (34,838)                | 0.9%                |
| SSG                           | 89,246                   | 53.9%               | 89,387                   | 49.7%               | (141)                      | 4.2%                |
| Total Quantum                 | \$ 215,627               | 33.9%               | \$ 250,606               | 31.3%               | \$ (34,979)                | 2.6%                |

In the nine months ended December 30, 2001, \$24.2 million of transition expenses were included in the DLTG operating expenses and were classified as follows: \$6.5 million in research and development expenses, \$4.1 million in sales and marketing expenses, and \$13.6 million in general and administrative expenses. In the three months ended December 30, 2001, \$4.1 million of transition expenses were included in the DLTG operating expenses and were classified as follows: \$0.2 million in research and development expenses, \$0.2 million in sales and marketing expenses, and \$3.6 million in general and administrative expenses. These transition expenses include stock compensation expenses, information systems related expenses, facilities related and other expenses incurred related to the disposition of HDD.

Given the recent trend of declining revenues and margins in many of our markets and the fact that we do not expect a rapid recovery in IT spending, we recognize the need to manage our operating expense efficiently. While we expect to further reduce our cost structure and operating expenses as much as possible, we will increase spending as we invest in strategic opportunities to improve our current product offerings and introduce new products, including investments in our new Enhanced Data Protection (EDP) products. Therefore, while we will continue to evaluate ways to improve our underlying cost structure as it relates to operating expenses in all categories, we may experience increases in some categories as we invest in strategic opportunities. As a result, we expect our operating expenses to be flat to slightly increased in the fourth quarter of fiscal year 2003, as compared with the third quarter of fiscal year 2003.

Research and Development Expenses

| <b>Three Months Ended</b>     |                          |                     |                          |                     |                            |                     |
|-------------------------------|--------------------------|---------------------|--------------------------|---------------------|----------------------------|---------------------|
| <b>(dollars in thousands)</b> | <b>December 29, 2002</b> |                     | <b>December 30, 2001</b> |                     | <b>Increase/(decrease)</b> |                     |
|                               |                          | <b>% of revenue</b> |                          | <b>% of revenue</b> |                            | <b>% of revenue</b> |
| DLTG                          | \$ 18,615                | 11.3%               | \$ 22,342                | 10.7%               | \$ (3,727)                 | 0.6%                |
| SSG                           | 9,068                    | 14.1%               | 7,102                    | 11.7%               | 1,966                      | 2.4%                |
| <b>Total Quantum</b>          | <b>\$ 27,683</b>         | <b>12.1%</b>        | <b>\$ 29,444</b>         | <b>10.9%</b>        | <b>\$ (1,761)</b>          | <b>1.2%</b>         |

| <b>Nine Months Ended</b>      |                          |                     |                          |                     |                            |                     |
|-------------------------------|--------------------------|---------------------|--------------------------|---------------------|----------------------------|---------------------|
| <b>(dollars in thousands)</b> | <b>December 29, 2002</b> |                     | <b>December 30, 2001</b> |                     | <b>Increase/(decrease)</b> |                     |
|                               |                          | <b>% of revenue</b> |                          | <b>% of revenue</b> |                            | <b>% of revenue</b> |
| DLTG                          | \$ 56,149                | 11.9%               | \$ 65,733                | 10.6%               | \$ (9,624)                 | 1.3%                |
| SSG                           | 26,545                   | 16.0%               | 21,433                   | 11.9%               | 5,112                      | 4.1%                |
| <b>Total Quantum</b>          | <b>\$ 82,694</b>         | <b>13.0%</b>        | <b>\$ 87,206</b>         | <b>10.9%</b>        | <b>\$ (4,512)</b>          | <b>2.1%</b>         |

Research and development expenses in the three months ended December 29, 2002 were \$27.7 million, or 12.1% of revenue, compared to \$29.4 million, or 10.9% of revenue, in the corresponding period of fiscal year 2002. Research and development expenses were \$82.7 million, or 13.0% of revenue, and \$87.2 million, or 10.9% of revenue, in the first nine months of fiscal years 2003 and 2002, respectively. The increase in research and development expenses as a percentage of revenue reflected lower revenue for Quantum as a whole and increased spending on research and development for SSG in absolute terms.

**DLTG:**

The level of research and development spending in DLTG decreased \$3.7 million to \$18.6 million in the three months ended December 29, 2002 compared to \$22.3 million in the three months ended December 30, 2001.

The level of research and development spending in DLTG decreased \$9.6 million to \$56.1 million in the nine months ended December 29, 2002, compared to \$65.8 million in the nine months ended December 30, 2001. The nine months ended December 30, 2001 included \$6.5 million of HDD-related transition expenses.

The decrease in the level of research and development spending in DLTG in the three and nine-month comparisons reflects the costs associated the development of the Quantum SuperLoader in the previous comparable periods, the development of which was transferred to SSG at the beginning of fiscal year 2003, and also incremental expense associated with Benchmark.

SSG:

The level of research and development spending in SSG increased \$2.0 million and \$5.1 million, respectively, in the three and nine-month periods ended December 29, 2002 compared to the same periods ended December 30, 2001. These increases were mainly due to product development costs associated with the Quantum SuperLoader, which we recently introduced in the marketplace, partially offset by the results of research and development site consolidation.

Sales and Marketing Expenses

| (dollars in thousands) | Three Months Ended |              |                   |              |                     |              |
|------------------------|--------------------|--------------|-------------------|--------------|---------------------|--------------|
|                        | December 29, 2002  |              | December 30, 2001 |              | Increase/(decrease) |              |
|                        |                    | % of revenue |                   | % of revenue |                     | % of revenue |
| DLTG                   | \$ 10,478          | 6.4%         | \$ 14,401         | 6.9%         | \$ (3,923)          | (0.5)%       |
| SSG                    | 13,922             | 21.6%        | 11,694            | 19.2%        | 2,228               | 2.5%         |
| Total Quantum          | \$ 24,400          | 10.7%        | \$ 26,095         | 9.7%         | \$ (1,695)          | 1.0%         |

| (dollars in thousands) | Nine Months Ended |              |                   |              |                     |              |
|------------------------|-------------------|--------------|-------------------|--------------|---------------------|--------------|
|                        | December 29, 2002 |              | December 30, 2001 |              | Increase/(decrease) |              |
|                        |                   | % of revenue |                   | % of revenue |                     | % of revenue |
| DLTG                   | \$ 35,589         | 7.6%         | \$ 48,215         | 7.8%         | \$ (12,626)         | (0.2)%       |
| SSG                    | 41,946            | 25.4%        | 36,575            | 20.4%        | 5,371               | 5.0%         |
| Total Quantum          | \$ 77,535         | 12.2%        | \$ 84,790         | 10.6%        | \$ (7,255)          | 1.6%         |

Sales and marketing expenses in the three months ended December 29, 2002 were \$24.4 million, or 10.7% of revenue, a decrease of \$1.7 million compared to \$26.1 million, or 9.7% of revenue, in the three months ended December 30, 2001. Sales and marketing expenses in the nine months ended December 29, 2002 were \$77.5 million, or 12.2% of revenue, a decrease of \$7.3 million compared to \$84.8 million, or 10.6% of revenue, in the nine months ended December 30, 2001. The increase in sales and marketing expenses as a percentage of revenue reflected lower revenue for Quantum as a whole and increased sales and marketing expenses for SSG in absolute terms.

The nine months ended December 30, 2001 included \$3.9 million of HDD-related transition expenses. Sales and marketing expenses decreased as a result of cost reduction actions and lower sales.

DLTG:

Sales and marketing expenses in DLTG decreased \$3.9 million to \$10.5 million in the three months ended December 29, 2002, compared to \$14.4 million in the three months ended December 30, 2001.

Sales and marketing expenses in DLTG decreased \$12.6 million to \$35.6 million in the nine months ended December 29, 2002, compared to \$48.2 million in the nine months ended December 30, 2001. The nine months ended December 30, 2001 included \$4.1 million of transition expenses.

Sales and marketing expenses in DLTG decreased in both the three and nine-month comparisons as a result of cost reduction actions and lower sales.

SSG:

Sales and marketing expenses in SSG increased \$2.2 million to \$13.9 million in the three months ended December 29, 2002 compared to \$11.7 million in the three months ended December 30, 2001.

Sales and marketing expenses in SSG increased by \$5.4 million to \$41.9 million in the nine months ended December 29, 2002 compared to \$36.6 million in the nine months ended December 30, 2001.

Sales and marketing expenses in SSG increased in both the three and nine-month comparisons as a result of increased channel marketing and new product advertising, partially offset by savings due to cost reduction actions.

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General and Administrative Expenses

| (dollars in thousands) | Three Months Ended |              |                   |              |                     |              |
|------------------------|--------------------|--------------|-------------------|--------------|---------------------|--------------|
|                        | December 29, 2002  |              | December 30, 2001 |              | Increase/(decrease) |              |
|                        |                    | % of revenue |                   | % of revenue |                     | % of revenue |
| DLTG                   | \$ 8,700           | 5.3%         | \$ 17,642         | 8.5%         | \$ (8,942)          | (3.2)%       |
| SSG                    | 6,984              | 10.9%        | 11,075            | 18.2%        | (4,091)             | (7.3)%       |
| Total Quantum          | \$ 15,684          | 6.9%         | \$ 28,717         | 10.7%        | \$ (13,033)         | (3.8)%       |

| (dollars in thousands) | Nine Months Ended |              |                   |              |                     |              |
|------------------------|-------------------|--------------|-------------------|--------------|---------------------|--------------|
|                        | December 29, 2002 |              | December 30, 2001 |              | Increase/(decrease) |              |
|                        |                   | % of revenue |                   | % of revenue |                     | % of revenue |
| DLTG                   | \$ 34,643         | 7.4%         | \$ 47,231         | 7.6%         | \$ (12,588)         | (0.2)%       |
| SSG                    | 20,755            | 12.5%        | 31,379            | 17.5%        | (10,624)            | (4.9)%       |
| Total Quantum          | \$ 55,398         | 8.7%         | \$ 78,610         | 9.8%         | \$ (23,212)         | (1.1)%       |

General and administrative expenses in the three months ended December 29, 2002 were \$15.7 million, or 6.9% of revenue, a decrease of \$13.0 million compared to \$28.7 million, or 10.7% of revenue, in the three months ended December 30, 2001. Excluding for the three months ended December 30, 2001, \$3.6 million of HDD-related transition expenses and \$3.8 million in amortization of goodwill, which, in accordance with the adoption of SFAS No. 142, *Goodwill and Other Intangible Assets*, on April 1, 2002, is no longer being amortized, general and administrative expenses decreased by \$5.6 million in the three months ended December 29, 2002. This decrease reflects legal costs incurred in the three months ended December 30, 2001 related to the lawsuits with Imation, which were settled in the first quarter of fiscal year 2003, and decreased spending on outside services, including consulting costs.

General and administrative expenses in the nine months ended December 29, 2002 were \$55.4 million, or 8.7% of revenue, a decrease of \$23.2 million compared to \$78.6 million, or 9.8% of revenue, in the nine months ended December 30, 2001. Excluding for the nine months ended December 30, 2001, \$13.6 million of HDD-related transition expenses and \$11.4 million in amortization of goodwill, general and administrative expenses increased by \$1.8 million in the nine months ended December 29, 2002. This increase reflects higher legal costs.

DLTG:

General and administrative expenses in DLTG decreased by \$8.9 million to \$8.7 million in the three months ended December 29, 2002, compared to \$17.6 million in the three months ended December 30, 2001. Excluding the effect of \$3.6 million of HDD-related transition expenses included in the three months ended December 30, 2001, the decrease in general and administrative expenses in DLTG in the three-month comparison was \$5.3 million. This decrease reflects legal costs incurred in the three months ended December 30, 2001 related to the lawsuits with Imation, which were settled in the first quarter of fiscal year 2003, and decreased spending on outside services, including consulting costs.

General and administrative expenses in DLTG decreased by \$12.6 million to \$34.6 million in the nine months ended December 29, 2002, compared to \$47.2 million in the nine months ended December 30, 2001. Excluding the effect of \$13.6 million of HDD-related transition expenses included in the nine months ended December 30, 2001, there was an increase in general and administrative expenses in DLTG in the nine-month comparison of \$1.0 million.

SSG:

General and administrative expenses in SSG decreased by \$4.1 million to \$7.0 million in the three months ended December 29 2002, from \$11.1 million in the three months ended December 30, 2001. Approximately \$3.8 million of this decrease was due to the adoption of SFAS No. 142, *Goodwill and Other Intangible Asset*, on April 1, 2002, under which goodwill is no longer amortized but is subject to annual impairment tests.

General and administrative expenses in SSG decreased by \$10.6 million to \$20.8 million in the nine months ended December 29, 2002, compared to \$31.4 million in the nine months ended December 30, 2001. This decrease primarily reflected \$11.4 million of goodwill amortization in the nine months ended December 30, 2001.

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## Special Charges

In summary, throughout fiscal year 2002, and the first quarter of fiscal year 2003, both DLTG and SSG experienced more rapidly declining revenues and lower gross margins than we had anticipated in our business planning or had experienced in previous years. We found it necessary to broaden and accelerate certain cost reduction programs begun in prior years and to undertake new programs in the current fiscal year in an attempt to offset the effects of lower revenues and margins.

Although unit shipments sequentially increased in the second and third quarters of fiscal year 2003, our tape drive business has experienced declining quarterly unit shipments in the previous two fiscal years, and more recently, sequential declines in gross margin rates. These trends resulted in Quantum incurring special charges in fiscal years 2000, 2001, 2002 and the second and third quarters of fiscal year 2003 related to plans to reduce costs in our tape drive business. In fiscal year 2000, we incurred charges related to reducing overhead expenses and discontinuing certain tape drive production in Colorado Springs, Colorado. Remaining tape drive production was discontinued at our operation in Colorado Springs, Colorado, in the second quarter of fiscal year 2002 and is now outsourced to Jabil.

The Storage Solutions group incurred operating losses throughout fiscal year 2002. Pursuant to plans to reduce our cost structure, we recorded special charges in fiscal year 2002 and in the first nine months of fiscal year 2003 primarily related to reductions in the number of employees, sites and the outsourcing of manufacturing.

The disposition of HDD to Maxtor occurred on April 2, 2001 and transformed Quantum from a company with operations supporting over \$4 billion in annual revenue to a company with operations supporting less than \$1 billion in annual revenue. Accordingly, we incurred significant special charges in the first quarter of fiscal year 2002 related to the HDD disposition and actions taken to reduce our cost structure to a level more appropriate for our reduced revenue expectations subsequent to the disposition of HDD.

### Fiscal year 2003 special charges

#### *DLT Group cost reductions*

In the second quarter of fiscal year 2003, a charge of \$3.2 million was recorded to reduce DLTG's costs through a headcount reduction. This charge relates to severance benefits for approximately 75 employees.

In the third quarter of fiscal year 2003, the following special charges were recorded by DLTG:

- A charge of \$3.8 million related to severance for the 870 employees who were terminated as a result of outsourcing our tape drive manufacturing and certain tape automation manufacturing to Jabil.
- A charge of \$2.3 million was recorded in order to reduce future DLTG operating costs through a headcount reduction. The charge related to severance benefits for approximately 44 employees.
- A charge of \$1.3 million reflects vacant facilities' costs associated with the renegotiation of an operating lease (refer to note 18, '*Commitments and Contingencies*').

#### *Storage Solutions group cost reductions*

In the first quarter of fiscal year 2003, a charge of \$1.1 million was recorded related to reduce SSG's costs with the integration of sales and marketing activities within Quantum's Storage Solutions group. The charge primarily relates to severance benefits for approximately 30 employees who were terminated or have been notified they will be terminated as a result of this restructuring plan.

In the second quarter of fiscal year 2003, a charge of \$7.2 million was recorded to reduce SSG's costs and the actions include outsourcing sub-assembly manufacturing of Quantum's P-Series enterprise tape libraries, consolidating the number of research and development sites for disk-based backup and tape automation, and centralizing sales and marketing support functions. The charge reflects severance benefits for approximately 140 employees, fixed asset write-offs and vacant facility charges.

In the third quarter of fiscal year 2003, the following amounts were recorded by SSG:

- A special charge of \$2.6 million related to severance costs for 41 employees.
- A special charge of \$0.7 million was reversed on our statement of operations related to special charges recorded in the second quarter of fiscal year 2003 for vacant facilities due to a renegotiation of the terms with the lessor.

#### *Corporate severance*

In the second quarter of fiscal year 2003, a charge of \$3.7 million was recorded primarily for separation costs related to Quantum's former Chief Executive Officer, who remains an employee as Quantum's Chairman of the Board of Directors.

In the third quarter of fiscal year 2003, a charge of \$0.1 million was recorded for additional costs relating to severance for three corporate employees.

#### *European operations reorganization*

In the first quarter of fiscal year 2003, we reversed a charge of \$0.4 million on our statement of operations related to special charges recorded in the second quarter of fiscal year 2002 for the closure of our Geneva, Switzerland sales office. We reversed the special charge because the landlord was able to re-lease the space to a new tenant on terms more favorable than originally anticipated.

#### Fiscal year 2002 special charges

In the first quarter of fiscal year 2002, we recorded \$45.0 million of special charges related to our overall operations. These charges consisted of stock compensation and severance charges related to the disposition of HDD, restructuring costs incurred in order to align resources with our ongoing operations, and other cost reduction activities.

The charges are described in more detail below.

#### *Stock Compensation Charges*

We incurred stock compensation charges of \$16.4 million in the first quarter of fiscal year 2002. Of this \$16.4 million, we expensed stock compensation of \$13.9 million related to the conversion of vested HDD options into vested DSS options for employees remaining with Quantum. In addition, we recorded \$2.5 million of stock compensation in connection with certain corporate employees who were terminated at the HDD disposition date and whose unvested HDD and DSS stock options and HDD restricted stock converted into shares of DSS restricted stock. The classification of these stock compensation charges as special charges rather than cost of revenue or operating expenses was based on two factors: the unusual and non-recurring nature of the event (i.e., the disposition of the HDD business) that gave rise to stock awards and stock award modifications; and the fact that the stock award was vested and did not have to be earned over a future service period.

#### *Corporate Severance Charges*

Severance charges of \$8.7 million were incurred in the first quarter of fiscal year 2002 for the termination of corporate employees as a result of the disposition of HDD.

#### *Restructuring and Other Costs*

Approximately \$19.9 million of special charges were incurred in the first quarter of fiscal year 2002 related to:

- Staff reductions and other costs associated with cost saving actions in tape automation system activities (\$13.6 million), which were comprised of severance costs of \$2.3 million; vacant facilities costs of \$3.9 million for facilities in Irvine, California; sales and marketing demonstration equipment of \$6.3 million; and contract cancellation fees of \$1.1 million.

- Vacant facilities costs in Shrewsbury, Massachusetts, and Boulder, Colorado (\$3.4 million);
- Costs associated with discontinuing solid state storage systems, product development and marketing, comprised primarily of severance costs and fixed asset write-offs (\$2.2 million); and
- Other costs (\$0.7 million).

In July 2001, we announced a restructuring of our DLTape business. This restructuring resulted in the transfer of the remaining tape drive production in Colorado Springs, Colorado, to Penang, Malaysia. Additional special charges were recorded related to the closure of our European distributor operations based in Geneva, Switzerland. As a result of these restructurings, we recorded a combined special charge of \$17.0 million in the second quarter of fiscal year 2002.

The special charge of \$16.4 million that was recorded related to the transfer of tape drive production from Colorado Springs, Colorado, to Penang, Malaysia, consisted of the following:

- Severance and benefits costs of \$8.7 million representing severance for 370 employees;
- Vacant facilities costs of \$4.3 million in Colorado Springs, Colorado; and
- Write-off of fixed assets and leasehold improvements of \$3.4 million.

A special charge of \$0.6 million was recorded related to the closure of our Geneva, Switzerland sales office, reflecting vacant facilities costs.

In the third quarter of fiscal year 2002, a special charge of \$2.1 million was recorded for severance costs and the write-off of fixed assets related to the closure of European distributor operations.

Severance charges of \$4.6 million were reversed on our statement of operations in the third quarter of fiscal year 2002 as a result of a reduction in estimated severance costs related mainly to the disposition of the HDD group.

The following two tables show the activity for the nine-month period ended December 29, 2002 and the estimated timing of future payouts for the following major cost reduction projects (for a complete discussion of our special charge activity, refer to note 10 in our Annual Report on Form 10-K for the year ended March 31, 2002):

- Discontinuation of Manufacturing in Colorado Springs; and
- Other Restructuring Programs.

#### Discontinuation of Manufacturing in Colorado Springs

| (In thousands)                      | Severance | Facilities | Total     |
|-------------------------------------|-----------|------------|-----------|
| <b>Balance March 31, 2002</b>       | \$ 2,210  | \$ 16,240  | \$ 18,450 |
| Cash payments                       | (1,397)   | (1,155)    | (2,552)   |
| <b>Balance June 30, 2002</b>        | 813       | 15,085     | 15,898    |
| Cash payments                       | (813)     | (1,155)    | (1,968)   |
| <b>Balance September 29, 2002</b>   | \$ —      | \$ 13,930  | \$ 13,930 |
| Outsourcing of manufacturing        | 3,770     | —          | 3,770     |
| Renegotiation of operating lease    | —         | 1,334      | 1,334     |
| Cash payments                       | (3,770)   | (12,574)   | (16,344)  |
| <b>Balance December 29, 2002</b>    | \$ —      | \$ 2,690   | \$ 2,690  |
| Estimated timing of future payouts: |           |            |           |
| 4th Quarter of Fiscal Year 2003     | —         | 110        | 110       |
| Fiscal Year 2004                    | —         | 440        | 440       |
| Fiscal Year 2005 onward             | —         | 2,140      | 2,140     |
| <b>Total</b>                        | \$ —      | \$ 2,690   | \$ 2,690  |

The cash payments in the three months ended December 29, 2002 represented severance payments of \$3.8 million and lease payments of \$12.6 million related to facilities. Of the \$12.6 million payments related to facilities, \$11.2 million reflected a payment for the difference

between the current estimated market value of vacant facilities in Colorado Springs and the value guaranteed by us to the lessor at the end of the lease term. The remaining special charge accrual reflects a vacant space accrual of \$2.7 million, which will be paid over the respective lease terms through the third quarter of fiscal year 2008.

Other Restructuring Programs

| (In thousands)                       | Severance        | Fixed assets | Facilities      | Other           | Total            |
|--------------------------------------|------------------|--------------|-----------------|-----------------|------------------|
| <b>Balance at March 31, 2002</b>     | <b>\$ 2,127</b>  | <b>\$ —</b>  | <b>\$ 2,395</b> | <b>\$ 1,255</b> | <b>\$ 5,777</b>  |
| SSG Provision                        | 963              | 106          | —               | —               | 1,069            |
| Cash payments                        | (1,710)          | —            | (116)           | (150)           | (1,976)          |
| Non-cash charges                     | —                | (106)        | —               | —               | (106)            |
| Restructuring charge benefit         | —                | —            | (445)           | —               | (445)            |
| <b>Balance at June 30, 2002</b>      | <b>1,380</b>     | <b>—</b>     | <b>1,834</b>    | <b>1,105</b>    | <b>4,319</b>     |
| DLTG cost reduction                  | 3,238            | —            | —               | —               | 3,238            |
| Corporate separation                 | 3,700            | —            | —               | —               | 3,700            |
| SSG cost reduction                   | 4,965            | 824          | 1,369           | —               | 7,158            |
| Cash payments                        | (1,090)          | —            | (173)           | —               | (1,263)          |
| Non-cash charges                     | —                | (824)        | —               | —               | (824)            |
| <b>Balance at September 29, 2002</b> | <b>\$ 12,193</b> | <b>\$ —</b>  | <b>\$ 3,030</b> | <b>\$ 1,105</b> | <b>\$ 16,328</b> |
| DLTG cost reduction                  | 2,304            | —            | —               | —               | 2,304            |
| SSG cost reduction                   | 2,518            | —            | 49              | —               | 2,567            |
| Corporate separation                 | 105              | —            | —               | —               | 105              |
| Cash payments                        | (6,593)          | —            | (153)           | —               | (6,746)          |
| Special charge reversal              | —                | —            | (679)           | —               | (679)            |
| <b>Balance at December 29, 2002</b>  | <b>\$ 10,527</b> | <b>\$ —</b>  | <b>\$ 2,247</b> | <b>\$ 1,105</b> | <b>\$ 13,879</b> |
| Estimated timing of future payouts:  |                  |              |                 |                 |                  |
| 4th Quarter of Fiscal Year 2003      | 10,048           | —            | 519             | 1,105           | 11,672           |
| Fiscal Year 2004                     | 479              | —            | 791             | —               | 1,270            |
| Fiscal Year 2005 onward              | —                | —            | 937             | —               | 937              |
| <b>Total</b>                         | <b>\$ 10,527</b> | <b>\$ —</b>  | <b>\$ 2,247</b> | <b>\$ 1,105</b> | <b>\$ 13,879</b> |

The cash payments in the three months ended December 29, 2002 represented severance payments of \$6.6 million and lease payments of \$0.2 million for vacant facilities. The \$13.9 million remaining special charge accrual at December 29, 2002 is comprised mainly of obligations for severance, vacant facilities and contract cancellation fees. The severance charges will mainly be paid during the fourth quarter of fiscal year 2003. The facilities charges relating to vacant facilities in Irvine, California, will be paid over the respective lease term through the third quarter of fiscal year 2006. The contract cancellation fees are expected to be paid by the fourth quarter of fiscal year 2003.

We expect to realize annual cost savings from the restructuring programs detailed in the above two tables of approximately \$55 million, resulting mainly from employee reductions and reduced facility costs. Of this \$55 million, approximately \$20 million of the savings is expected in cost of revenue, with the remaining amount to come from reduced operating expenses. However, our experience has been that certain factors, including sales volume and price reductions, which have adversely impacted gross margins, and other operating costs, have offset these savings.

**Purchased In-process Research and Development Expense**

We did not expense any purchased in-process research and development in the acquisition of Benchmark Storage Innovations, Inc. because each of the in-process research and development projects at the date of acquisition had achieved technological feasibility.

We expensed purchased in-process research and development of \$13.3 million a result of the acquisition of M4 Data in April 2001. The following table summarizes the relevant factors used to determine the amount of purchased in process research and development.



| (dollars in thousands) | Amount of<br>purchased<br>IPR&D | Estimated cost<br>to complete<br>technology at<br>time of acquisition | Percentage<br>completion at<br>time of acquisition | Overall<br>compound<br>growth<br>rate | Discount<br>rate |
|------------------------|---------------------------------|---|--|---------------------------------------|------------------|
| M4 Data                | \$13,299                        | \$1,515   | 58% to 67%   | 27%                                   | 34%              |

In this acquisition, the amount of the purchase price allocated to in-process research and development was determined by estimating the stage of development of each in-process research and development project that had not achieved technological feasibility and had no alternative future use at the date of acquisition, estimating cash flows resulting from the expected revenue generated from such projects, and discounting the net cash flows back to their present value using an appropriate discount rate. The discount rate used represents a premium to our cost of capital. All of the projections used are based on management's estimates of market size and growth, expected trends in technology and the expected timing of new product introductions.

Revenue from the M4 Data acquisition for the purchased in-process projects is expected to grow from approximately \$60 million in 2002 to more than \$260 million in 2008. The M4 Data in-process research and development projects were completed in the second quarter of fiscal year 2003.

For additional information regarding the M4 Data acquisition, refer to note 3, 'Business Combinations', to the condensed consolidated financial statements.

During the fourth quarter of fiscal year 2003, we expect to expense a significant amount of purchased in-process research and development in connection with the acquisition of SANlight, Inc. because it is a development stage enterprise (refer to note 20, 'Subsequent Events').

#### Stock Compensation Charges

| (In thousands)  | Three Months Ended   |                      | Nine Months Ended    |                      |
|---|----------------------|----------------------|----------------------|----------------------|
|   | December 29,<br>2002 | December 30,<br>2001 | December 29,<br>2002 | December 30,<br>2001 |
| Stock compensation related to the disposition of the HDD group:     |                      |                      |                      |                      |
| Cost of revenue or Operating expenses                               | \$ 306               | \$ 3,863             | \$ 985               | \$ 14,466            |
| Special charges   | —                    | —                    | —                    | 16,404               |
|   | 306                  | 3,863                | 985                  | 30,870               |
| Stock compensation not related to the disposition of the HDD group: |                      |                      |                      |                      |
| Cost of revenue or Operating expenses                               | (42)                 | 898                  | 169                  | 3,021                |
|   | \$ 264               | \$ 4,761             | \$ 1,154             | \$ 33,891            |

Stock compensation expense decreased by \$32.7 million to \$1.2 million in the nine months ended December 29, 2002, compared to \$33.9 million in the nine months ended December 30, 2001. This decrease was mainly due to HDD disposition-related stock compensation expense of \$30.9 million recorded in the nine months ended December 30, 2001 for the conversion and/or acceleration of stock equity awards for employees remaining with Quantum after the disposition of HDD. The allocation of the \$30.9 million between "Cost of revenue or Operating expenses" and "Special charges" was based on two factors: the unusual and non-recurring nature of the event (i.e., the disposition of the HDD business) that gave rise to stock awards and stock award modifications; and whether the vesting had already occurred or was accelerated to fully vested at the time of the award or modification. If vesting had already occurred or was accelerated to fully vested then there was no future benefit to Quantum and the related stock compensation expense for the vested portion of the award was treated as "special charges". Where the unvested portion of an award was to be earned and vest over a future service period providing future value to Quantum, the related stock charge was recognized ratably as compensation expense over the vesting period in the appropriate category of "Cost of revenue or Operating expense".

Stock compensation expense recorded in fiscal year 2003 that related to the disposition of HDD reflects the vesting of DSS option and DSS restricted stock grants converted from HDD option and HDD restricted stock grants, respectively, on April 2, 2001, the date of disposition of HDD to Maxtor.

Stock compensation expense not related to the disposition of HDD consists of the vesting of DSS restricted stock grants and decreased by \$2.8 million, to \$0.2 million in the nine months ended December 29, 2002, compared to \$3.0 million in the nine months ended December 30, 2001. This decrease reflects the lower number of restricted stock grants that are outstanding. The stock compensation benefit of \$42 thousand in the three months ended December 29, 2002 reflects the reversal of stock compensation recorded for employees terminated as a result of the disposition of NAS and who therefore did not vest in all the restricted stock previously granted.

### Amortization of Goodwill and Intangible Assets

We adopted SFAS No. 141, *Business Combinations*, and SFAS No. 142, *Goodwill and Other Intangible Assets*, effective April 1, 2002. Under SFAS No. 142, goodwill and intangible assets deemed to have indefinite lives are no longer amortized but will be subject to annual impairment tests. With the adoption of SFAS No. 142, we ceased amortization of goodwill as of April 1, 2002. Our initial impairment test of goodwill was conducted in the first quarter of fiscal year 2003 and resulted in a non-cash accounting change adjustment of \$94.3 million, reflecting a reduction in the carrying amount of our goodwill. This charge is reflected as a cumulative effect of an accounting change in our condensed consolidated statements of operations. In the second quarter of fiscal year 2003, we recorded an additional goodwill impairment charge related to our Storage Solutions group of \$58.7 million due to a re-evaluation of the Storage Solutions group in light of deterioration in the market values of comparable companies, and to a lesser extent, a reduction in anticipated future cash flows. The continued slump in spending in the IT industry contributed to this decrease in estimated future cash flows. The fair value of the Storage Solutions group reporting entity was calculated using a combination of a discounted cash flow analysis involving projected data and a comparable market approach, which is a comparison with companies also in the tape automation sector.

The amortization expense associated with goodwill and intangible assets decreased from approximately \$6.9 million in the third quarter of fiscal year 2002 to \$3.8 million in the third quarter of fiscal year 2003. Amortization expense decreased by \$11.1 million to \$9.7 million in the nine months ended December 29, 2002 compared to \$20.8 million in the nine months ended December 30, 2001. The decreases were due mainly to goodwill no longer being amortized. The following table details goodwill and intangible asset amortization expense by classification within our condensed consolidated statements of operations:

| (In thousands)             | Three Months Ended   |                      | Nine Months Ended    |                      |
|----------------------------|----------------------|----------------------|----------------------|----------------------|
|                            | December 29,<br>2002 | December 30,<br>2001 | December 29,<br>2002 | December 30,<br>2001 |
| Cost of revenue            | \$ 2,335             | \$ 1,776             | \$ 5,725             | \$ 5,325             |
| Research and development   | 44                   | 291                  | 391                  | 869                  |
| Sales and marketing        | 1,246                | 939                  | 3,225                | 2,817                |
| General and administrative | 126                  | 3,942                | 378                  | 11,828               |
|                            | <u>\$ 3,751</u>      | <u>\$ 6,948</u>      | <u>\$ 9,719</u>      | <u>\$ 20,839</u>     |

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The following table summarizes our goodwill and intangible assets:

| (In thousands)                | December 29, 2002 | March 31, 2002    |
|-------------------------------|-------------------|-------------------|
| Goodwill                      | \$ 74,870         | \$ 173,967        |
| Intangible assets             | 128,340           | 101,500           |
|                               | <u>203,210</u>    | <u>275,467</u>    |
| Less accumulated amortization | (85,063)          | (75,345)          |
|                               | <u>\$ 118,147</u> | <u>\$ 200,122</u> |

Net goodwill and intangible assets at December 29, 2002 and March 31, 2002 represented approximately 12% and 17% of total assets, respectively. The goodwill and intangible assets balances, net of amortization, at December 29, 2002 and March 31, 2002, were \$118.1 million and \$200.1 million, respectively, and included \$28.2 million of additions to intangible assets as a result of the acquisition of Benchmark (refer to note 3, '*Business Combinations*') in the third quarter of the fiscal year 2003. The following table presents goodwill from acquisitions net of amortization:

| (In thousands)                | December 29, 2002 |        | March 31, 2002 |         | Segment |
|-------------------------------|-------------------|--------|----------------|---------|---------|
| ATL                           | \$                | 7,711  | \$             | 105,720 | SSG     |
| M4 Data                       |                   | 2,247  |                | 30,097  | SSG     |
| Benchmark (allocated to DLTG) |                   | 19,402 |                | —       | DLTG    |
| Benchmark (allocated to SSG)  |                   | 7,360  |                | —       | SSG     |
|                               | \$                | 36,720 | \$             | 135,817 |         |

The \$99.1 million decrease in goodwill from March 31, 2002 to December 29, 2002 reflects the following:

- A goodwill impairment charge in the second quarter of fiscal year 2003 of \$58.7 million;
- The \$67.9 million portion of the cumulative effect of an accounting change of \$94.3 million upon adoption of SFAS No. 142 that is applicable to continuing operations; partially offset by:
- An addition to goodwill of \$26.8 million attributable to the acquisition of Benchmark; and
- The reclassification of assembled workforce of \$0.7 million, net of taxes, from intangible assets to goodwill.

Acquired intangible assets are amortized over their estimated useful lives, which range from three to ten years. Management, in estimating the useful lives of intangible assets, considered the following factors:

- The cash flow projections used to estimate the useful lives of the intangible assets showed a trend of growth that was expected to continue for an extended period of time;
- The tape automation products, in particular, have long development cycles and have experienced long product life cycles; and
- The ability to leverage core technology into new tape automation products, and to therefore extend the lives of these technologies.

We assess the recoverability of our long-lived assets, including intangible assets with finite lives, in accordance with SFAS No. 144 by comparing projected undiscounted net cash flows associated with those assets against their respective carrying amounts to determine whether impairment exists. Impairment, if any, is based on the excess of the carrying amount over the fair value of those assets. As of December 29, 2002, no such impairment has been identified with respect to our acquired intangible assets.

Goodwill will be reviewed for impairment at least on an annual basis, or more frequently when indicators of impairment are present. Goodwill impairment is deemed to exist if the net book value of a reporting unit exceeds its fair value. The fair values of the reporting units underlying SSG and DLTG are estimated using a discounted cash flow methodology. If the reporting units' net book values exceed their fair values, therefore indicating impairment, then we will compare the implied fair values of the reporting units' goodwill to their carrying amounts.

Refer to note 4, 'Cumulative Effect of an Accounting Change', and note 5, 'Goodwill and Intangible Assets', of the condensed consolidated financial statements for further information on the effect on goodwill and intangible assets of adopting and applying SFAS No. 142.

### Interest and Other Expense, net, and Write-down of Equity Investments

|                                   | Three Months Ended |              |                   |              |
|-----------------------------------|--------------------|--------------|-------------------|--------------|
|                                   | December 29, 2002  |              | December 30, 2001 |              |
|                                   | (in thousands)     | % of revenue | (in thousands)    | % of revenue |
| Interest and other income         | \$ 3,878           | 1.7%         | \$ 2,663          | 1.0%         |
| Interest expense                  | (5,988)            | (2.6)%       | (6,289)           | (2.3)%       |
|                                   | \$ (2,110)         | (0.9)%       | \$ (3,626)        | (1.3)%       |
| Write-downs of equity investments | \$ —               | 0.0%         | \$ (2,694)        | (1.0)%       |

**Nine Months Ended**

|                                   | December 29, 2002 |              | December 30, 2001 |              |
|-----------------------------------|-------------------|--------------|-------------------|--------------|
|                                   | (in thousands)    | % of revenue | (in thousands)    | % of revenue |
| Interest and other income         | \$ 8,902          | 1.4%         | \$ 12,936         | 1.6%         |
| Interest expense                  | (18,248)          | (2.9)%       | (17,350)          | (2.2)%       |
|                                   | \$ (9,346)        | (1.5)%       | \$ (4,414)        | (0.6)%       |
| Write-downs of equity investments | \$ (17,061)       | (2.7)%       | \$ (7,364)        | (0.9)%       |

Net interest and other expense in the third quarter of fiscal year 2003 was \$2.1 million compared to \$3.6 million in the third quarter of fiscal year 2002. For the nine months ended December 29, 2002, net interest and other expense was \$9.3 million compared to \$4.4 million in the nine months ended December 30, 2001. The decrease in expense in the three-month comparison reflected mainly lower interest expense due to the \$38.7 million payment of M4 Data debentures in the first quarter of the fiscal year 2003, and a foreign currency gain in the third quarter of fiscal year 2003. The increase in expense in the nine-month comparison mainly reflected reduced interest income as a result of lower interest rates and lower cash balances. Also contributing to the decrease in other income in the nine-month period ended December 29, 2002 was \$1.5 million net currency loss, attributable to the effect that the weakening U.S. dollar had on dollar-denominated bank accounts held by our European subsidiaries.

During the nine months ended December 29, 2002, we recorded charges of \$17.1 million compared to charges of \$7.4 million in the nine months ended December 30, 2001 to write down our equity investments to net realizable value based on other-than-temporary declines in the estimated value of these investments. In the second quarter of fiscal year 2003, we sold our entire portfolio of venture capital equity investments for \$11.0 million (refer to note 17, *Investments in Other Entities*). Our equity investments are recorded in "Other assets".

**Income Taxes**

We recorded a tax benefit of \$1.2 million for the three months ended December 29, 2002 compared to a tax expense of \$6.1 million for the three months ended December 30, 2001. Included in the tax benefit for the three months ended December 29, 2002 was a \$1.8 million tax charge related to a foreign subsidiary's purchase of international technology and marketing rights as a part of the acquisition of Benchmark. Excluding this charge, our effective tax rates from continuing operations were 43% and 48% for the three months ended December 29, 2002 and December 30, 2001, respectively. The higher rate in fiscal year 2002 reflects the non-deductibility of equity investment write-downs and goodwill amortization.

The effective tax rates on income from continuing operations, excluding write-downs of equity investments, restructuring charges, HDD-related transition expenses, intangible amortization and other special charges were 30% and 29% for the three-month periods ended December 29, 2002 and December 30, 2001, respectively.

We recorded tax benefits of \$5.2 million and \$0.9 million for the nine months ended December 29, 2002 and December 30, 2001 respectively. Excluding the \$1.8 million tax charge for our foreign subsidiary's purchase of Benchmark's international rights and the \$10.2 million tax charge related to the planned repatriation of offshore earnings connected with the outsourcing of our Malaysian manufacturing, our effective tax rates on continuing operations were 13% and 3% respectively. These benefit rates reflect the non-deductibility of goodwill impairment, write-downs of equity investments, purchased in-process research and development, and special charges.

The effective tax rates on income from continuing operations, excluding write-downs of equity investments, restructuring charges, transition charges, intangible amortization and other special charges was 30% for the nine months ended December 29, 2002 and December 30, 2001 respectively.

**Results of Discontinued Operations**

Loss from NAS discontinued operations, net of income taxes

(In thousands)

|   | Three Months Ended   |                      | Nine Months Ended    |                      |
|---|----------------------|----------------------|----------------------|----------------------|
|   | December 29,<br>2002 | December 30,<br>2001 | December 29,<br>2002 | December 30,<br>2001 |
| Loss from operations, net of income taxes | \$ (9,607)           | \$ (7,221)           | \$ (38,235)          | \$ (26,689)          |

On October 28, 2002, we sold certain assets and assigned certain contract rights related to our NAS business. The assets included inventories, service inventories, fixed assets and intellectual property. The proceeds from the sale include approximately \$4.7 million in cash, \$3.9 million in restricted equity securities of the buyer (with an option to acquire an additional \$1.8 million of such equity securities), a secured promissory note for \$2.4 million issued by the buyer and the assumption by the buyer of \$1.6 million of warranty liability related to the prior installed customer base of NAS products.

The loss from operations in the nine-month period ended December 29, 2002 includes an impairment charge of \$16.4 million and special charges of \$12.2 million. In the second quarter of fiscal year 2003, we determined that the sale of the NAS business was probable and wrote down the assets held for sale to fair value less cost to sell. The fair value of the assets held for sale was determined to be the proceeds from the sale. The resulting impairment charge related mainly to completed technology arising from the acquisitions of Meridian Data Inc. and certain assets of Connex. In the first quarter of fiscal year 2003, a charge of \$4.3 million was recorded related to the integration of sales and marketing activities within SSG. The charge primarily relates to severance benefits for approximately 60 employees who were terminated as a result of this restructuring plan. In the third fiscal quarter of fiscal year 2003, a charge of \$7.9 million was recorded related to the severance of 45 employees and for vacant facilities charges associated with the sale of the NAS business.

#### Gain on disposition of HDD group, net of income taxes

On March 30, 2001, our stockholders approved the disposition of HDD to Maxtor. On April 2, 2001, each authorized and outstanding share of HDD common stock was exchanged for 1.52 shares of Maxtor common stock.

The gain from disposition of discontinued operations of \$124.1 million in the condensed statements of operations for the nine months ended December 30, 2001, reflects the gain on the disposition of HDD. This gain, net of tax, is comprised of the proceeds recorded for the exchange of HDD shares for Maxtor shares, less the disposal of the assets and liabilities in conjunction with the disposition of HDD to Maxtor, and stock compensation charges for the conversion of unvested DSS options to DSS restricted stock for employees who transferred to Maxtor. See risk factor entitled—*If we incur an uninsured tax liability as a result of the disposition of HDD, our financial condition and operating results could be negatively affected.*

#### Recent Accounting Pronouncements

##### Accounting for Costs Associated with Exit or Disposal Activities

In June 2002, the Financial Accounting Standards Board issued SFAS No. 146, “*Accounting for Costs Associated with Exit or Disposal Activities*”. This statement supercedes EITF Issue No. 94-3 and requires that a liability for a cost associated with an exit or disposal activity be recognized when the liability is incurred rather than at the date of an entity’s commitment to an exit plan. The statement further establishes fair value as the objective for initial measurement of the liability and that employee benefit arrangements requiring future service beyond a “minimum retention period” be recognized over the future service period. This statement is effective prospectively for exit or disposal activities initiated after December 31, 2002. We are in the process of the evaluating the financial statement impact, if any, of adoption of SFAS No. 146.

##### Guarantor’s Disclosure Requirements for Guarantees

In November 2002, the Financial Accounting Standards Board issued FASB Interpretation (FIN) No. 45, “*Guarantor’s Disclosure Requirements for Guarantees, Including Indirect Guarantees of Others*”. FIN No. 45 clarifies the guarantor’s requirements relating to the guarantor’s accounting for, and disclosure of, the issuance of certain types of guarantees and requires the guarantor to recognize at the inception of a guarantee a liability for the fair value of the lease obligation. The provisions for the initial recognition and measurement of guarantees are effective on a prospective basis for guarantees that are issued or modified after December 31, 2002 and we do not believe these provisions will have a material impact on our results of operations or financial position. The provisions for disclosures of product warranties are included in note 8, ‘*Accrued Warranty*’. The disclosures required for operating lease guaranteed value and for shares contingently issuable in connection with business combinations are included in note 18, “*Guarantees, Commitments and Contingencies*”.

##### Accounting for Stock-Based Compensation

In December 2002, the Financial Accounting Standards Board issued SFAS No. 148, “*Accounting for Stock-Based Compensation, Transition*

and Disclosure." SFAS No. 148 provides alternative methods of transition for a voluntary change to the fair value based method of accounting for stock-based employee compensation. SFAS No. 148 also requires that disclosures of the pro forma effect of using the fair value method of accounting for stock-based employee compensation be displayed more prominently and in a tabular format. Additionally, SFAS No. 148 requires disclosure of the pro forma effect in interim financial statements. The additional disclosure requirements of SFAS No. 148 are effective for fiscal years ended after December 15, 2002. We do not intend to adopt the fair value based method of accounting for stock-based employee compensation, but will provide the additional disclosures required by SFAS No. 148.

#### Consolidation of Variable Interest Entities

In January 2003, the Financial Accounting Standards Board issued FASB Interpretation (FIN) No. 46, "Consolidation of Variable Interest Entities". FIN No. 46 requires that if a business enterprise has a controlling interest in a variable interest entity (a.k.a. special purpose entity), the assets, liabilities and results of operations of the variable interest entity should be included in the consolidated financial statements of the business enterprise. FIN No. 46 applies immediately to variable interest entities created after January 31, 2003, and to variable interest entities in which an enterprise obtains an interest after that date. It applies in the first fiscal year or interim period beginning after June 15, 2003, to variable interest entities in which an enterprise holds a variable interest that it acquired before February 1, 2003. We believe that the operating lease disclosed in note 18, 'Commitments and Contingencies' could be subject to FIN 46. We are in the process of the evaluating the financial statement impact, if any, of adoption of FIN No. 46.

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#### Subsequent Events

##### Acquisition of SANLight

On February 4, 2003, we entered into a definitive agreement to acquire the remaining outstanding shares of SANlight Inc., which we did not already own. SANlight Inc. is a development stage enterprise in storage solution technology. The purchase price is approximately \$9 million, consisting of \$8 million of Quantum common stock and acquisition costs of approximately \$1 million. We expect to expense a significant amount of purchased in-process research and development in connection with this acquisition, which we expect to finalize during the fourth quarter of fiscal year 2003.

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## LIQUIDITY AND CAPITAL RESOURCES

| (dollars in thousands)   | As of or for nine months ended |                      |
|--|--------------------------------|----------------------|
|  | December 29,<br>2002           | December 30,<br>2001 |
| Cash and cash equivalents  | \$ 316,278                     | \$ 363,115           |
| Days sales outstanding (DSO) (1)   | 54.4                           | 58.8                 |
| Inventory turns—annualized (1)   | 8.3                            | 6.1                  |
| Net cash provided by operating activities of continuing operations           | \$ 23,718                      | \$ 61,041            |
| Net cash provided by (used in) investing activities of continuing operations | \$ (5,240)                     | \$ (65,792)          |
| Net cash used in financing activities of continuing operations               | \$ (38,299)                    | \$ (5,392)           |

(1) The ratios for the nine months ended December 29, 2002, include the effect of Benchmark balances.

#### **First Nine Months of Fiscal Year 2003 compared to the First Nine Months of Fiscal Year 2002**

##### Net cash provided by operating activities:

Net cash provided by operating activities of continuing operations decreased to \$23.7 million provided in the first nine months of fiscal year 2003 from \$61.0 million provided in the first nine months of fiscal year 2002. The primary sources of this change are listed in the following table:

**Nine Months Ended**

| <b>(In thousands)</b>   | <b>December 29,<br/>2002</b>     | <b>December 30,<br/>2001</b>     | <b>Change in<br/>cash (used),<br/>provided</b> |
|---|----------------------------------|----------------------------------|--|
|   | <b>cash (used),<br/>provided</b> | <b>cash (used),<br/>provided</b> |  |
| Loss from continuing operations including cumulative effect of an accounting change | \$ (219,621)                     | \$ (33,766)                      | \$ (185,855)                                   |
| Non-cash income statement items   | 194,515                          | 112,953                          | 81,562   |
| Adjusted income (loss) from operations  | (25,106)                         | 79,187                           | (104,293)                                      |
| Accounts receivable   | 15,245                           | 28,801                           | (13,556)                                       |
| Inventories   | 33,463                           | 14,891                           | 18,572   |
| Accounts payable  | 25,940                           | 23,206                           | 2,734  |
| Income taxes payable  | (11,755)                         | 1,299                            | (13,054)                                       |
| Other, net  | (14,069)                         | (86,343)                         | 72,274   |
|   | <b>\$ 23,718</b>                 | <b>\$ 61,041</b>                 | <b>\$ (37,323)</b>                             |

Net cash provided by operating activities of continuing operations decreased by \$37.3 million in the nine months ended December 29, 2002 compared to the nine months ended December 30, 2001. The decrease in net cash provided by operating activities was primarily due to the increase in the loss from continuing operations and a decrease in cash provided by accounts receivable and income taxes payable, partially offset by an increase in cash provided by inventories, due to the transition to an outsourcing model for our tape drive manufacturing, and a decrease in cash used in net other liabilities.

The loss from operations in the nine months ended December 29, 2002, adjusted for non-cash items, was \$25.1 million, a decrease of \$104.3 million from the \$79.2 million in income from operations reported in the nine months ended December 30, 2001. The declining revenues and gross margins that we experienced during the first nine months of fiscal year 2003 primarily caused the decrease.

Net cash used in investing activities:

Net cash used in investing activities of continuing operations decreased to \$5.2 million in the nine months ended December 29, 2002 from \$65.8 million used in the nine months ended December 30, 2001. The decrease in cash used in investing activities reflects the following:

- A decrease in the purchase of equity securities of \$24.8 million;
- The acquisition of M4 Data in April 2001 for \$14.9 million;
- A decrease in net cash used for purchases of property and equipment of \$12.4 million;
- The sale of equity securities in the second quarter of fiscal year 2003 for \$11.0 million; partially offset by:
- The use of cash in the acquisition of Benchmark in November 2002 of \$3.0 million net (\$11 million used in acquisition of Benchmark net of Benchmark cash acquired of \$8 million).

Net cash used in financing activities:

Net cash used in financing activities of continuing operations was \$38.3 million in the nine months ended December 29, 2002, compared to \$5.4 million used in financing activities in the nine months ended December 30, 2001. The increase in cash used in financing activities reflects principal payments of \$38.7 million in the first quarter and \$2.6 million in the third quarter of fiscal year 2003 for debentures issued in the M4 Data acquisition and a \$35.3 million decrease in the proceeds from the exercise of employee stock options in the first nine months of fiscal year 2003 compared to the first nine months of fiscal year 2002. The comparison of cash used was impacted by the lack of any repurchase of our common stock in the first nine months of fiscal year 2003, compared to \$43.7 million in repurchases in the first nine months of fiscal year 2002.

Credit line

In April 2000, we entered into an unsecured senior credit facility with a group of banks providing a \$187.5 million revolving credit line that would have expired in April 2003. In December 2002, we terminated this facility and entered into a secured senior credit facility with a group

of five banks, providing a \$100 million revolving credit line that expires in June 2004. As of December 29, 2002, \$89 million is committed to standby letters of credit and there were no borrowings from the remaining \$11 million available under this credit facility. There is a cross default provision between this facility and the operating lease facility such that a default on one facility constitutes a default on the other facility. The credit facility is secured by a blanket lien on all of the assets of Quantum and contains certain financial and reporting covenants, which we are required to satisfy as a condition of the credit line. There is also a cross default provision between this facility and the operating lease facility (see note 18, '*Commitments and Contingencies*'), such that a default on one facility constitutes a default on the other facility. If in future quarters we are in violation of any financial or reporting covenant and receive a notice of default letter from the bank group, the credit line could become unavailable, and any amounts outstanding could become immediately due and payable. In addition, if we were unsuccessful in securing a waiver in subsequent quarters, we would also lose access to the \$89 million standby letters of credit contained within our credit line facility and have to restrict \$89 million of our cash to cover these existing letters of credit. This would have a material and adverse impact on our liquidity.

### Operating Lease Commitment

We have an operating lease commitment that requires us to maintain specified financial and reporting covenants. There is a cross default provision between this lease and the credit line facility such that a default on one facility constitutes a default on the other facility. We currently believe that we will be in compliance with future reporting and financial covenants. However, if in future quarters we violate these financial covenants, and are unable to obtain a waiver for such covenant violations, the lessor could terminate the lease, resulting in the acceleration of our obligation to purchase the leased facility for the stipulated sales price of \$50 million. This could result in our having to purchase and re-sell the facilities promptly and potentially at a substantial discount to their current appraised value. If this occurred, our liquidity and financial position would be materially and adversely affected.

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### General outlook

We have taken numerous actions over the last year to strengthen our cash position and balance sheet and to improve our ability to generate net income and positive cash flow from operating activities. Many of these actions were taken in order to offset the negative impacts of increased competition in our product and market segments, as well as to counter the negative effects of the economic downturn, which have adversely impacted our business.

The actions that we have taken to strengthen our balance sheet include the following:

- The sale of our venture capital portfolio;
- The transition to an outsourced manufacturing model;
- A reduction in inventory levels;
- No common stock repurchases to date in fiscal year 2003;
- Improved collection of receivables and a reduction in days sales outstanding (DSO's); and
- A reduction in capital expenditure levels.

Actions that we have taken to increase our ability to generate positive cash flow from operating activities include the following:

- The sale of our NAS business, which was unprofitable and had negative cash flow;
- Significant restructuring actions implemented over the last several quarters that were aimed at reducing costs (see note 13, '*Special Charges*);
- The outsourcing of our manufacturing; and
- The acquisition of Benchmark.

While we have taken actions to increase cash flows, there have been significant uses of cash and factors that reduced cash inflow in the first nine months of fiscal year 2003, including: our settlement of the debentures associated with the M4 Data acquisition of \$41.4 million; the payment of \$12.8 million toward our Colorado Springs, Colorado, operating lease commitment in order to bring this commitment in line with the facility's recently appraised value; and cash inflows from the exercise of employee stock options are down by \$35.3 million reflecting the decline in the company's common stock price.

We expect to consume cash from operating activities in the fourth quarter of fiscal year 2003. Significant uses of cash include the upcoming semi-annual convertible bond interest payment and the use of more than \$10 million of cash in order to meet special charge obligations, primarily for severance and vacant space.

However, we believe that our existing cash and capital resources, including any cash generated from operations after we complete our restructuring efforts over the next several quarters, will be sufficient to meet all currently planned expenditures and sustain operations for the next 12 months. This belief is dependent upon our ability to generate acceptable levels of revenue, maintain or improve gross margins, and maintain or reduce operating expenses in order to provide net income and positive cash flow from operating activities in the future. Operating cash flows, driven by net income, have been a significant source of our past liquidity. If in the future we do not return to sustained profitability, such lack of profitability may have a material adverse impact on our operating cash flows, liquidity and financial position. Key



factors in generating net income and positive operating cash flow include the introduction of competitive products and their effect on sales of our own comparable products, our ability to timely develop and offer new products, customer acceptance of new products, and our ability to deliver continued reductions in our cost of sales and operating expenses. Also, changes in accounts receivable and inventory balances are significant factors in whether we provide or use cash from operations and are affected by our ability to collect cash from our customers in a timely manner and the continued demand for our inventory. If we were to experience significant deterioration in sales, profit margins and/or working capital management and performance, cash flows from our operating activities would be materially and adversely affected, which would impact the future availability of debt or equity arrangements on terms acceptable to us as well as prevent us from making strategic investments in property, equipment, tangible and intangible assets. We can make no assurances that we will be able to generate sufficient liquidity or obtain sufficient amounts of cash in the future, and if we cannot, this lack of cash could have a material adverse impact on our liquidity and financial position.

## Capital Resources

During fiscal year 2000, the Board of Directors authorized us to repurchase up to \$700 million of our common stock in open market or private transactions. Of the total repurchase authorization, \$600 million was authorized for repurchase of Quantum, DSS or the previously outstanding HDD common stock. An additional \$100 million was authorized solely for repurchase of the previously outstanding HDD common stock. For the nine months ended December 29, 2002, there were no repurchases of Quantum common stock. Since the beginning of the stock repurchase authorization through December 29, 2002, we have repurchased a total of 8.6 million shares of Quantum common stock (including 3.9 million shares that were outstanding prior to the issuance of the DSS and HDD common stocks), 29.2 million shares of DSS common stock and 13.5 million shares of HDD common stock, for a combined total of \$612.1 million. At December 29, 2002, there was approximately \$87.9 million remaining authorized to purchase Quantum common stock.

We filed a registration statement that became effective on July 24, 1997, pursuant to which we may issue debt or equity securities, in one or more series or issuances, limited to \$450 million aggregate public offering price. In July 1997, under the registration statement, we issued \$287.5 million of 7% convertible subordinated notes. The notes mature on August 1, 2004, and are convertible at the option of the holder at any time prior to maturity, unless previously redeemed, into shares of Quantum common stock and Maxtor common stock. The notes are convertible into 6,206,152 shares of Quantum common stock (or 21.587 shares per \$1,000 note), and 4,716,676 shares of Maxtor common stock (or 16.405 shares per \$1,000 note). We have recorded a receivable from Maxtor of \$95.8 million for the portion of the debt previously attributed to HDD and for which Maxtor has agreed to reimburse us for both principal and associated interest payments. Although we believe the \$95.8 million due from Maxtor will ultimately be realized, if Maxtor were for any reason unable or unwilling to pay such amount, we would be obligated to pay this amount and record a loss with respect to this amount in a future period. We may redeem the notes at any time with Maxtor's mutual agreement. In the event of certain changes involving all or substantially all of our common stock, the holder would have the option to redeem the notes. Redemption prices range from 101% of the principal to 100% at maturity. The notes are unsecured obligations subordinated in right of payment to all of our existing and future senior indebtedness. Although we believe the \$95.8 million due from Maxtor will ultimately be realized, if Maxtor were for any reason unable or unwilling to pay such amount, we would remain obligated to pay this amount and would likely record a loss with respect to this amount in a future period, which would have a material adverse effect on our results of operations and financial condition.

Debentures payable of \$41.4 million were issued as partial consideration for the acquisition of M4 Data in April 2001. The debenture holders called and received payment from Quantum for \$38.7 million in the first quarter of fiscal year 2003 and \$2.7 million in the third quarter of fiscal year 2003.

The table below summarizes our long-term commitments:

| (In thousands)                      | <1 year   | >1 year and <2 years | 2 years and beyond | Total      |
|-------------------------------------|-----------|----------------------|--------------------|------------|
| Convertible subordinated debt       | \$ —      | \$ 287,500           | \$ —               | \$ 287,500 |
| Portion payable by Maxtor (1)       | —         | (95,833)             | —                  | (95,833)   |
| Subtotal                            | —         | 191,667              | —                  | 191,667    |
| Short-term debt                     | 443       | —                    | —                  | 443        |
| Inventory purchase commitment       | 12,753    | —                    | —                  | 12,753     |
| Operating lease - Colorado facility |           |                      |                    |            |
| - base rent                         | 1,094     | 1,094                | 3,281              | 5,469      |
| - contingent obligation (2)         |           |                      | 50,000             | 50,000     |
| Other operating leases              | 13,667    | 11,081               | 24,436             | 49,184     |
| Total Contractual Cash Obligations  | \$ 27,957 | \$ 203,842           | \$ 77,717          | \$ 309,516 |

- (1) Refer to note 2 to the condensed consolidated financial statements.
- (2) Appraised value of the facility, the collateral that would be used to satisfy the contingent obligation, is \$50 million.

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## TRENDS AND UNCERTAINTIES

THE READER SHOULD CAREFULLY CONSIDER THE RISKS DESCRIBED BELOW, TOGETHER WITH ALL OF THE OTHER INFORMATION INCLUDED IN THIS QUARTERLY REPORT ON FORM 10-Q, BEFORE MAKING AN INVESTMENT DECISION. THE RISKS AND UNCERTAINTIES DESCRIBED BELOW ARE NOT THE ONLY ONES FACING QUANTUM. ADDITIONAL RISKS AND UNCERTAINTIES NOT PRESENTLY KNOWN TO US OR THAT ARE CURRENTLY DEEMED IMMATERIAL MAY ALSO IMPAIR OUR BUSINESS AND OPERATIONS. THIS QUARTERLY REPORT ON FORM 10-Q CONTAINS “FORWARD-LOOKING” STATEMENTS THAT INVOLVE RISKS AND UNCERTAINTIES. FORWARD-LOOKING STATEMENTS USUALLY CONTAIN THE WORDS “ESTIMATE,” “ANTICIPATE,” “EXPECT,” “BELIEVE”, OR SIMILAR EXPRESSIONS. ALL FORWARD-LOOKING STATEMENTS, INCLUDING, BUT NOT LIMITED TO, PROJECTIONS OR ESTIMATES CONCERNING OUR BUSINESS, INCLUDING DEMAND FOR OUR PRODUCTS, ANTICIPATED GROSS MARGINS, OPERATING RESULTS AND EXPENSES, MIX OF REVENUE STREAMS, EXPECTED REVENUE FROM PURCHASED IN-PROCESS PROJECTS, COST SAVINGS, STOCK COMPENSATION, THE PERFORMANCE OF OUR MEDIA BUSINESS AND THE SUFFICIENCY OF CASH TO MEET PLANNED EXPENDITURES, ARE INHERENTLY UNCERTAIN AS THEY ARE BASED ON MANAGEMENT’S EXPECTATIONS AND ASSUMPTIONS CONCERNING FUTURE EVENTS, AND THEY ARE SUBJECT TO NUMEROUS KNOWN AND UNKNOWN RISKS AND UNCERTAINTIES. READERS ARE CAUTIONED NOT TO PLACE UNDUE RELIANCE ON THESE FORWARD-LOOKING STATEMENTS, WHICH SPEAK ONLY AS OF THE DATE HEREOF. OUR ACTUAL RESULTS COULD DIFFER MATERIALLY FROM THOSE ANTICIPATED IN THESE FORWARD-LOOKING STATEMENTS AS A RESULT OF CERTAIN FACTORS, INCLUDING THOSE SET FORTH BELOW AND ELSEWHERE IN THIS QUARTERLY REPORT ON FORM 10-Q.

**We are exposed to general economic conditions that have resulted in significantly reduced sales levels and operating losses and, if such adverse economic conditions were to continue or worsen, our business, financial condition and operating results could be further adversely and materially impacted.**

If the adverse economic conditions in the United States and throughout the world economy continue or worsen, we may experience a further material adverse impact on our business, operating results, and financial condition. We took actions in fiscal year 2002 and in the first nine months of fiscal year 2003 to reduce our cost of sales and operating expenses in order to address these adverse conditions. A prolonged continuation or worsening of sales trends would require that we take additional actions to further reduce our cost of sales and operating expenses in subsequent quarters to align these costs with reduced revenue. We may be unable to reduce our cost of sales and operating expenses at a rate and to a level consistent with such a future adverse sales environment. If we are required to undertake further expense reductions, we may incur significant incremental special charges associated with such expense reductions that are disproportionate to sales, thereby materially and adversely affecting our business, financial condition and operating results.

**Quantum is currently not profitable. If we are unable to generate positive cash flow from operating activities, our ability to obtain additional capital in the future could be jeopardized, and our business could suffer.**

We must devote substantial resources to new product development, manufacturing, and sales and marketing activities to be competitive in our markets. Historically, cash flow from operating activities has provided us with a significant portion of the cash and liquidity that we have required in order to invest in the product development, manufacturing and sales activities that will allow us to maintain our competitiveness. Until or unless we return to profitable operations, we will have significantly less liquidity to invest in our business. In turn, reduced cash flow from operations may jeopardize our ability to gain access to capital, which potentially could have a material adverse impact on our business, results of operations, liquidity, and financial condition.

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**To service our debt and fund our other capital requirements, we will require a significant amount of cash, and our ability to generate cash will depend on many factors beyond our control.**

Our ability to meet our debt service obligations and to fund working capital, capital expenditures, acquisitions, research and development and other general corporate purposes, will depend upon our future performance, which will be subject to financial, business and other factors affecting our operations, many of which are beyond our control. If our losses from operations were to persist at current levels or worsen, or if Maxtor were unable or unwilling to reimburse us for its portion of our debt, we would not have sufficient cash resources to pay our debt. We cannot provide assurance that we will generate sufficient cash flow from operations, or that future borrowings will be available, or available in an amount sufficient to enable us to pay our debt or fund other liquidity needs.

If we are unable to generate sufficient cash flow and are unable to refinance or extend outstanding borrowings on commercially reasonable terms or at all, we may have to:

- Reduce or delay capital expenditures planned for replacements, improvements and expansions;
- Sell assets;
- Restructure debt; and/or

- Obtain additional debt or equity financing.

We cannot assure you that we could effect or implement any of these alternatives on satisfactory terms, if at all.

**The agreements for our credit facilities contain various covenants that limit our discretion in the operation of our business.**

The agreements for our secured credit facilities contain numerous restrictive covenants that require us to comply with and maintain certain financial tests and ratios, thereby restricting our ability to:

- Incur debt;
- Incur liens;
- Redeem or prepay subordinated debt;
- Make acquisitions of businesses or entities;
- Make investments, including loans, guarantees and advances;
- Make capital expenditures;
- Engage in mergers, consolidations or certain sales of assets;
- Engage in transactions with affiliates;
- Pay dividends or engage in stock repurchases; and
- Enter into certain restrictive agreements.

Our ability to comply with covenants contained in our secured credit facility may be affected by events beyond our control, including prevailing economic, financial and industry conditions. Our failure to comply with our debt-related covenants could result in an acceleration of our indebtedness and cross-defaults under our other indebtedness, which may have a material adverse effect on our financial condition. Even if we are able to comply with all covenants, the restrictions on our ability to operate our business could harm our business by, among other things, limiting our ability to take advantage of financings, mergers, acquisitions and other corporate opportunities.

Our senior secured credit facility is secured by a pledge of all of our assets. If we were to default under our senior secured credit facility and were unable to obtain a waiver for such a default, the lenders would have a right to foreclose on our assets in order to satisfy our obligations under the credit facility. Any such action on the part of the lenders against us could have a materially adverse impact on our business, financial condition and results of operations.

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**Our Storage Solutions group currently operates at a loss and may continue to operate at a loss. If we are unable to make our Storage Solutions business profitable, the losses from this group could materially and adversely affect our business, financial condition and results of operations.**

We have invested, and will continue to invest, in the development, promotion and sale of storage solutions, such as our recent acquisition of SANlight. Operating expenses associated with our Storage Solutions revenue are comparatively high, resulting in losses and cash consumption out of proportion to the revenue generated by the group, when compared to our tape business. Therefore, we will need to generate significant storage solutions revenues or significantly reduce our related operating expenses for the group in order to make the Storage Solutions business profitable. We cannot provide assurance that the Storage Solutions group will ever produce operating income or will ever generate positive cash flow, and, if we were unable to do so, these losses could negatively impact our business, financial condition and operating results.

Goodwill and intangible assets used in the Storage Solutions group were reviewed for possible impairment upon the adoption on April 1, 2002 of SFAS No. 142, *Goodwill and Other Intangible Assets*, and SFAS No. 144, *Accounting for the Impairment or Disposal of Long-lived Assets*. The impairment test conducted relative to goodwill resulted in a \$94.3 million accounting adjustment in the first quarter of fiscal year 2003 and a \$58.7 million impairment charge in the second quarter of fiscal year 2003. The intangible assets were not determined to be impaired, based on projections of discounted net cash flows from the Storage Solutions group compared to the carrying value of the intangible assets. However, both tests use financial projections involving significant estimates and uncertainties regarding future revenues, expenses and cash flows. We cannot provide assurance that future net cash flows will be sufficient to avoid further impairment charges. As a result, in the future, we may incur additional impairment charges related to our Storage Solutions business, which would adversely affect the group's operating income, which could have a materially adverse impact on the results of our operations or our financial condition.

**A majority of our sales come from a few customers, and these customers have no minimum or long-term purchase commitments. The loss of, or a significant change in demand from, one or more key customers could materially and adversely affect our business, financial condition and operating results.**

Our sales are concentrated among a few customers. Sales to our top five customers in the nine months ended December 29, 2002 represented 40% of total revenue. Furthermore, customers are not obligated to purchase any minimum product volume and our relationships with our customers are terminable at will.

The merger of Hewlett-Packard and Compaq in 2002 significantly increased the concentration of our sales and dependency on a single customer. Approximately 25% of our revenue derives from this newly merged entity, and, therefore, could be materially and adversely

affected if Hewlett-Packard were to experience a significant decline in storage revenue whether due to customer loss or integration issues or otherwise. There is an additional risk since the combined entity owns a competing LTO brand of tape drive and media. The combined Hewlett-Packard and Compaq entity has decided to market both the LTO and Super DLTape platforms, whereas Compaq had exclusively marketed Super DLTape for tape backup and archiving. To the extent that the combined Hewlett-Packard and Compaq entity significantly reduces its purchases of DLTape and Super DLTape products in favor of LTO products, our tape drive and media revenues, operating results and financial condition would be materially and adversely affected.

**Competition has increased, and may increasingly intensify, in the tape drive market as a result of competitors introducing tape drive products based on new technology standards and on DLTape technology, which could materially and adversely affect our business, financial condition and results of operations.**

We compete with companies that develop, manufacture, market and sell tape drive products. Our principal competitors include Exabyte Corporation (“Exabyte”), Hewlett-Packard, IBM Corporation (“IBM”), Seagate Technology Inc. (“Seagate”), Sony Corporation and Storage Technology Corporation (“StorageTek”). These competitors are aggressively trying to advance and develop new tape drive technologies to compete more successfully with products based on DLTape technology. Hewlett-Packard, IBM and Seagate formed a consortium to develop and have developed new linear tape drive products (LTO). These products target the high-capacity data back-up market and compete with our products based on Super DLTape technology. This competition has resulted in a trend, which is expected to continue, toward lower prices and lower margins earned on our DLTape and Super DLTape drives and media. In addition, the merger between Hewlett-Packard and Compaq has resulted in a larger competitor in the tape drive market with greater resources, a potentially greater market reach with a product that competes directly with our Super DLTape drives and Super DLTape media. These factors when combined with the current economic environment, which has resulted in reduced shipments of our own tape drives, and tape drives in general, could result in a further reduction in our prices, volumes and margins, which could materially and adversely impact our business, financial condition and results of operations.

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**Competition has increased, and may increasingly intensify, and sales have trended lower in the tape library market as a result of current economic conditions, and, if these adverse trends continue or worsen, our business, financial condition and operating results may be materially and adversely affected.**

Our tape library products compete with product offerings of Advanced Digital Information Corporation, Exabyte, Hewlett-Packard, Overland Data Inc. and StorageTek, which also offer tape automation systems incorporating DLTape and Super DLTape technology as well as new linear tape technology. In addition, the merger between Hewlett-Packard and Compaq has resulted in a larger competitor in the tape automation market with greater resources and a potentially greater market reach. Current economic conditions are characterized by lower information technology investment, particularly for higher priced products, such as high-end tape automation systems. However, more recently, even competitors that derive a significant percentage of their sales from lower priced tape automation products, have seen economic conditions adversely impact their quarterly sequential sales. The lower demand has also resulted in increased price competition. If this trend continues or worsens and/or if competition further intensifies, our sales and gross margins could decline further, which could materially and adversely affect our business, financial condition and results of operations.

**Competition from alternative storage solutions that compete with our products may increase and, as a result, our business, financial condition and operating results may be materially and adversely affected.**

Our products, particularly our tape products, including tape drives and automation systems, also compete with other storage technologies, such as hard disk drives. Hard disk drives have experienced a trend toward lower prices while capacity and performance have increased. If hard disk drive costs decline far more rapidly than tape drive and media costs, the competition resulting from hard disk drive based storage solutions, including backup solutions, may increase. As a result, our business, financial condition and operating results may be materially and adversely affected.

**We do not control licensee pricing or licensee sales of tape media cartridges and, as a result, our royalty revenue may decline, and, as a result, our business, financial condition and operating results may be materially and adversely affected.**

We receive a royalty fee based on sales of tape media cartridges by Fuji Photo Film Co., Ltd. (“Fuji”), Hitachi Maxell Ltd. (“Maxell”), Sony and Imation. Under our license agreements with these companies, each of the licensees determines the pricing and number of units of tape media cartridges that it sells. As a result, our royalty revenue will vary depending on the level of sales and prices set by the licensees. In addition, lower prices set by licensees could require us to lower our prices on direct sales of tape media cartridges, which would reduce our margins on this product. As a result, our business, financial condition and operating results may be materially and adversely affected.

**Our royalty and media revenue is dependent on an installed base of tape drives that utilize Super DLTape and DLTape media cartridges, and, if the installed base declines, or if competing media products gain market share from us, media and royalty revenue may decline, and, as a result, our business, financial condition and operating results may be materially and adversely affected.**

Competition from other tape or storage technologies that use their own media could result in reduced sales of Super DLTape and DLTape drives and such competition could also lower the installed base of tape drives that utilize DLTape media. Since we earn a royalty from media consumed by the installed base of tape drives, a reduced installed tape drive base could result in a reduction in our media and royalty revenue. This could materially and adversely affect our business, financial condition and results of operations.

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**Our operating results depend on new product introductions, which may not be successful, and, as a result, our business, financial condition and operating results may be materially and adversely affected.**

To compete effectively, we must continually improve existing products and introduce new ones, such as the DX30. We have devoted and expect to continue to devote considerable management and financial resources to these efforts. We cannot provide assurance that:

- We will introduce any of these new products in the time frame we are forecasting;
- We will not experience technical, quality, performance-related or other difficulties that could prevent or delay the introduction of, and market acceptance of, these new products;
- Our new products will achieve market acceptance and significant market share, or that the markets for these products will grow as we have anticipated;
- Our new products will be successfully or timely qualified with our customers by meeting customer performance and quality specifications because a successful and timely customer qualification must occur before customers will place large product orders; or
- We will achieve high volume production of these new products in a timely manner, if at all.

**If we are unable to generate sufficient amounts of future taxable income in the U.S., we may incur higher income tax expenses to write off the deferred tax assets and we may recognize lower tax benefits or no tax benefits associated with future losses.**

We have approximately \$20 million of deferred tax assets in excess of deferred tax liabilities. This net amount represents future U.S. tax deductions that will reduce future U.S. tax liabilities only if we are able to generate sufficient amounts of future U.S. taxable income to realize the benefit of those tax deductions. If we are unable to generate sufficient future taxable income, we may incur a tax expense to write-off the balance of this deferred tax asset. In addition, our inability to generate sufficient amounts of future taxable income may prevent us from continuing to recognize tax benefits associated with any losses that we may incur in the future. This would have a material and adverse impact on our results of operations and financial condition.

**Reliance on a limited number of third-party suppliers could result in significantly increased costs and delays in the event these suppliers experience shortages or quality problems, and, as a result, our business, financial condition and operating results may be materially and adversely affected.**

We depend on a limited number of suppliers for components and sub-assemblies, including recording heads, media cartridges and integrated circuits, all of which are essential to the manufacture of tape drives and tape automation systems.

We currently purchase the DLTtape and Super DLTtape media cartridges that we sell primarily from Imation, Fuji and Maxell. We cannot provide assurance that Imation, Fuji or Maxell will continue to supply an adequate number of high quality media cartridges in the future. If component shortages occur, or if we experience quality problems with component suppliers, shipments of products could be significantly delayed and/or costs significantly increased, and as a result, our business, financial condition and operating results could be materially and adversely affected. In addition, we qualify only a single source for many components and sub-assemblies, which magnifies the risk of future shortages.

Furthermore, our main supplier of tape heads is located in China. Political instability, trade restrictions, changes in tariff or freight rates or currency fluctuations in China could result in increased costs and delays in shipment of our products and could materially and adversely impact our business, financial condition and operating results.

**We rely on heavily on distributors and other resellers to market and sell our products. If one or more distributors were to experience significant deterioration in financial condition or business relationship with us, this could disrupt the distribution of our products.**

In certain product and geographic segments we heavily utilize distributors and value added resellers to perform the functions necessary to market and sell our products. To fulfill this role, the distributor must maintain an acceptable level of financial stability and creditworthiness. If not, we may be required to reduce the amount of sales of our product to the distributor or terminate the relationship. We may also incur financial losses for product returns or for the failure or refusal to pay obligations owed to us. This could result in less product being available to the affected market segments and reduced levels of customer satisfaction, which could in turn have a material and adverse impact on our business, results of operations and financial condition.

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**If we fail to protect our intellectual property or if others use our proprietary technology without authorization, our competitive position may suffer.**

Our future success and ability to compete depends in part on our proprietary technology. We rely on a combination of copyright, patent, trademark and trade secrets laws and nondisclosure agreements to establish and protect our proprietary technology. We currently hold 114 United States patents and have 84 United States patent applications pending. However, we cannot provide assurance that patents will be issued with respect to pending or future patent applications that we have filed or plan to file or that our patents will be upheld as valid or will prevent the development of competitive products or that any actions we have taken will adequately protect our intellectual property rights. We generally enter into confidentiality agreements with our employees, consultants, resellers, customers and potential customers, in which we strictly limit access to, and distribution of, our software, and further limit the disclosure and use of our proprietary information. Despite our efforts to protect our proprietary rights, unauthorized parties may attempt to copy or otherwise obtain or use our products or technology. Our competitors may also independently develop technologies that are substantially equivalent or superior to our technology. In addition, the laws of some foreign countries do not protect our proprietary rights to the same extent as the laws of the United States.

**Third party infringement claims could result in substantial liability and significant costs, and, as a result, our business, financial condition and operating results may be materially and adversely affected.**

From time to time, third parties allege our infringement of and need for a license under their patented or other proprietary technology. While we currently believe the amount of ultimate liability, if any, with respect to these actions will not materially affect our financial position, results of operations, or liquidity, the ultimate outcome of any litigation is uncertain. Adverse resolution of any third party infringement claim could subject us to substantial liabilities and require us to refrain from manufacturing and selling certain products. In addition, the costs incurred in intellectual property litigation can be substantial, regardless of the outcome. As a result, our business, financial condition and operating results may be materially and adversely affected.

**Pursuant to an operating lease, we have an obligation for a guaranteed value to the lessor at the end of the lease term, which could result in our being required to make a significant cash payment to the lessor, and if we are required to do so, our business, financial condition and results of operations could be materially and adversely impacted.**

We have a lease for our Colorado Springs facility, which is accounted for as an operating lease. At the end of the lease term, we will either renew the lease, purchase the facility, or cause the facility to be sold to a third party, with us retaining an obligation to the lessor for the guaranteed value. The proceeds of a sale to a third party would be used to satisfy the \$50 million obligation to the lessor at the end of the lease term. In the event of sale to a third party, we would be liable for any shortfall between the net proceeds resulting from the sale of the facility and the \$50 million obligation to the lessor, up to a maximum of \$43.9 million, and this could have a material adverse impact on our financial condition and liquidity.

In the past we incurred a charge because of a decline in the appraised value of this facility. We have the facility independently appraised on a periodic basis. Any future declines in the appraised value of the facility would result in a charge, which could be material and adverse to our financial condition.

Our lease commitment requires us to maintain specified financial covenants. If we fail to comply with these financial covenants and are unable to obtain a waiver, or amend the lease, for such future non-compliance, the lessor could terminate the lease, resulting in either the acceleration of our obligation to purchase the leased facility at the guaranteed value, which could have an adverse affect on our financial condition and liquidity.

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**In previous quarters we violated certain financial covenants under our credit facility; if in the future we again violate financial covenants, we may not be able to use this credit facility, which could materially and adversely impact our financial condition and liquidity.**

In April 2000, we entered into an unsecured senior credit facility with a group of nine banks, providing a \$187.5 million revolving credit line that expires in April 2003. On August 9, 2002, we received a waiver from the bank group for covenant violations as of June 30, 2002. During the quarter ended September 29, 2002, we violated the Tangible Net Worth, Leverage Ratio and EBITDA financial covenants of the credit line. On October 25, 2002, we received a waiver of these covenant violations from the bank group for the quarter ended September 29, 2002. In December 2002, we terminated this facility and entered into a secured senior credit facility with a group of five banks, providing a \$100 million revolving credit line that expires in June 2004. As of December 29, 2002, \$89 million is committed to standby letters of credit. If in future quarters we are in violation of any financial or reporting covenant and receive a notice of default letter from the bank group, the credit line could become unavailable, and any amounts outstanding could become immediately due and payable. In addition, if we were unsuccessful in securing a waiver in subsequent quarters, we would also lose access to the \$89 million standby letters of credit contained within our credit line facility and have to restrict \$89 million of our cash to cover these existing letters of credit. This would have a material and adverse impact on our liquidity.

Without the availability of this credit facility, we will have to rely on operating cash flows and debt or equity arrangements other than the unsecured senior credit facility (if such alternative funding arrangements are available to us at all) in order to maintain sufficient liquidity. If we are not able to obtain sufficient cash from our operations or from these alternative funding sources, our operations, financial condition and liquidity may be materially and adversely affected.

**We completed the acquisition of Benchmark during the third quarter of fiscal year 2003. If we fail to successfully integrate this acquisition, it could harm our business, financial condition and operating results.**

As a part of our business strategy, we acquired Benchmark, whose business is complementary to our DLT group's products and technologies. Any acquisition is accompanied by the risks commonly encountered in acquisitions of companies. These risks include:

- Difficulties in assimilating its operations and personnel;
- Diversion of management's attention from ongoing business concerns;
- The potential inability to maximize our financial and strategic position through the successful incorporation of acquired technology and rights into our products and services;
- Insufficient revenues to offset increased expenses associated with the acquisition;
- Maintenance of uniform standards, controls, procedures and policies;
- Impairment of existing relationships with employees, suppliers and customers as a result of the integration of new personnel;
- The possibility that we may not receive a favorable return on our investment, the original investment may become impaired, and/or incur losses from these investments; and

- Assumption of unknown liabilities or other unanticipated adverse events or circumstances.

We cannot provide assurance that we will be able to successfully integrate the Benchmark business and our failure to do so could harm our business, financial condition and operating results.

**We may engage in future acquisitions of companies, technologies or products, and the failure to integrate any future acquisitions could harm our business, financial condition and operating results.**

As a part of our business strategy, we expect to make additional acquisitions of, or significant investments in, complementary companies, products or technologies. Any future acquisitions would be accompanied by the risks commonly encountered in acquisitions of companies. These risks include:

- Difficulties in assimilating the operations and personnel of the acquired companies;
- Diversion of management's attention from ongoing business concerns;
- The potential inability to maximize our financial and strategic position through the successful incorporation of acquired technology and rights into our products and services;
- Insufficient revenues to offset increased expenses associated with acquisitions;
- Maintenance of uniform standards, controls, procedures and policies; and
- Impairment of existing relationships with employees, suppliers and customers as a result of the integration of new personnel;
- Difficulties in entering markets in which we have no or limited direct prior experience and where competitors in such markets have stronger market positions;
- The possibility that we may not receive a favorable return on our investment, the original investment may become impaired, and/or incur losses from these investments;
- Dissatisfaction or performance problems with an acquired company;
- The cost associated with acquisitions; and
- Assumption of known or unknown liabilities or other unanticipated events or circumstances.

We cannot provide assurance that we will be able to successfully integrate any business, products, technologies or personnel that we may acquire in the future, and our failure to do so could harm our business, financial condition and operating results.

**We outsourced tape drive manufacturing to Jabil during the third quarter of fiscal year 2003. Our Storage Solutions Group has increased its use of contract manufacturers for certain manufacturing functions as well. Our ability to meet customer demand depends on our ability to obtain timely deliveries of products and parts from our suppliers; as a result, if we cannot obtain these products and parts in such a manner, such a delay could materially and adversely impact our business, financial condition and results of operations.**

- Sole source of product supply. Jabil is our sole source of supply for all of our tape drives and certain tape automation products. Because we are relying on one supplier, we are at greater risk of experiencing component shortages or other delays in customer deliveries that could result in customer dissatisfaction and lost sales, which could materially damage customer relationships and result in lost revenue.
- Cost and purchase commitments. We may not be able to control the costs we would be required to pay Jabil for the products they manufacture for us. Jabil procures inventory to build our products based upon a forecast of customer demand that we provide. We would be responsible for the financial impact on Jabil of any reduction or product mix shift in the forecast relative to materials that Jabil had already purchased under a prior forecast. Such a variance in forecasted demand could require us to pay Jabil for finished goods in excess of current customer demand or for excess or obsolete inventory. As a result, we could experience reduced gross margins and larger operating losses based on these purchase commitments.
- Quality. We will have limited control over the quality of products produced by Jabil. Therefore, the quality of the products may not be acceptable to our customers and could result in customer dissatisfaction, lost revenue, and increased warranty costs.

**Our manufacturing outsourcing arrangement in Malaysia with Jabil, a third party contract manufacturer, has the potential to affect our tax status in Malaysia and could therefore materially and adversely affect our business, financial condition and results of operations.**

We were granted strategic pioneer tax status beginning in December 2000 contingent on us meeting five separate conditions linked to investments in the Malaysian economy. While we have actively worked to meet each of these conditions, changes in the business environment have meant that we have not yet fully met these conditions as these conditions assumed a five-year profile of investment. Based on the status of current discussions with the Malaysian government, we believe that the probability of assessment of additional tax liability is unlikely given that the third-party contract manufacturer already has strategic pioneer tax status and since there is no change in our business as a result of this transfer of manufacturing operations. However, were the Malaysian government to revoke Quantum's strategic pioneer tax status in its entirety, then the maximum potential tax liability that could be assessed would be \$15 million, which could materially and adversely affect our business, financial condition and results of operations.

**A significant portion of the consideration for the disposition of the material assets of our NAS business was restricted stock and a debt instrument issued by the buyer, a privately held company.**

A portion of the consideration for the sale of the material assets of our NAS business was \$3.9 million in restricted equity securities and a

secured \$2.4 million promissory note issued by the buyer, a privately held company. The equity securities are “restricted securities”, as that term is defined in Rule 144 under the Securities Act of 1933, as amended, and, therefore, are subject to substantial restrictions on the sale or disposition of such shares, many of which restrictions are contingent on or governed by matters solely within the control of the privately-held company. Similarly, the secured promissory note may become subject to the priority of a future senior lender and does not become due and payable until May 2003 and, even then, is only partly due and payable. Because of the nature of the privately held issuer as well as the restrictions on our ability to transfer these securities, there is no public market for these securities.

We generally record our investment in an early development stage company’s equity and debt securities on a cost basis, adjusted for other than temporary impairment. The restricted stock and promissory note we received in the NAS disposition has a combined carrying value of \$6.3 million but could lose value and become worthless if the buyer fails to profitably achieve its business plans or is not able to obtain adequate funding to do so. And because there is no market in these securities, we would not be able to hedge or otherwise mitigate any losses on these securities. If the buyer is not successful in achieving its business plan, we could be required to write down some or all of the value of these assets, which could have a material and adverse impact on our financial condition and results of operations.

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**Tax allocations under a tax sharing and indemnity agreement with Maxtor are the subject of a dispute between us and Maxtor. In the event this dispute is not resolved favorably, we could incur significant costs that could have a material adverse effect on our business, financial condition and operating results.**

Pursuant to a tax sharing and indemnity agreement between us and Maxtor entered into in connection with the disposition of HDD, Maxtor and we provided for the allocation of certain liabilities related to taxes. Maxtor and we presently disagree about the amounts owed by each party under this Agreement. The parties are in negotiations to resolve this matter, and no litigation has been initiated to date. However, there can be no assurance that we will be successful in asserting our position. If disputes regarding reimbursable amounts cannot be resolved favorably, we may incur costs, including both litigation as well as the payment of the disputed amounts, which could have a material adverse effect on our business, financial condition and operating results.

**Maxtor’s failure to perform under the indemnification provisions of a tax sharing and indemnity agreement entered into with us providing for payments to us that relate to tax liabilities, penalties, and interest resulting from the conduct of our business prior to the HDD disposition date could have a material adverse effect on our business, financial condition and operating results.**

Under a tax sharing and indemnity agreement between us and Maxtor entered into in connection with the disposition of HDD, Maxtor has agreed to assume responsibility for payments related to certain taxes, penalties, and interest resulting from the conduct of business by the Quantum DSS group for all periods before our issuance of tracking stock and the conduct of the Quantum HDD group for all periods before the disposition of HDD to Maxtor. If audit adjustments are successfully asserted with respect to such conduct, and if Maxtor fails to indemnify us under this obligation or is not able to pay the reimbursement in full, we would nevertheless be obligated, as the taxpayer, to pay the tax. As a result, we could experience a material adverse effect on our business, financial condition and operating results.

Maxtor is a publicly traded company (NYSE symbol: MXO) that has been incurring financial operating losses and has experienced a decreasing cash position. If Maxtor were unable to pay its share of any obligations, we would be required to pay and that would have a material adverse impact on our results of operations and financial position.

**Maxtor’s failure to perform under the agreements in connection with our convertible debt and contingent liabilities would harm our business, financial condition and operating results.**

Maxtor has agreed to assume responsibility for payments of up to \$95.8 million of our convertible debt. If Maxtor fails to repay its portion of the convertible debt, we would have to deplete our existing cash resources or borrow cash to make the payments. As a result, our business, financial condition and operating results could be materially and adversely affected.

We may have contingent liabilities for some obligations assumed by Maxtor, including real estate and litigation, and Maxtor’s failure to perform under these obligations could result in significant costs to us that could have a materially adverse impact on our business, financial condition and operating results.

**The disposition of HDD may be determined not to be tax-free, which would result in us or our stockholders, or both, incurring a substantial tax liability, which could materially and adversely affect our business, financial condition and results of operations.**

Maxtor and Quantum have agreed not to request a ruling from the Internal Revenue Service (the “IRS”), or any state tax authority confirming that the structure of the combination of Maxtor with HDD will not result in any federal income tax or state income or franchise tax to Quantum or the previous holders of HDD common stock. Instead, Maxtor and we have agreed to effect the disposition and the merger on the basis of an opinion from Ernst & Young LLP, our tax advisor, and a tax opinion insurance policy issued by a syndicate of major insurance companies to us covering up to \$340 million of tax loss caused by the disposition and merger.

If the disposition of HDD is determined not to be tax-free and the tax opinion insurance policy does not fully cover the resulting tax liability, we or our stockholders or both could incur substantial tax liability, which could materially and adversely affect our business, financial condition and results of operations.



**The tax opinion insurance policy issued in conjunction with the disposition of HDD does not cover all circumstances under which the disposition could become taxable to us, and as a result, we could incur an uninsured tax liability, which could materially and adversely affect our business, financial condition and results of operations.**

In addition to customary exclusions from its coverage, the tax opinion insurance policy does not cover any federal or state tax payable by us if the disposition becomes taxable to us as a result of:

- A change in relevant tax law;
- An acquisition representing a 50% or greater interest in Quantum which began during the one-year period before and six-month period following the disposition, whether or not approved by our board of directors; or
- An acquisition representing a 50% or greater interest in Maxtor which began during the one-year period before and six-month period following the disposition, whether or not approved by Maxtor's board of directors.

If any of these events occur, we could incur uninsured tax liability, which could materially and adversely affect our business, financial condition and results of operations.

**If we incur an uninsured tax liability as a result of the disposition of HDD, our financial condition and operating results could be negatively affected.**

If the disposition of HDD were determined to be taxable to Quantum, we would not be able to recover an amount to cover the tax liability either from Maxtor or under the insurance policy in the following circumstances:

- If the tax loss were not covered by the policy because it fell under one of the exclusions from the coverage under the tax opinion insurance policy described above, insurance proceeds would not be available to cover the loss.
- If the tax loss were caused by our own acts or those of a third party that made the disposition taxable (for instance, an acquisition of control of Quantum which began during the one-year period before and six-month period following the closing), Maxtor would not be obligated to indemnify us for the amount of the tax liability.
- If Maxtor were required to reimburse us for the amount of the tax liability according to its indemnification obligations under the HDD disposition, but was not able to pay the reimbursement in full, we would nevertheless be obligated, as the taxpayer, to pay the tax.

In any of these circumstances, the tax payments due from us could be substantial. In order to pay the tax, we would have to either deplete our existing cash resources or borrow cash to cover our tax obligation. Our payment of a significant tax prior to payment from Maxtor under Maxtor's indemnification obligations, or in circumstances where Maxtor has no payment obligation, could harm our business, financial condition and operating results.

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**Our business, financial condition and operating results may be harmed as a result of operating solely as a tape drive and storage solutions business.**

Prior to the disposition of HDD on April 2, 2001, our operations consisted of the DLT group, the Storage Solutions group and HDD. Operating results of the DLT and Storage Solutions groups alone may be materially and adversely affected by the loss of one or more of the following benefits that HDD had contributed to Quantum:

- The ability to leverage the expertise of HDD in areas related to HDD's core competency in hard disk drives;
- The opportunity to jointly develop various products, such as online storage solutions;
- The ability to reduce the cost of data storage solutions more effectively;
- The ability to use the goodwill and brand recognition associated with HDD;
- The opportunity to take advantage of a larger market capitalization; and
- The opportunity to take advantage of the benefits of diversification associated with a single company serving the tape drive, storage solutions and hard disk drive markets.

**Historical financial information regarding Quantum may not be representative of our future results solely as a tape drive and storage solutions business.**

The historical financial information regarding Quantum does not necessarily reflect what our financial position, operating results, and cash flows would have been had we existed solely as a tape drive and storage solutions business during the periods presented. In addition, the historical information is not necessarily indicative of what our operating results, financial position and cash flows will be in the future.

**Our quarterly operating results could fluctuate significantly, and past quarterly operating results should not be used to predict future performance.**

Our quarterly operating results have fluctuated significantly in the past and could fluctuate significantly in the future. As a result, our past quarterly operating results should not be used to predict future performance. Quarterly operating results could be materially and adversely affected by a number of factors, including, but not limited to:

- An inadequate supply of tape media cartridges;
- Customers canceling, reducing, deferring or rescheduling significant orders as a result of excess inventory levels, weak economic conditions or other factors;
- Declines in network server demand;
- Failure to complete shipments in the last month of a quarter during which a substantial portion of our products are typically shipped; or
- Increased competition.

**A significant portion of our manufacturing and sales operations occurs in foreign locations; we are increasingly exposed to risks associated with conducting our business internationally.**

We manufacture and sell our products in a number of different markets throughout the world. As a result of our global manufacturing and sales operations, we are subject to a variety of risks that are unique to businesses with international operations of a similar scope, including the following:

- Adverse movement of foreign currencies against the U.S. dollar (in which our results are reported);
- Import and export duties and value-added taxes;
- Import and export regulation changes that could erode our profit margins or restrict our exports;
- Potential restrictions on the transfer of funds between countries;
- Inflexible employee contracts in the event of business downturns; and
- The burden and cost of complying with foreign laws.

In addition, our suppliers have operations in several emerging or developing economies that have a potential for higher risk than in the developed markets. The risks associated with these economies include, but are not limited to, political risks and natural disasters. In particular, with one of our outsourced manufacturers located in Malaysia, a significant portion of our product manufacturing may be subject to such political and climactic risks. Political instability, including the threat of terrorism, or a natural disaster in Malaysia or any other foreign market in which we operate could materially and adversely affect our business, financial condition and results of operations.

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**We are exposed to fluctuations in foreign currency exchange rates and an adverse change in foreign currency exchange rates relative to our position in such currencies could have a materially adverse impact on our business, financial condition and results of operations.**

We do not use derivative financial instruments for speculative purposes. Our goal is to hedge our foreign currency-denominated transactions in a manner that substantially offsets the effects of changes in foreign currency exchange rates. Presently, we use foreign currency obligations to match and offset net currency exposures associated with certain assets and liabilities denominated in non-functional currencies. Corresponding gains and losses on the underlying transaction generally offset the gains and losses on these foreign currency obligations. We have used in the past, and may use in the future, foreign currency forward contracts to hedge our exposure to foreign currency exchange rates. To the extent that we have assets or liabilities denominated in a foreign currency that are inadequately hedged or not hedged at all, we may be subject to foreign currency losses, which could be significant.

Our international operations can act as a natural hedge when both operating expenses and sales are denominated in local currencies. In these instances, although an unfavorable change in the exchange rate of a foreign currency against the U.S. dollar would result in lower sales when translated to U.S. dollars, operating expenses would also be lower in these circumstances. Also, since an insignificant amount of our net sales for the nine months ending on December 29, 2002 are denominated in currencies other than the U.S. dollar, we do not believe that our total foreign exchange rate exposure is significant. Nevertheless, an increase in the rate at which a foreign currency is exchanged for U.S. dollars would require more of that particular foreign currency to equal a specified amount of U.S. dollars than before such rate increase. In such cases, and if we were to price our products and services in that particular foreign currency, we would receive fewer U.S. dollars than we would have received prior to such rate increase for the foreign currency. Likewise, if we were to price our products and services in U.S. dollars while competitors priced their products in a local currency, an increase in the relative strength of the U.S. dollar would result in our prices being uncompetitive in those markets. Such fluctuations in currency exchange rates could materially and adversely affect our business, financial condition and results of operations.

**We must maintain appropriate levels of service inventories. If we have too little service inventory, we may experience increased levels of customer dissatisfaction. If we have too much service inventory, we may incur financial losses.**

We maintain levels of service inventories to satisfy future warranty obligations and also to earn service revenue to repair products for which the warranty has expired. We estimate the required amount of service inventories based on historical usage and forecasts of future warranty requirements, including estimates of failure rates and costs to repair, and out of warranty revenue. Given the significant levels of judgment inherently involved in the process, we cannot provide assurance that we will be able to maintain appropriate levels of service inventories to satisfy customer needs and to avoid financial losses from excess inventory charges. If we are unable to maintain appropriate levels of service inventories, our business, financial condition and results of operations maybe materially and adversely impacted.

**Many of our facilities are located near known earthquake fault zones, and the occurrence of an earthquake or other disasters could cause damage to our facilities and equipment, which could require us to curtail or cease operations.**

Many of our facilities are located in Northern and Southern California, near known earthquake fault zones and are, therefore, vulnerable to damage from earthquakes. In October 1989, a major earthquake that caused significant property damage and a number of fatalities struck Northern California. In addition, in 1994, a major earthquake that caused significant property damage and a number of fatalities struck Southern California. We and our suppliers are also vulnerable to damage from other types of disasters, including fire, floods, power loss, communications failures, terrorism and similar events. If any disaster were to occur, our ability to operate our business at our facilities could be seriously, or completely, impaired. The insurance we maintain may not be adequate to cover our losses resulting from disasters or other business interruptions.

**Item 3. Quantitative and Qualitative Disclosures About Market Risk**

For financial market risks related to changes in interest rates and foreign currency exchange rates, reference is made to **Part II Item 7A**, Quantitative and Qualitative Disclosures About Market Risk, in Quantum's Annual Report on Form 10-K for the year ended March 31, 2002, filed with the Securities and Exchange Commission on July 1, 2002.

**Item 4. Controls and Procedures**

(a) **Evaluation of disclosure controls and procedures.** Based on their evaluation as of a date within 90 days of the filing date of this Quarterly Report on Form 10-Q, the Company's principal executive officer and principal financial officer have concluded that the Company's disclosure controls and procedures (as defined in Rules 13a-14(c) and 15d-14(c) under the Securities Exchange Act of 1934 (the "Exchange Act") are effective to ensure that information required to be disclosed by the Company in reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in Securities and Exchange Commission rules and forms.

(b) **Changes in internal controls.** There were no significant changes in the Company's internal controls or in other factors that could significantly affect these controls subsequent to the date of their evaluation. There were no significant deficiencies or material weaknesses, and therefore there were no corrective actions taken.

**QUANTUM CORPORATION**

**PART II—OTHER INFORMATION**

**Item 1. Legal Proceedings**

The information contained in note 12 to the condensed consolidated financial statements is incorporated into this Part II, Item 1 by reference.

**Item 2. Changes in Securities**

None.

**Item 3. Defaults Upon Senior Securities**

None.

**Item 4. Submission of Matters to a Vote of Security Holders**

None.

**Item 5. Other information**

None.

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**Item 6. Exhibits and Reports on Form 8-K.**

**(a) Exhibits.**

- 10.1 Master Lease, Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated as of December 17, 2002, between Selco Service Corporation, as Lessor, and Quantum Corporation, as Lessee
- 10.2 Participation Agreement, dated as of December 17, 2002, by and among Quantum Corporation, as Lessee, Selco Service Corporation, as Lessor, Comerica Bank-California, Fleet National Bank and Keybank National Association, as Participants, and Keybank National Association, as Agent for the Participants
- 10.3 Credit Agreement, dated as of December 17, 2002, by and among Quantum Corporation, each lender, and Keybank National Association, as Administrative Agent and Issuing Lender
- 10.4\*\*\* Master Supply Agreement, dated as of December 10, 2002, between Quantum Corporation, and Jabil Circuit, Inc.
- 10.5\*\*\* Repair Services Agreement, dated as of December 10, 2002, between Quantum Corporation and Jabil Circuit, Inc.
- 10.6\*\*\* Transition Services Agreement, dated as of December 10, 2002, between Quantum Corporation and Jabil Circuit, Inc.
- 99.1 Certification of Chief Executive Officer pursuant to 18 U.S.C. section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley act of 2002.
- 99.2 Certification of Chief Financial Officer pursuant to 18 U.S.C. section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley act of 2002.

\*\*\*Confidential treatment has been requested for omitted portions.

**(b) Reports on Form 8-K**

The Company filed the following Current Reports on Form 8-K during the three months ended December 29, 2002:

On November 12, 2002, Quantum Corporation filed a Current Report on Form 8-K, reporting that on October 28, 2002, Quantum Corporation completed the sale of the Network Attached Storage ("NAS") business to SNAP Appliance, Inc. ("SNAP") f/k/a Broadband Storage, Inc.

On November 15, 2002, Quantum Corporation filed a Current Report on Form 8-K, reporting that on November 13, 2002, Quantum Corporation completed the acquisition of Benchmark Storage Innovations, Inc.

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**SIGNATURE**

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

**QUANTUM CORPORATION**

(Registrant)

Date: February 11, 2003

By: /s/ Michael J. Lambert

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Michael J. Lambert

Executive Vice President, Finance  
and Chief Financial Officer

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**CERTIFICATIONS**

I, Richard Belluzo, certify that:

1. I have reviewed this quarterly report on Form 10-Q of Quantum Corporation;
2. Based on my knowledge, this quarterly report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this quarterly report;
3. Based on my knowledge, the financial statements, and other financial information included in this quarterly report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this quarterly report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and we have:
  - a) designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this quarterly report is being prepared;
  - b) evaluated the effectiveness of the registrant's disclosure controls and procedures as of a date within 90 days prior to the filing date of this quarterly report (the "Evaluation Date"); and
  - c) presented in this quarterly report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
  - a) all significant deficiencies in the design or operation of internal controls which could adversely affect the registrant's ability to record, process, summarize and report financial data and have identified for the registrant's auditors any material weaknesses in internal controls; and
  - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls; and
6. The registrant's other certifying officer and I have indicated in this quarterly report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Date: February 11, 2003

/s/ Richard Belluzo

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I, Michael J. Lambert, certify that:

1. I have reviewed this quarterly report on Form 10-Q of Quantum Corporation;
2. Based on my knowledge, this quarterly report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this quarterly report;
3. Based on my knowledge, the financial statements, and other financial information included in this quarterly report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this quarterly report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and we have:
  - a) designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this quarterly report is being prepared;
  - b) evaluated the effectiveness of the registrant's disclosure controls and procedures as of a date within 90 days prior to the filing date of this quarterly report (the "Evaluation Date"); and
  - c) presented in this quarterly report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
  - a) all significant deficiencies in the design or operation of internal controls which could adversely affect the registrant's ability to record, process, summarize and report financial data and have identified for the registrant's auditors any material weaknesses in internal controls; and
  - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls; and
6. The registrant's other certifying officer and I have indicated in this quarterly report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Date: February 11, 2003

/s/ Michael J. Lambert

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Michael J. Lambert

Executive Vice President, Finance  
and Chief Financial Officer

**Exhibit 99.1**

**CERTIFICATION OF CHIEF EXECUTIVE OFFICER  
PURSUANT TO  
18 U.S.C. SECTION 1350,  
AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

I, Richard Belluzo, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that

the Quarterly Report of Quantum Corporation on Form 10-Q for the fiscal quarter ended December 29, 2002 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in such Quarterly Report on Form 10-Q fairly presents in all material respects the financial condition and results of operations of Quantum Corporation.

By: /s/ Richard Belluzo  
Name: Richard Belluzo  
Title: Chief Executive Officer

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**Exhibit 99.2**

**CERTIFICATION OF CHIEF FINANCIAL OFFICER  
PURSUANT TO  
18 U.S.C. SECTION 1350,  
AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

I, Michael J. Lambert, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Quarterly Report of Quantum Corporation on Form 10-Q for the fiscal quarter ended December 29, 2002 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in such Quarterly Report on Form 10-Q fairly presents in all material respects the financial condition and results of operations of Quantum Corporation.

By: /s/ Michael J. Lambert  
Name: Michael J. Lambert  
Title: Executive Vice President, Finance  
and Chief Financial Officer

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**MASTER LEASE,  
DEED OF TRUST WITH ABSOLUTE ASSIGNMENT OF LEASES AND RENTS,  
SECURITY AGREEMENT AND FIXTURE FILING**

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THIS MASTER LEASE, DEED OF TRUST WITH ABSOLUTE ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING (including all Lease Supplements from time to time executed and delivered, this "Lease"), is dated as of December 17, 2002, between SELCO SERVICE CORPORATION, an Ohio corporation, having its principal office at 66 South Pearl Street, Albany, New York 12207, as Lessor (the "Lessor"), and QUANTUM CORPORATION, a Delaware corporation, having a principal office at 501 Sycamore Drive, Milpitas, California 95035, as Lessee (the "Lessee").

**WITNESSETH:**

- A. WHEREAS, the Original Lessor previously transferred its interests in the Land Interest, Improvements, Fixtures and Equipment to Lessor and assigned to Lessor the Original Lessor's interests under the Master Lease, dated as of August 22, 1997 (the "Original Lease"), between the Original Lessor and Lessee;
- B. WHEREAS, the Original Lease was amended by that certain Amended and Restated Master Lease, dated as of July 12, 2000 (the "First Amended Lease"), by and between Lessor and Lessee at the time Lessor acquired the Original Lessor's interests in the Land Interest, Improvements, Fixtures and Equipment, and was further amended by that certain First Amendment to Amended and Restated Master Lease dated as of March 28, 2001;
- C. WHEREAS, pursuant to a Participation Agreement dated as of December 17, 2002 (as amended, supplemented, amended and restated or otherwise modified from time to time, the "Participation Agreement"), among Lessee, Lessor, KeyBank National Association, as Agent, and the Participants who are signatories thereto, the parties have agreed, subject to the terms and conditions thereof, to refinance the obligations under the existing First Amended Lease and Existing Financing (through a repayment in full of all loans and other obligations of Lessor outstanding thereunder and the making of the Refinancing Advance described in the Participation Agreement);
- D. WHEREAS, Lessor and Lessee have requested that the First Amended Lease (as amended, supplemented, restated or otherwise modified) be terminated and that Lessor and Lessee thereafter enter into this Lease upon the terms and subject to the conditions set forth herein; and
- E. WHEREAS, this Lease is superior to a deed of trust, dated as of December 17, 2002, in favor of Agent under the Participation Agreement.

NOW, THEREFORE, in consideration of the foregoing, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree that the Lease shall, as of the date hereof, read in its entirety as follows:

1.

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ARTICLE 1.

- 1.1 **Definitions; Interpretation.** Capitalized terms used but not otherwise defined in this Lease have the respective meanings specified in **Appendix 1** to this Lease; and the rules of interpretation set forth in **Appendix 1** to this Lease shall apply to this Lease.

ARTICLE 2.

- 2.1 **Acceptance and Lease of Property.** Effective as of the Effective Date, Lessor, subject to the satisfaction or waiver of the conditions set forth in Section 6 of the Participation Agreement, hereby agrees to lease to Lessee hereunder for the Term (as defined in Section 2.3), Lessor's interest in the Property, and to lease to Lessee all Fixtures, Equipment and Improvements, and Lessee hereby agrees, expressly for the direct benefit of Lessor, to lease from Lessor for the Term, Lessor's interest in the Property, all Fixtures, Equipment and Improvements, and any buildings and other improvements, fixtures, and equipment which may be constructed or placed thereon at the expense of Lessor from time to time.
- 2.2 **Acceptance Procedure.**
- (a) [Intentionally omitted]
- (b) Lessee hereby agrees that the execution and delivery by Lessee of a Lease Supplement in the form of Exhibit A hereto (appropriately completed) shall, without further act, constitute the irrevocable acceptance by Lessee of the Property which is the subject thereof for all purposes of this Lease and the other Operative Documents on the terms set forth therein and herein, and that the Property (including the Improvements constructed thereon and any Fixtures and Equipment) shall be deemed to be included in the leasehold estate of this Lease.
- (c) [Intentionally omitted]
- 2.3 **Lease Term.** The term of this Lease (the "**Term**") shall begin on December 17, 2002 and shall end on December 17, 2007, unless the Term is renewed or earlier terminated in accordance with the provisions of this Lease.
- 2.4 **Title.** The Property is leased to Lessee without any representation or warranty of title, condition of the Improvements or permitted uses, express or implied, by Lessor and subject to the rights of parties in possession, the existing state of title (including, without limitation, the Permitted Exceptions) and all applicable Requirements of Law. Lessee shall, in no event, have any recourse against Lessor for any defect in or exception to title to the Property, other than for any such defect or exception constituting a Lessor Lien. Lessee expressly waives and releases Lessor from any common law or statutory covenant of quiet enjoyment, provided that Lessor shall be obligated to remove Lessor Liens.

2.

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### ARTICLE 3

- 3.1 **Rent.** During the Term, Lessee shall pay Basic Rent on each Payment Date, and as required by Sections 15.4 and 22.1(i) in connection with Lessee's exercise of the Remarketing Option, and on any date on which this Lease shall terminate. In addition to the Basic Rent due on the first Payment Date, Lessee shall also pay \$2,495,000 as the Initial Adjustment on the first Payment Date.
- (a) The Initial Adjustment and all Basic Rent (other than Basic Rent covered by Basic Rent Credits as provided in Section 3.8(c)(iii) of the Participation Agreement) shall be due and payable in lawful money of the United States and shall be paid by wire transfer of immediately available funds on the due date therefor to such account or accounts at such bank or banks or to the Agent or in such other manner as the Agent shall from time to time direct.
- (b) Neither Lessee's inability or failure to take possession of all or any portion of the Property when delivered by Lessor, nor Lessor's inability or failure to deliver all or any portion of the Property to Lessee on or before the Closing Date, whether or not attributable to any act or omission of Lessee or any act or omission of Lessor, or for any other reason whatsoever, shall delay or otherwise affect Lessee's obligation to pay Rent for the Property from and after commencement of the Term.
- 3.2 **Payment of Basic Rent.** Basic Rent shall be paid absolutely net to Lessor, so that this Lease shall yield to Lessor the full amount thereof for each month of the Term, without setoff, deduction or reduction, whether or not Lessee's quiet possession of the Property is disturbed, except as otherwise expressed herein and in Sections 8.3(c)(iii) and 13.5(e) of the Participation Agreement.
- 3.3 **Supplemental Rent.** Lessee shall pay to Lessor or the Person entitled thereto any and all Supplemental Rent promptly as the same shall become due and payable, and if Lessee fails to pay any Supplemental Rent, Lessor shall have all rights, powers and remedies provided for herein or by law or equity or otherwise in the case of nonpayment of Basic Rent. Lessee shall pay to Lessor, as Supplemental Rent, among other things, on demand, to the extent permitted by Applicable Law, interest at the applicable Default Rate on any installment of Basic Rent not paid when due for the period for which the same shall be overdue and on any payment of Supplemental Rent not paid when due or demanded by Lessor for the period from the due date or the date of any such demand, as the case may be, until the same shall be paid. The expiration or other termination of Lessee's obligations to pay Basic Rent hereunder shall not limit or modify the obligations of Lessee with respect to Supplemental Rent. Unless expressly provided otherwise in this Lease, in the event of any failure on the part of Lessee to pay and discharge any Supplemental Rent as and when due, Lessee shall also promptly pay and discharge any fine, penalty, interest or cost which may be assessed or added under any agreement with a third party for nonpayment or late payment of such Supplemental Rent, all of which shall also constitute Supplemental Rent.

- 3.4 **Method of Payment.** Each payment of Rent shall be made by Lessee to the Agent by 12:00 noon, San Francisco time at the place of payment in funds consisting of lawful currency of the United States of America which shall be immediately available on the scheduled date when such payment shall be due, unless such scheduled date shall not be a Business Day, in which case such payment shall be made on the next succeeding Business Day or as otherwise required by the definition of the term "Interest Period" set forth in **Appendix 1** hereto. Payments initiated after 12:00 noon, San Francisco time shall be deemed received on the next succeeding Business Day.

3.

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ARTICLE 4

- 4.1 **Utility Charges.** Lessee shall pay or cause to be paid all charges for electricity, power, gas, oil, water, telephone, sanitary sewer service and all other rents and utilities used in or on the Property during the Term. Lessee shall be entitled to receive any credit or refund with respect to any utility charge paid by Lessee and the amount of any credit or refund received by Lessor on account of any utility charges paid by Lessee, net of the costs and expenses reasonably incurred by Lessor in obtaining such credit or refund, shall be promptly paid over to Lessee. All charges for utilities imposed with respect to the Property for a billing period during which this Lease expires or terminates shall be adjusted and prorated on a daily basis between Lessor and Lessee, and each party shall pay or reimburse the other for each party's pro rata share thereof, except that if Lessee retains possession of the Property after termination or expiration of this Lease, no such adjustment and proration shall be made.

ARTICLE 5.

- 5.1 **Quiet Enjoyment.** Subject to the rights of Lessor contained in Section 17.2 and the other terms of this Lease and so long as no Lease Event of Default shall have occurred and be continuing, Lessee shall peaceably and quietly have, hold and enjoy the property for the Term, free of any claim or other action by Lessor or anyone rightfully claiming by, through or under Lessor (other than Lessee) with respect to any matters arising from and after the first day of the Term.

ARTICLE 6.

- 6.1 **Net Lease.** This Lease shall constitute a net lease. It is the further express intent of Lessor and Lessee that the obligations of Lessor and Lessee hereunder shall be separate and independent covenants and agreements and that the Basic Rent and Supplemental Rent, and all other charges and sums payable by Lessee hereunder, shall commence at the times provided herein and shall continue to be payable in all events unless the obligations to pay the same shall be terminated pursuant to an express provision in this Lease. Any present or future law to the contrary notwithstanding, this Lease shall not terminate, nor shall Lessee be entitled to any abatement, suspension, deferment, reduction, setoff, counterclaim, or defense with respect to the Rent, nor shall the obligations of Lessee hereunder be affected (except as expressly herein permitted and by performance of the obligations in connection therewith) by reason of: (i) any defect in the condition, merchantability, design, construction, quality or fitness for use of the Property or any part thereof, or the failure of the Property to comply with all Requirements of Law, including any inability to occupy or use the Property by reason of such non-compliance; (ii) any damage to, removal, abandonment, salvage, loss, contamination of or Release from, scrapping or destruction of or any requisition or taking of the Property or any part thereof; (iii) any restriction, prevention or curtailment of or interference with any use of the Property or any part thereof including eviction; (iv) any defect in title to or rights to the Property or any Lien on such title or rights or on the Property (other than Lessor Liens); (v) any change, waiver, extension, indulgence or other action or omission or breach in respect of any obligation or liability of or by Lessor, the Agent or any Participant; (vi) any bankruptcy, insolvency, reorganization, composition, adjustment, dissolution, liquidation or other like proceedings relating to Lessee, Lessor, the Agent, any Participant, or any other Person, or any action taken with respect to this Lease by any trustee or receiver of Lessee, Lessor, the Agent, any Participant or any other Person, or by any court, in any such proceeding; (vii) any claim that Lessee has or might have against any Person, including without limitation Lessor, any vendor, manufacturer, contractor of or for the Property, the Agent or any Participant; (viii) any failure on the part of Lessor to perform or comply with any of the terms of this Lease, any other Operative Document or any other agreement; (ix) any invalidity or unenforceability or illegality or disaffirmance of this Lease or against or by Lessee or any provision hereof or any of the other Operative Documents or any provision of any thereof; (x) the impossibility or illegality of performance by Lessee, Lessor or both; (xi) any action by any court, administrative agency or other Governmental Authority; (xii) any restriction, prevention or curtailment of or interference with the construction on or any use of the Property or any part thereof; or (xiii) any other cause or circumstances whether similar or dissimilar to the foregoing and whether or not Lessee shall have notice or knowledge of any of the foregoing. The parties intend that the obligations of Lessee hereunder shall be covenants and agreements that are separate and independent from any obligations of Lessor hereunder or under any other Operative Documents and the obligations of Lessee shall continue unaffected unless such obligations shall have been modified or terminated in accordance with an express provision of this Lease.

4.

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- 6.2 **No Termination or Abatement.** Lessee shall remain obligated under this Lease in accordance with its terms and shall not take any action to terminate, rescind or avoid this Lease, notwithstanding any action for bankruptcy, insolvency, reorganization, liquidation, dissolution, or other proceeding affecting Lessor, the Agent or any Participant, or any action with respect to this Lease or any Operative Document which may be taken by any trustee, receiver or liquidator of Lessor, the Agent or any Participant or by any court with respect to Lessor, the Agent or any Participant. Lessee hereby waives all right (i) to terminate or surrender this Lease (except as provided herein) or (ii) except as otherwise provided in this Lease or the Participation Agreement with regard to withholding taxes, to avail itself of any abatement, suspension, deferment, reduction, setoff, counterclaim or defense (other than the defense of payment) with respect to any Rent. Lessee shall remain obligated under this Lease in accordance with its terms and Lessee hereby waives any and all rights now or hereafter conferred by statute or otherwise to modify or to avoid strict compliance with its obligations under this Lease. Notwithstanding any such statute or otherwise, Lessee shall be bound by all of the terms and conditions contained in this Lease.

#### ARTICLE 7.

##### 7.1 **Ownership of the Property.**

- (a) It is the intent of the parties hereto that: (i) this Lease constitutes an "operating lease" pursuant to Statement of Financial Accounting Standards No. 13, as amended, for purposes of Lessee's financial reporting, and (ii) for purposes of federal, state, and local income or franchise taxes and for any other tax imposed on or measured by income, the transaction contemplated hereby is a financing arrangement and preserves ownership in the Property in Lessee. Nevertheless, Lessee and Lessor acknowledge and agree that none of Lessee, the Agent, Lessor nor any Participant has made any representations or warranties to Lessee concerning the tax, accounting or legal characteristics of the Operative Documents and that they have obtained and relied upon such tax, accounting and legal advice concerning the Operative Documents as they deem appropriate. Accordingly, and notwithstanding any provision of this Lease to the contrary, Lessor and Lessee agree and declare that: (i) the transactions contemplated hereby are intended to have a dual, rather than a single, form; and (ii) all references in this Lease to the "lease" of the Property which fail to reference such dual form do so as a matter of convenience only and do not reflect the intent of Lessor and Lessee as to the true form of such arrangements.

5.

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- (b) Anything to the contrary in the Operative Documents notwithstanding, Lessor and Lessee intend that with respect to the nature of the transactions evidenced by this Lease in the context of the exercise of remedies under the Operative Documents, including, without limitation, in the case of any insolvency or receivership proceedings or a petition under the United States bankruptcy laws or any other applicable insolvency laws or statute of the United States of America or any State or Commonwealth thereof affecting Lessee, Lessor, or any Participant or any enforcement or collection actions, as follows: (i) the transactions evidenced by this Lease are loans made by Lessor and the Participants as unrelated third party lenders to Lessee secured by the Property, (ii) the obligations of Lessee under this Lease to pay Basic Rent and Supplemental Rent or Asset Termination Value in connection with a purchase of the Property pursuant to this Lease shall be treated as payments of interest on and principal of, respectively, loans from Lessor and the Participants to Lessee, and (iii) this Lease grants a security interest and mortgage or deed of trust or lien, as the case may be, in the Property and the collateral described in Section 7.2 to Lessor, the Agent and the Participants to secure the Lessee Obligations.
- (c) Specifically, without limiting the generality of anything contained in this Section 7.1, Lessor and Lessee further intend and agree that, for purposes of filing federal, state and local returns, reports and other statements relating to income or franchise taxes, or any other taxes imposed upon or measured by income, (i) Lessee shall be entitled to take any deduction, credit, allowance or other reporting position consistent with its status as owner of the Property; and (ii) neither Lessor nor the Participants shall take a position on their respective federal, state and local returns, reports and other statements relating to income or franchise taxes that is inconsistent with Lessee's status as owner of the Property, provided that Lessor and any Participant may take a position that is inconsistent with Lessee's status as owner of the Property if: (x) there has been a change in law or regulation so requiring as supported by an opinion of counsel reasonably acceptable to Lessee that there is not substantial authority for such a consistent reporting position; or (y) (A) there has been an administrative or judicial holding that Lessee is not the owner of the Property for such tax purposes, (B) Lessee has no right to contest such holding pursuant to Section 13.5 of the Participation Agreement, and (C) Lessee's lack of right to contest is not the result of an Indemnitee's waiver of its right to indemnification pursuant to Section 13.5(f)(iii) of the Participation Agreement or failure of the amount at issue to exceed the minimum amount set forth in Section 13.5(f)(iv)(B) of the Participation Agreement.

##### 7.2 **Grant of Lien.**

- (a) Specifically, without limiting the generality of Section 7.1, Lessor and Lessee further intend and agree that, for the purpose of securing payment of the principal sum of the Fifty Million Dollars (\$50,000,000), together with interest thereon calculated at the rate provided in the Participation Agreement and all other Lessee Obligations, Lessee hereby grants, bargains, mortgages, conveys, sells, assigns and sets over to the Public Trustee of the County of El Paso, as trustee ("Trustee"), and its successors and assigns, for the benefit of Lessor, the Agent and the Participants, WITH POWER OF SALE AND RIGHT OF ENTRY AND POSSESSION:

6.

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(i) all right, title and interest of Lessee in and to the Property (including the Land Interest, Improvements, Fixtures, Equipment, and Appurtenant Rights), together with the reversions, remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, at law as well as in equity, of Lessee of, in and to the same, including, without limitation, all credits, options, deposits, rights of first offer, rights of first refusal, extension rights and expansion rights relating thereto;

(ii) all right, title and interest of Lessee in and to the Land Interest and Improvements in any way hereafter belonging, relating or appertaining to the Property;

(iii) all right, title and interest of Lessee in, to and under (i) all books and records, and (ii) all inventory, accounts, cash receipts, deposit accounts, accounts receivable, general intangibles, chattel paper (whether electronic or tangible), notes, drafts, letter of credit rights, supporting obligations, trade names, trademarks and service marks arising from or related or used in connection with the ownership, management, leasing, sale or operation of the Property;

(iv) all right, title and interest of Lessee in and to (i) all refunds, awards, tax abatements, rebates, reserves, deferred payments, deposits, and payments of any kind payable by an Governmental Authority or any insurance or utility company with respect to the Property, and (ii) all reserves, deferred payments, deposit accounts, refunds, cost savings and payments of any kind with respect to the Property or any part thereof; provided, however, that except during the continuation of any Lease Event of Default, Lessee may collect, apply and retain any of the foregoing in accordance with Section 7.2(e) below;

(v) all right, title and interest of Lessee in and to all insurance policies (including title insurance policies) required to be maintained by Lessee pursuant to the Lease for loss of the Property, including the right to collect, receive and disburse to Lessee such proceeds in accordance with the Operative Documents; provided, however, that except during the continuation of any Lease Event of Default, Lessee may collect, apply and retain any of the foregoing in accordance with Section 7.2(e) below;

(vi) all awards and other compensation, including the interest payable thereon and the right to collect and receive the same, for the taking by eminent domain, condemnation or otherwise, of all or any part of the Property or any easement or other real property right therein; provided, however, that except during the continuation of any Lease Event of Default, Lessee may collect, apply and retain any of the foregoing in accordance with Section 7.2(e) below;

(vii) all right, title and interest of Lessee in and to (i) all consents, licenses, building permits, certificates of occupancy and other governmental or quasi-governmental approvals relating to construction, completion, occupancy, use or operation of any of the Improvements or any other part of the Property and (ii) all plans and specifications relating to the ownership or leasing of the Improvements;

7.

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(viii) all right, title and interest in, to and under any leases, subleases or licenses of the Property, any license, concession, management, mineral or other agreements of a similar kind that permit the use or occupancy of the Property or any part thereof for any purpose, in return for any payment, permit the extraction or taking of any gas, oil, water or other minerals from the Property or any part thereof in return for payment of any fee, rent or royalty, now or hereafter entered into by Lessee (collectively, the "Other Leases"), together with all estate, rights, title, interest, benefits, powers and privileges of Lessee, as lessor, under the Other Leases including, without limitation, the immediate and continuing right to make claim for, receive, collect and receipt for all charges, fees, income, issues, profits, receipts, rents, revenues or royalties payable under any of the Other Leases (collectively, the "Other Lease Rents") and all estate, right, title and interest of Lessee thereunder, including all cash, securities or letters of credit delivered or deposited thereunder to secure performance by Lessee of its obligations thereunder; provided, however, that except during the continuation of any Lease Event of Default, Lessee may collect, apply and retain any of the foregoing in accordance with Section 7.2(e) below.

(ix) all proceeds, both cash and non-cash, of the foregoing.

(x) (all of the foregoing property and rights and interests now owned or held or subsequently acquired by Lessee and described in the foregoing clauses (i) through (ix) are collectively referred to as the "Mortgaged Property.") The grant provided hereby shall be deemed a deed of trust, security agreement and fixture filing pursuant to the laws of the State of Colorado governing deeds of trust and security agreements.

(b) It also is the intention of the parties hereto that this Lease shall constitute a "Security Agreement" within the meaning of the UCC and grants a security interest in the Mortgaged Property which is subject to the UCC and described herein to Lessor and the Participants. Lessee and Lessor agree, to the extent permitted by law, that this Lease upon recording or registration in the real estate records of the proper office shall constitute a financing statement filed as a "fixture filing" within the meaning of Sections 9-102 and 9-502 of the UCC. Lessee's Federal Tax Identification Number is 94-2665054.

(c) Notwithstanding any other provision hereof, Lessor shall not be deemed to have accepted any property other than cash in satisfaction of any obligation of Lessee or Lessor, unless Lessee shall make an express written election of said remedy under Section 9-620(b) of the UCC, or other Applicable Law.

(d) Specifically, without limiting the generality of anything contained in Section 7, Lessor and Lessee further intend and agree that (i) the possession by Lessor or any of its agents of notes and such other items of Mortgaged Property as constitute instruments, money, negotiable documents or chattel paper shall be deemed to be "possession by the secured party" for purposes of perfecting the security interest pursuant to Section 9-334 of the UCC; and (ii) for any deposit account within the meaning of Section 9-102 of the UCC, the execution and delivery of an Account Control Agreement by the Depository Bank and Lessee in the form attached to the Participation Agreement, shall perfect a security interest in any such deposit account pursuant to that Section. Lessor and Lessee shall, to the extent consistent with this Lease, take such actions and execute, deliver, file and record such other documents, financing statements, mortgages and deeds of trust as may be necessary to ensure that, if this Lease were deemed to create a security interest in any item of the Mortgaged Property in accordance with this Section, such security interest would be deemed to be a perfected security interest of first priority under Applicable Law and will be maintained as such throughout the Term.

8.

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(e) The assignment of Other Leases and Other Lease Rents is a present and absolute assignment, not an assignment for security purposes only, and Lessor's right to the Other Leases and Other Lease Rents is not contingent upon, and may be exercised without possession of, the Property.

(i) If no Lease Event of Default has occurred and is continuing, Lessee shall have a revocable license to collect and retain the Other Lease Rents as they become due and to collect, retain, use and apply the other Mortgaged Property in any manner not expressly prohibited by this Lease. Upon the occurrence and during the continuance of any Lease Event of Default, such license shall automatically terminate, and Lessor may collect and apply the Other Lease Rents and Mortgaged Property to the Lessee Obligations (with an associated reduction in the Asset Termination Value) pursuant to Section 17.2.3(f), without further notice to Lessee or any other Person and without taking possession of the Property. All Other Lease Rents collected by Lessee during a Lease Event of Default shall be held by Lessee as trustee in a constructive trust for the benefit of Lessor for so long as a Lease Event of Default shall exist. Lessee hereby irrevocably authorizes and directs the sublessees under the Other Leases, without any need on their part to inquire as to whether a Lease Event of Default has actually occurred or is then existing, to rely upon and comply with any notice or demand by Lessor for the payment to Lessor of any rental or other sums which may become due under the Other Leases or for the performance of any of the sublessees' undertakings under the Other Leases. Collection of any Other Lease Rents or Mortgaged Property by Lessor shall not cure or waive any default or notice of default hereunder or invalidate any acts done pursuant to such notice, but such collected amounts shall be immediately deemed applied by Lessor to pay Lessee Obligations in such order as Lessor shall determine in accordance with the Operative Documents (with the associated reduction in the Asset Termination Value) on the date such sums are received by the Lessor.

(ii) The foregoing irrevocable assignment shall not cause Lessor to be (A) a mortgagee in possession; (B) responsible or liable for (1) the control, care, management or repair of the Property or for performing any of Lessee's obligations or duties under the Other Leases, (2) any waste committed on the Property by the sublessees under any of the Other Leases or by any other Persons, (3) any dangerous or defective condition of the Property, or (4) any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any sublessee, licensee, employee, invitee or other Person; or (C) responsible for or impose upon Lessor any duty to produce rents or profits. Lessor, in the absence of gross negligence or willful misconduct on its part, shall not be liable to Lessee as a consequence of (y) the exercise or failure to exercise any of the rights, remedies or powers granted to Lessor hereunder or (z) the failure or refusal of Lessor to perform or discharge any obligation, duty or liability of Lessee arising under the Other Leases.

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## ARTICLE 8

8.1 **C ondition of the Property.** LESSEE ACKNOWLEDGES AND AGREES THAT ALTHOUGH LESSOR WILL HOLD FEE TITLE TO THE PROPERTY, LESSEE IS SOLELY RESPONSIBLE FOR THE IMPROVEMENTS AND ANY ALTERATIONS OR MODIFICATIONS. LESSEE FURTHER ACKNOWLEDGES AND AGREES THAT IT IS LEASING THE PROPERTY "AS IS" WITHOUT REPRESENTATION, WARRANTY OR COVENANT (EXPRESS OR IMPLIED) BY LESSOR, THE AGENT OR ANY PARTICIPANT AND IN EACH CASE SUBJECT TO (A) THE EXISTING STATE OF TITLE, (B) THE RIGHTS OF ANY PARTIES IN POSSESSION THEREOF, (C) ANY STATE OF FACTS WHICH AN ACCURATE SURVEY OR PHYSICAL INSPECTION MIGHT SHOW, AND (D) VIOLATIONS OF REQUIREMENTS OF LAW WHICH MAY EXIST ON THE DATE HEREOF. NEITHER LESSOR, THE AGENT NOR ANY PARTICIPANT HAS MADE OR SHALL BE DEEMED TO HAVE MADE ANY REPRESENTATION, WARRANTY OR COVENANT (EXPRESS OR IMPLIED) OR SHALL BE DEEMED TO HAVE ANY LIABILITY WHATSOEVER AS TO THE TITLE (INCLUDING BUT NOT LIMITED TO ANY IMPLIED LIABILITY RELATING TO A COVENANT OF QUIET ENJOYMENT, WHICH LESSEE HEREBY EXPRESSLY WAIVES), VALUE, HABITABILITY, USE, CONDITION, DESIGN, OPERATION, OR FITNESS FOR USE OF THE PROPERTY (OR ANY PART THEREOF), OR ANY OTHER REPRESENTATION, WARRANTY OR COVENANT WHATSOEVER, EXPRESS OR IMPLIED, WITH RESPECT TO THE PROPERTY (OR ANY PART THEREOF) AND NEITHER LESSOR, THE AGENT NOR ANY PARTICIPANT SHALL BE LIABLE FOR ANY LATENT, HIDDEN, OR PATENT DEFECT THEREIN OR THE FAILURE OF THE PROPERTY, OR ANY PART THEREOF, TO COMPLY WITH ANY REQUIREMENT OF LAW. THE FOREGOING IS SUBJECT TO THE PROVISIONS OF SECTION 5.1 HEREOF AND SECTION 10.4(a) OF THE PARTICIPATION AGREEMENT.

- 8.2 **Possession and Use of the Property.** The Property may be used only for such purposes as are permitted by Applicable Law and consistent with all Insurance Requirements and in compliance with any covenants, conditions and restrictions of record and any ordinance or law affecting the use and occupancy of the Property; and provided that such uses do not Materially increase the liability, directly or indirectly, of Lessor or Materially adversely affect the value, utility or remaining useful life of the Property from that which would obtain if the Property were to be used as administration, manufacturing, design, research and development and warehouse facilities. Lessee shall pay, or cause to be paid, all charges and costs required in connection with the use of the Property as contemplated by this Lease. Lessee shall not commit or permit any waste of the Property or any part thereof (provided, that waste shall not include ordinary wear and tear and damage by fire or other peril).

## ARTICLE 9

- 9.1 **Compliance with Requirements of Law and Insurance Requirements.** Subject to the terms of Article 13 relating to permitted contests, Lessee, at its sole cost and expense, shall (a) comply with all Requirements of Law (including all Environmental Laws) and comply with all Insurance Requirements relating to the Property, including the construction, use, operation, maintenance, repair and restoration thereof and the remarketing thereof pursuant to Article 22, whether or not compliance therewith shall require structural or extraordinary changes in the Improvements or interfere with the use and enjoyment of the Property, and (b) procure, maintain and comply with all licenses, permits, orders, approvals, consents and other authorizations required for the construction, use, maintenance and operation of the Property and for the use, operation, maintenance, repair and restoration of the Improvements.

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## ARTICLE 10

### 10.1 **Maintenance and Repair; Return.**

- (a) Except for ordinary wear and tear, Lessee, at its sole cost and expense, shall maintain the Property in good working order, mechanical condition and repair and make all necessary repairs thereto, of every kind and nature whatsoever, whether interior or exterior, ordinary or extraordinary, structural or nonstructural or foreseen or unforeseen, in each case as required by all Requirements of Law and Insurance Requirements and on a basis consistent with the operation and maintenance of commercial properties comparable in type and location to the Property and in compliance with prudent industry practice.
- (b) Lessor shall under no circumstances be required to build any improvements on the Property, make any repairs, replacements, alterations or renewals of any nature or description to the Property, make any expenditure whatsoever in connection with this Lease (except for Advances required under the Participation Agreement) or maintain the Property in any way. Lessor shall not be required to maintain, repair or rebuild all or any part of the Property, and Lessee waives any right to (i) require Lessor to maintain, repair, or rebuild all or any part of the Property, or (ii) make repairs at the expense of Lessor pursuant to any Requirement of Law, Insurance Requirement, contract, agreement, or covenant, condition or restriction in effect at any time during the Term.
- (c) Lessee shall, upon the expiration or earlier termination of this Lease, vacate and surrender the Property to Lessor in its then-current, "AS IS" condition, subject to Sections 9.1, 10.1(a), 11.1, 12.1, 15.1(e), 15.2, 20.1, 22.1 and 23.1.

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## ARTICLE 11

### 11.1 **Modifications, Substitutions and Replacements.**

- (a) Lessee, at its sole cost and expense, may at any time and from time to time make alterations, renovations, improvements and additions to the Property or any part thereof and substitutions and replacements therefor (collectively, "Modifications"); provided that: (i) no Modification shall Materially impair the value, utility or useful life of the Property or any part thereof from that which existed immediately prior to such Modification; (ii) the Modification shall be done expeditiously and in a good and workmanlike manner; (iii) subject to the provisions of Article 13 concerning contests, Lessee shall comply with all Requirements of Law (including all Environmental Laws) and comply with all Insurance Requirements applicable to the Modification, including the obtaining of all permits and certificates of occupancy, and the structural integrity of the Property shall not be adversely affected; (iv) subject to the terms of Article 13 relating to permitted contests, Lessee shall pay all costs and expenses and shall discharge (or cause to be insured or bonded over) within sixty (60) days after the same shall be filed (or otherwise become effective) any Liens arising with respect to the Modification; and (v) such Modifications shall comply with Sections 8.2 and 10.1. All Modifications required to be made pursuant to a Requirement of Law generally applicable to buildings comparable to the Property or an Insurance Requirement ("Required Modification") and all Modifications which are replacements or substitutions of the Property, all Modifications of the utility and building services and sections of the building or building systems which are not removable without impairing the utility or remaining useful life of the Property shall remain part of the realty and shall be subject to this Lease, and title thereto shall immediately vest in Lessor. All other Modifications and all trade fixtures, machinery, equipment or other tangible personal property shall at all times be Lessee's property ("Lessee's Property") and Lessee may remove the same at any time during the Term, subject, however, to the terms of Section 10.1(a); provided, however, that Lessee shall keep and maintain at the Property and shall not remove from the Property any Equipment unless Lessee replaces the same with equivalent or better Equipment.



- (b) Lessee shall deliver to Lessor and the Agent a brief written narrative of any Modification to be done in connection with any Modification to the Property the cost of which is anticipated to exceed \$500,000 in the aggregate.

## ARTICLE 12

### 12.1 **Warranty of Title.**

- (a) Lessee agrees that except as otherwise provided herein and subject to the terms of Article 13 relating to permitted contests, Lessee shall not directly or indirectly create or allow to remain, and shall promptly discharge at its sole cost and expense, any Lien, defect, attachment, levy, title retention agreement or claim upon the Property (or Lessor's interest therein) or any Modifications or any Lien, attachment, levy or claim with respect to the Rent or with respect to any amounts held by the Agent pursuant to the Participation Agreement or the other Operative Documents, other than Permitted Exceptions and Lessor Liens.
- (b) Nothing contained in this Lease shall be construed as constituting the consent or request of Lessor, expressed or implied, to or for the performance by any contractor, mechanic, laborer, materialman, supplier or vendor of any labor or services or for the furnishing of any materials for any construction, alteration, addition, repair or demolition of or to the Property or any part thereof. NOTICE IS HEREBY GIVEN THAT NEITHER LESSOR, ANY PARTICIPANT NOR THE AGENT IS OR SHALL BE LIABLE FOR ANY LABOR, SERVICES OR MATERIALS FURNISHED OR TO BE FURNISHED TO LESSEE OR TO ANYONE HOLDING THE PROPERTY OR ANY PART THEREOF THROUGH OR UNDER LESSEE AND THAT NO MECHANIC'S OR OTHER LIENS FOR ANY SUCH LABOR, SERVICES OR MATERIALS SHALL ATTACH TO OR AFFECT THE INTEREST OF LESSOR IN AND TO THE PROPERTY.

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### 12.2 **Grants and Releases of Easements.** Provided that no Lease Event of Default shall have occurred and be continuing and subject to the provisions of Articles 8, 9, 10 and 11, Lessor hereby consents in each instance to the following actions by Lessee, in the name and stead of Lessor, but at Lessee's sole cost and expense:

- (a) the granting of easements, licenses, rights- of-way and other rights and privileges in the nature of easements reasonably necessary or desirable for the completion of construction of the Improvements, use, repair, operation or maintenance of the Property as herein provided;
- (b) the release of existing easements or other rights in the nature of easements which are for the benefit of the Property;
- (c) the execution of petitions to have the Property annexed to any municipal corporation or utility district; and
- (d) the execution of amendments to any covenants and restrictions affecting the Property; provided, however, in each case Lessee shall have delivered to Lessor a Responsible Officer's Certificate stating that (i) such grant, release, dedication or transfer does not materially impair the value, utility and remaining useful life of the Property, (ii) such grant, release, dedication or transfer is reasonably necessary in connection with the completion of construction of any Improvements or Modifications, or the use, operation maintenance, alteration or improvement of the Property or any Modification, (iii) Lessee shall remain obligated under this Lease and under any instrument executed by Lessee consenting to the assignment of Lessor's interest in this Lease as security for indebtedness, in each such case in accordance with their terms, as though such grant, release, dedication or transfer, had not been effected, and (iv) Lessee shall pay and perform any obligations of Lessor under such grant, release, dedication or transfer, and (v) such easements, rights-of-way and other rights shall be subordinate and subject to the Lien of the Mortgage. Without limiting the effectiveness of the foregoing, provided that no Lease Event of Default shall have occurred and be continuing, Lessor shall, upon the request of Lessee, and at Lessee's sole cost and expense, execute and deliver any instruments necessary or appropriate to confirm any such grant, release, dedication or transfer to any Person permitted under this Section 12.2.

## ARTICLE 13.

13.1 **Permitted Contests Other Than in Respect of Indemnities.** Except to the extent otherwise provided for in Section 13 of the Participation Agreement, Lessee, on its own or on Lessor's behalf, but at Lessee's sole cost and expense, may contest, by appropriate administrative or judicial proceedings conducted in good faith and with due diligence, the amount, validity or application, in whole or in part, of any Requirement of Law, or utility charges payable pursuant to Section 4.1 or any Lien, attachment, levy, encumbrance or encroachment, and Lessor agrees not to pay, settle or otherwise compromise any such item, provided that (a) the commencement and continuation of such proceedings shall suspend the collection thereof from, and suspend the enforcement thereof against, the Property, Lessor, the Agent and the Participants or Lessee shall have bonded or otherwise secured such amount in a manner satisfactory to Lessor and the Agent; (b) there shall be no risk of the imposition of a Lien (other than Permitted Exceptions or Liens for which adequate security (in the opinion of Lessor) for payments in the event of an unsuccessful contest has been posted) on the Property and no part of the Property nor any Rent would be in any danger of being sold, forfeited, lost or deferred; (c) at no time during the permitted contest shall there be a risk of the imposition of criminal liability or material civil liability on Lessor, the Agent or any Participant for failure to comply therewith (unless, in the case of civil liability, Lessee shall have bonded or otherwise secured such amount in a manner satisfactory to Lessor and the Agent); and (d) in the event that, at any time, there shall be a material risk of extending the application of such item beyond the end of the Term, then Lessee shall deliver to Lessor a Responsible Officer's Certificate certifying as to the matters set forth in clauses (a), (b) and (c) of this Section 13.1. Lessor, at Lessee's sole cost and expense, shall execute and deliver to Lessee such authorizations and other documents as may reasonably be required in connection with any such contest and, if reasonably requested by Lessee, shall join as a party therein at Lessee's sole cost and expense.

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#### ARTICLE 14

14.1 **Public Liability and Workers' Compensation Insurance.** During the Term, Lessee shall procure and carry, at Lessee's sole cost and expense, commercial general liability insurance, including contractual liability, for claims for injuries or death sustained by persons or damage to property while on the Property and such other public liability coverages as are ordinarily procured by Persons who own or operate similar properties and consistent with prudent business practice, which policies shall include contractual liability endorsements covering Lessee's indemnification obligations in Section 14.4. Such insurance shall be on terms and in amounts (which shall be reasonably acceptable to Lessor and in the event of liability insurance shall not require coverage in excess of \$10,000,000) that are no less favorable than insurance maintained by Lessee with respect to similar properties that it owns and that are in accordance with prudent business practice and may be provided under blanket policies maintained by or on behalf of Lessee. The policy shall be endorsed to name Lessor, the Agent, and each Participant as additional insureds. The policy shall also specifically provide that the policy shall be considered primary insurance, which shall apply to any loss or claim before any contribution by any insurance which Lessor, the Agent or the Participants may have in force. Lessee shall, in the construction of the Improvements and the operation of the Property (including in connection with any Modifications thereof) comply with the applicable workers' compensation laws and protect Lessor, the Agent and the Participants against any liability under such laws.

14.2 **Hazard and Other Insurance.** During the Term, Lessee shall keep, or cause to be kept, the Property insured against loss or damage by fire, flood, and other risks typically included in policies in the state of Colorado for facilities similar to the Property in an amount not less than the then current replacement cost of the buildings and improvements on the Property (provided, that Lessee's flood insurance may have a sublimit of not less than \$50,000,000) and on terms that are no less favorable than insurance covering other similar properties owned or leased by Lessee or any of its Affiliates and that are in accordance with prudent business practice. Lessee may provide such coverage under blanket policies maintained by Lessee. During the construction of any Improvements Lessee shall also maintain builders' risk insurance. Each policy of insurance maintained by Lessee pursuant to this Section 14.2 shall provide that all insurance proceeds in respect of any loss or occurrence shall be paid to and adjusted solely by Lessee, except from and after the date on which the insurer receives written notice from Lessor or the Agent that a Lease Event of Default exists. In such latter event, unless and until such insurer receives written notice from Lessor or the Agent that all Lease Events of Default have been cured, all losses shall be adjusted solely by, and all insurance proceeds shall be paid solely to, the Agent for application in accordance with the terms of this Lease.

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#### 14.3 **Coverage.**

- (a) Lessee shall furnish Lessor and the Agent with certificates showing the insurance required under Sections 14.1 and 14.2 to be in effect and naming Lessor, the Agent and each Participant as additional insureds and, with respect to the insurance required under Section 14.2, loss payees along with Lessee, as their respective interests may appear, and showing the mortgagee endorsement required by Section 14.3(c). All such insurance shall be at the cost and expense of Lessee. Such certificates shall include a provision for thirty (30) days' advance written notice by the insurer to Lessor and the Agent in the event of cancellation of or any reduction to less than ninety percent (90%) of Replacement Value (or, in the case of Flood insurance, less than ninety percent (90%) of the sublimit specified in Section 14.2) in the coverage provided by such insurance.

- (b) Lessee agrees that the insurance policy or policies required by Sections 14.1 and 14.2 shall include (i) a clause in substantially the following form pursuant to which such policy shall provide that it will not be invalidated should Lessee waive, in writing, prior to a loss, any or all rights of recovery against any party for losses covered by such policy, and that the insurance in favor of Lessor, the Agent and the Participants, and their respective rights under and interests in said policies shall not be invalidated or reduced by any act or omission or negligence of Lessee or any other Person having any interest in the Property, and (ii) a so-called "Waiver of Subrogation Clause." Lessee hereby waives any and all such rights against Lessor, the Agent and the Participants to the extent of payments made under such policies. Lessor, the Agent and the Participants hereby waive all such rights against Lessee to the extent of payments made to Lessor under any of such policies.
- (c) All such insurance shall be written by reputable insurance companies that are financially sound and solvent and otherwise reasonably appropriate considering the amount and type of insurance being provided by such companies. Any insurance company selected by Lessee which is rated in Best's Key Rating Guide or any successor thereto (or if there be none, an organization having a similar national reputation) shall have a general policyholder rating of "A-" and a financial rating of at least 10 in Best's Key Rating Guide or be otherwise acceptable to Lessor, the Agent and the Required Participants. All insurance policies required by Section 14.2 shall include a standard form mortgagee endorsement in favor of the Agent.
- (d) Lessor shall not carry separate insurance concurrent in kind or form or contributing in the event of loss with any insurance required under this Article 14 except that Lessor may carry separate liability insurance (at its sole cost) so long as (i) Lessee's insurance is designated as primary and in no event excess or contributory to any insurance Lessor may have in force which would apply to a loss covered under Lessee's policy and (ii) each such insurance policy will not cause Lessee's insurance required under this Article 14 to be subject to a coinsurance exception of any kind.

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- (e) Lessee shall pay as they become due all premiums for the insurance required by Section 14.1 and Section 14.2, and shall renew or replace each policy prior to the expiration date thereof. Throughout the Term, at the time each of Lessee's insurance policies is renewed (but in no event less frequently than once each year), Lessee shall deliver to Lessor and the Agent certificates of insurance evidencing that all insurance required by this Article 14 is being maintained by Lessee with respect to the Property and is in effect.
- (f) Notwithstanding the other provisions of this Article 14, Lessee may provide the insurance coverage required under this Article 14 through its self-insurance program, so long as Lessee remains in compliance with the Consolidated Tangible Net Worth covenant in clause (i) of Section 10.2(k) to the Participation Agreement.
- (g) Notwithstanding anything to the contrary contained in the Operative Documents: (i) Lessee hereby waives, releases and discharges Lessor, the Agent and each Participant and their agents and employees from all claims whatsoever arising out of loss, claim, expense or damage to or destruction covered or coverable by insurance required under this Article 14 notwithstanding that such loss, claim, expense or damage may have been caused by Lessor, the Agent or any Participant or any of their agents or employees, and Lessee agrees to look to the insurance coverage only in the event of such loss; and (ii) Lessor, the Agent and the Participants hereby waive, release and discharge Lessee and its agents and employees from all claims whatsoever arising out of loss, claim, expense, or damage to or destruction covered by insurance required under this Article 14 to the extent of payments made to Lessor notwithstanding that such loss, claim, expense or damage may have been caused by Lessee or any of its agents or employees.

14.4 **Indemnification.** In addition to the indemnification provisions provided for in Section 13 of the Participation Agreement, to the fullest extent allowed by law, Lessee shall at all times during the Term, and to the extent resulting from acts or events occurring prior to or during the Term or during any other period when Lessee is in possession and control of the Property, indemnify, defend and hold each Indemnitee harmless against and from any and all Claims by or on behalf of any Person arising from the construction of any Improvements or Modifications, or conduct or management, or from any work or things whatsoever done in or about the Property, and will further indemnify, defend and hold each Indemnitee harmless against and from any and all Claims arising during the Term of this Lease, from any condition of the Property, any Improvements or any street, curb or sidewalk adjoining the Property, or of any passageways or space therein or appurtenant thereto, or arising from any breach or default on the part of Lessee in the performance of any covenant or agreement on the part of Lessee to be performed, pursuant to the terms of this Lease, or arising from any act or negligence of Lessee, its agents, servants, employees or licensees, or arising from any accident, injury or damage whatsoever caused to any Person occurring during the term of this Lease, in or about the Property, or upon the sidewalk and the land adjacent thereto, other than in any of the foregoing cases (a) any Claim resulting from a voluntary act or omission of the Indemnitee not in compliance with any of the terms of the Operative Documents not caused by or attributable to acts or omissions of Lessee or any third party who is not an Affiliate or an employee, agent or contractor of an Indemnitee or its Affiliates, and (b) any Claim resulting from the gross negligence or willful misconduct of an Indemnitee. Any action, suit or proceeding in respect of any such Claim shall be handled in the manner set forth in Section 13.4 of the Participation Agreement

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## 15.1 **Casualty and Condemnation**

- (a) Subject to the provisions of this Article 15 and Article 16 (in the event Lessee delivers, or is obligated to deliver, an Early Termination Notice), and except during the occurrence and continuation of a Potential Lease Default, Lessee shall be entitled to receive (and Lessor shall pay over to Lessee, if received by Lessor, and hereby irrevocably assigns to Lessee all of Lessor's right, title and interest in) any award, compensation or insurance proceeds to which Lessee or Lessor may become entitled by reason of their respective interests in the Property (i) if all or a portion of the Property is damaged or destroyed in whole or in part by a Casualty or (ii) if the use, access, occupancy, easement rights or title to the Property or any part thereof, is the subject of a Condemnation; provided, however, if a Potential Lease Default shall have occurred and be continuing, such award, compensation or insurance proceeds shall be paid directly to the Agent or, if received by Lessee, shall be held in trust for the Agent, and shall be paid over by Lessee to the Agent and held in accordance with the terms of this paragraph (a). If, contrary to such provision, any such award, compensation or insurance proceeds are paid to Lessor or Lessee, rather than to the Agent, Lessor and Lessee, as the case may be, hereby agree to transfer any such payment to the Agent. All amounts held by Lessor or the Agent shall either be (x) paid to Lessee for the repair of damage caused by such Casualty or Condemnation in accordance with paragraph (e) of this Section 15.1, or (y) held in an interest bearing account reasonably acceptable to Lessor and Lessee until applied to the Lessee Obligations pursuant to subpart (z), or (z) upon any Early Termination Date, the Expiration Date, or any purchase or sale of the Property pursuant to this Lease, applied to the Lessee Obligations, with an associated reduction in the Asset Termination Value payable on such date.
- (b) Except during the continuation of a Lease Event of Default, Lessee may appear in any proceeding or action to negotiate, prosecute, adjust or appeal any claim for any award, compensation or insurance payment on account of any such Casualty or Condemnation and shall pay all expenses thereof. At Lessee's reasonable request, and at Lessee's sole cost and expense, Lessor and the Agent shall participate in any such proceeding, action, negotiation, prosecution or adjustment. Lessor and Lessee agree that this Lease, to the extent not inconsistent with Section 3 of the Participation Agreement, shall control the rights of Lessor and Lessee, inter se, in and to any such award, compensation or insurance payment. The Lessor's obligations to disburse its share of such award, compensation or insurance payment are set forth in Section 3 of the Participation Agreement.
- (c) If Lessor or Lessee shall receive notice of a Casualty or of an actual, pending or threatened Condemnation of the Property or any interest therein, Lessor or Lessee, as the case may be, shall give notice thereof to the other and to the Agent promptly after the receipt of such notice.
- (d) In the event of a Casualty or receipt of notice by Lessee or Lessor of a Condemnation, Lessee may deliver to Lessor and the Agent an "Early Termination Notice" pursuant to Section 16.1. If Lessee delivers an Early Termination Notice, a Significant Event shall irrevocably be deemed to have occurred with respect to the Property, and, in such event, Lessee shall have the rights and obligations provided in Sections 15.4 and 16.2 hereof.

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- (e) Unless and until Lessee purchases or causes another Person to purchase Lessor's interest in the Property as provided herein for a price equal to or greater than Asset Termination Value, this Lease shall continue in full force and effect following any Casualty or Condemnation, and Lessee shall, at its sole cost and expense (and, without limitation, if any award, compensation or insurance payment is not sufficient to restore the Property in accordance with this paragraph, Lessee shall pay the shortfall), promptly and diligently repair any damage to the Property caused by such Casualty or Condemnation in conformity with the requirements of Sections 10.1 and 11.1 using any as-built plans and specifications for the Property (as modified to give effect to any subsequent Modifications, any Condemnation affecting the Property and all applicable Requirements of Law) so as to restore the Property to at least the same condition, operation, function and value as existed immediately prior to such Casualty or Condemnation; provided, the substitution of any affected Fixtures and Equipment shall, at Lessor's reasonable request, be subject to delivery of an independent third-party appraisal reasonably satisfactory to Lessor and the Required Participants by an appraiser satisfactory to Lessor and the Required Participants showing both (i) a current Fair Market Sales Value and (ii) expected Fair Market Sales Value as of the then current Expiration Date and the dates on which any potential Renewal Term would expire, in each case equal to or greater than such values at such dates for the Fixtures and Equipment being replaced. In the event of such restoration, title to the Property shall remain with Lessor; provided, that (i) title to any such substituted Fixtures and Equipment shall vest in Lessor, and (ii) Lessor shall assign all of its right, title and interest to Lessee in any such replaced Fixtures and Equipment without representation or warranty of any kind other than that such fixtures and equipment is free of Lessor Liens. Upon completion of such restoration, Lessee shall furnish Lessor an architect's certificate of substantial completion and a Responsible Officer's Certificate confirming that such restoration has been completed pursuant to this Lease.
- (f) Unless and until Lessee purchases or causes another Person to purchase Lessor's interest in the Property as provided herein for a price equal to or greater than Asset Termination Value, no Casualty or Condemnation shall excuse Lessee's obligations to pay Rent pursuant to Section 3.1 or to perform its obligations and pay any amounts due on the Expiration Date or pursuant to Articles 19 and 20.

- (g) Any Excess Proceeds received by Lessor or the Agent in respect of a Casualty or Condemnation shall be turned over to Lessee, provided that no Lease Event of Default or Potential Lease Default has occurred and is continuing. Any Excess Proceeds which are not turned over to Lessee due to the existence of a Lease Event of Default or a Potential Lease Default shall be applied against Lessee Obligations (with an associated reduction in the Asset Termination Value) under the Lease, and any excess remaining after such Lessee Obligations have been satisfied shall be paid to Lessee.

15.2 **Environmental Matters.** Promptly upon Lessee's actual knowledge of the presence of Hazardous Substances in any portion of the Property in concentrations and conditions that constitute an Environmental Violation, Lessee shall notify Lessor in writing of such condition. In the event of such Environmental Violation, Lessee shall, not later than thirty (30) days after Lessee has actual knowledge of such Environmental Violation, either, (i) deliver to Lessor and the Agent an Early Termination Notice pursuant to Section 16.1, or (ii) at Lessee's sole cost and expense, promptly and diligently commence any Response Actions necessary to investigate, remove, clean up or remediate the Environmental Violation in accordance with the terms of Section 9.1. If Lessee does not deliver an Early Termination Notice with respect to the Property pursuant to Section 16.1, Lessee shall, upon completion of Response Actions by Lessee, cause to be prepared by an environmental consultant reasonably acceptable to Lessor a report describing the Environmental Violation and the Response Actions taken by Lessee (or its agents) for such Environmental Violation, and a statement by the consultant that the Environmental Violation has been remedied in compliance in all material respects with applicable Environmental Law. Each such Environmental Violation shall be remedied prior to the Expiration Date. Nothing in this Article 15 shall reduce or limit Lessee's obligations under Sections 13.1, 13.2 or 13.3 of the Participation Agreement.

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15.3 **Notice of Environmental Matters.** Promptly, but in any event within the thirty (30) Business Days from the date Lessee has actual knowledge thereof, Lessee shall provide to Lessor written notice of any material pending or threatened claim, action or proceeding involving any Environmental Law or any Release on or in connection with the Property. All such notices shall describe in reasonable detail the nature of the claim, action or proceeding and Lessee's proposed response thereto. In addition, Lessee shall provide to Lessor, within thirty (30) Business Days of receipt, copies of all material written communications with any Governmental Authority relating to any Environmental Law in connection with the Property. Lessee shall also promptly provide such detailed reports of any such Material environmental claims as may reasonably be requested by Lessor and the Agent.

15.4 **Accelerated Purchase of Property.**

- (a) Upon receipt of any notice of a Condemnation, Casualty or Environmental Violation, Lessor, at Lessee's expense, may engage one or more independent consultants acceptable to Lessee, which acceptance shall not be unreasonably withheld or delayed, to assist in determining whether such Condemnation, Casualty or Environmental Violation constitutes or will constitute a Significant Event. If the consultant advises Lessor and Lessee that the Condemnation, Casualty or Environmental Violation constitutes or is likely to constitute a Significant Event, a Significant Event will be deemed to have occurred.
- (b) If Lessor determines that a Significant Event is proceeding or has occurred, and if directed to do so by the Required Participants, Lessor shall deliver a written notice to Lessee (an "Early Termination Notice"), requiring Lessee to purchase, or arrange for an Affiliate or other third party to purchase, Lessor's interest in the Property for the Asset Termination Value, on the date specified in the Early Termination Notice, which date (an "Early Termination Date") shall not be earlier than thirty (30) days following the date the Termination Notice is delivered to Lessee.
- (c) Notwithstanding Lessor's delivery of any such Early Termination Notice because of any Significant Event, if Lessee satisfies the conditions listed in this Section which are applicable to such event, then Lessee may elect between (A) exercising the Remarketing Option provided in Section 22.1 hereof by giving notice to Lessor and paying the Residual Value Guarantee Amount to Lessor within ten (10) Business Days of Lessee's receipt of the Termination Notice, in which case this Lease will not terminate pursuant to this Section until one hundred eighty (180) days after such exercise of the Remarketing Option by Lessee and the "Early Termination Date" will be the date which is one hundred eighty (180) days after such exercise of the Remarketing Option by Lessee (which period shall constitute the Remarketing Period), with the sale of Lessor's interest in the Property to be consummated no later than the date upon which such one hundred eighty (180) day period ends (which date shall constitute the Expiration Date if such option is exercised), or (B) exercising its Purchase Option under Section 20.1, with the purchase of Lessor's interest in the Property by Lessee or its designee to be consummated, and the other payments required thereunder to be made to Lessor, on the next Payment Date following the Lessee's exercise of the Purchase Option.

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- (d) The right of Lessee under paragraph (c) to elect between the Remarketing Option and the Purchase Option is subject to all of the following conditions, regardless of nature of the Significant Event that resulted in the Lessor's delivery of the Early Termination Notice:
- (i) Lessee must notify Lessor which option Lessee is exercising (the Remarketing Option or the Purchase Option) within ten (10) days after Lessee receives Lessor's Early Termination Notice.

(ii) No Accelerated Purchase Event shall be continuing unrelated to such Significant Event at the time Lessee makes the election or, if Lessee elects the Remarketing Option, at the time of a sale of Lessor's interest in the Property to a third party because of such election.

(iii) If Lessee elects the Remarketing Option, Lessee must pay to Lessor (i) the maximum Residual Value Guarantee Amount on the date it furnishes such notice of the exercise of the Remarketing Option (the "Option Notice Date"), (ii) all breakage costs incurred by the Participants for the duration of all then current Interest Periods under the Participation Agreement with respect to the amount so paid following notices thereof by the Agent, (iii) Basic Rent on the Residual Guarantee Amount so paid, accrued to and payable on the Option Notice Date, (iv) Basic Rent when due with respect to the unpaid portion of the Adjusted Lease Balance, and (v) the other payments required under Section 22.1 when required thereunder and no later than the Expiration Date.

(e) The right of Lessee under paragraph (c) to elect the Remarketing Option will also subject to all of the following additional conditions if a Significant Condemnation is the Significant Event that resulted in the Lessor's delivery of the Early Termination Notice:

(i) At any time requested to do so by Lessor, Lessee must have assigned to Lessor any and all rights Lessee has in and to any award or compensation payable by the condemning authorities and must have relinquished control to Lessor of all proceedings related to such Condemnation or claims for an award or other compensation, thereby waiving any provisions of this Lease or other Operative Documents that would permit Lessee to participate in such award or compensation or control such proceedings.

(ii) Lessee must cooperate fully with Lessor and Agent as they request from time to time and deemed necessary or helpful to permit them to maximize any such award or other compensation.

(iii) Lessee must acknowledge and agree that even after Lessee's payment of the Residual Value Guarantee Amount, Lessor shall have no obligation to sell its interest in the Property pursuant to this Lease for a price below the amount that will result in the repayment of less than the full Asset Termination Value (calculated after deduction of the Residual Value Guarantee Amount paid by Lessee).

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(f) The right of Lessee under paragraph (c) to elect the Remarketing Option will also subject to all of the following additional conditions if a Casualty is the Significant Event resulted in the Lessor's delivery of the Early Termination Notice:

(i) Such Casualty must not have been caused by or be within the control of Lessee or any of its assignees or subtenants or of any invitees of Lessee or its assignees or subtenants.

(ii) If Lessee elects the Remarketing Option, Lessee must not have failed to provide insurance adequate to pay the entire cost of repairing and restoring the Property.

(iii) If Lessee elects the Remarketing Option, Lessee shall either (1) arrange for the sale of the Lessor's interest in Property on the new Expiration Date at a price sufficiently high to result in the repayment in full of the Asset Termination Value (after deduction of the Residual Value Guarantee Amount paid by Lessee), or (2) completely repair and restore the Property prior to the sale.

(g) The right of Lessee under paragraph (c) to elect the Remarketing Option will also be subject to all of the following additional conditions if an Environmental Violation is the Significant Event that resulted in the Lessor's delivery of the Early Termination Notice:

(i) Such Environmental Violation must not have been caused by or be within the control of Lessee or any of its assignees or subtenants or of any invitees of Lessee or its assignees or subtenants.

(ii) If Lessee elects the Remarketing Option, Lessee shall either (1) arrange for the sale of the Lessor's interest in Property on the new Expiration Date at a price sufficiently high to result in the repayment in full of the Asset Termination Value (after deduction of the Residual Value Guarantee Amount paid by Lessee), or (2) completely cure and rectify such Environmental Violation prior to the sale and cause the Property to comply with all environmental and other Legal Requirements at the time of the sale.

(h) If Lessee elects or attempts to elect the Remarketing Option as provided in this Section, but fails to satisfy any applicable conditions listed above or to buy the Property for the Net Asset Termination Value on the Early Termination Date, such failure shall constitute a Lease Event of Default.

(i) In any event, if Lessee does not properly elect the Remarketing Option pursuant to the foregoing provisions after receipt of an Early Termination Notice from Lessor, Lessee shall be obligated to purchase (or cause an Affiliate or other third party to purchase) the Property in accordance with Section 16.2(b) hereof on the Early Termination Date specified in Lessor's Early Termination Notice for a price equal to the Asset Termination Value.

## ARTICLE 16

- 16.1 **Termination upon Certain Events.** After Lessee or Lessor receives notice of a Condemnation, or a Casualty occurs, or an Environmental Violation occurs or is discovered, Lessee may deliver a written notice in the form described in Section 16.2(a) (an "Early Termination Notice"). If Lessee shall not have delivered an Early Termination Notice with respect to any Condemnation, Casualty or Environmental Violation, but Lessor shall have determined that a Significant Event is in progress or has occurred, Lessor may deliver an Early Termination Notice pursuant to Section 15.4; provided, that even if Lessor delivers the Early Termination Notice, so long as the conditions set forth in Section 15.4 are satisfied, Lessee may exercise either its Purchase Option or Remarketing Option as provided in Section 15.4.
- (a) Any Early Termination Notice delivered by Lessee as described in the preceding Section shall contain: (i) notice of termination of this Lease on a date specified therein (the "Early Termination Date") (which date must be no later than thirty (30) days after the date the Early Termination Notice is delivered or required to be delivered, unless Lessee has properly elected the Remarketing Option as provided in Section 15.4, in which case such date will be one hundred eighty (180) days after the date Lessee exercised the Remarketing Option); and (ii) unless Lessee has elected the Remarketing Option as provided in Section 15.4, a binding and irrevocable agreement of Lessee to purchase (or cause an Affiliate or other third party to purchase) the Property on the Early Termination Date for the Asset Termination Value on the Early Termination Date. Notwithstanding the delivery of an Early Termination Notice by Lessee, the termination of this Lease as provided therein will be subject to the condition that Lessee must perform any obligation it may have under the next paragraph to purchase (or cause the purchase) of the Lessor's interest in Property for the Asset Termination Value.
- (b) On any Early Termination Date specified in any Early Termination Notice given by Lessor or Lessee as provided herein, unless Lessee has properly elected the Remarketing Option as provided in Section 15.4, Lessee shall pay (or cause an Affiliate or other third party to pay) to Lessor the Asset Termination Value, and Lessor shall convey Lessor's interest in the Property to Lessee (or Lessee's designee) all in accordance with Section 19.1, as well as any Net Proceeds with respect to any Casualty or Condemnation theretofore received by Lessor and not previously applied to the payment of the Lessee Obligations. Lessee may designate, in a notice given to Lessor not less than ten (10) Business Days prior to the closing of such purchase (time being of the essence), the transferee or transferees to whom the conveyance shall be made (if other than to Lessee), in which case such conveyance shall (subject to the terms and conditions set forth herein) be made to such designee; provided, however, that such designation of a transferee or transferees shall not cause Lessee to be released, fully or partially, from any of its obligations under this Lease, including, without limitation, the obligation to pay Lessor an amount equal to the Asset Termination Value that was not fully and finally paid by such designee on the Early Termination Date.
- 16.3 **Termination by Lessor upon Certain Events.** If Lessor reasonably determines that any change in, or change by a Governmental Authority in the interpretation of, any Applicable Law after the date hereof would result in it or any Participant being unable to continue to hold legal or beneficial title to all or any portion of the Property or, except as provided in Section 15.4 hereof, subject it or any Participant to onerous regulations or onerous liability on account thereof, Lessor may elect to terminate this Lease by delivery of a notice thereof (also an "Early Termination Notice") to the Agent, the Participants and Lessee, such termination to be effective on the date specified therein (also an "Early Termination Date"), which date shall not be earlier than thirty (30) days following the date the notice is delivered to Lessee. However, in the event Lessor delivers such an Early Termination Notice, Lessee may exercise the Remarketing Option provided in Section 22.1 hereof by giving notice to Lessor and paying the Residual Value Guarantee Amount to Lessor within ten (10) Business Days of Lessee's receipt of the Termination Notice, in which case this Lease will not terminate pursuant to this Section until one hundred eighty (180) days after such exercise of the Remarketing Option by Lessee and the Expiration Date will be the date which is one hundred eighty (180) days after such exercise of the Remarketing Option by Lessee. If Lessee does not exercise the Remarketing Option as provided in the preceding sentence, Lessee shall be obligated to purchase (or cause an Affiliate or other third party to purchase) the Property in accordance with Section 20.2 hereof on the Early Termination Date specified in Lessor's Early Termination Notice for a price equal to Asset Termination Value.

## ARTICLE 17

- 17.1 **Accelerated Purchase Events.** As used herein, "Accelerated Purchase Event" means any one or more of the following events (whether such event shall be voluntary or involuntary or come about or be effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body):
- (a) Lessee shall fail to make payment of (i) any Basic Rent (other than a payment of Basic Rent due on the Expiration Date or any Early Termination Date) within five (5) Business Days after the same has become due and payable, (ii) any Partial Purchase Option Price or other amounts due on a Partial Purchase Date pursuant to Section 20.6, after the same has become due and payable, or (iii) Basic Rent, Supplemental Rent, Purchase Option Price, Asset Termination Value or Residual Value Guarantee Amount or other amounts, which are due on the Expiration Date or an Early Termination Date, including, without limitation, amounts due pursuant to Articles 15, 16, and 20, after the same has become due and payable;

- (b) Lessee shall fail to make payment of any Supplemental Rent (other than Supplemental Rent referred to in clause (iii) of this Subsection (a), above) due and payable within thirty (30) days after written notice of such failure;
- (c) Lessee shall fail to maintain insurance as required by Article 14 of this Lease (whether a failure to have in force a policy of insurance substantially meeting the requirements of Article 14, or, if such policy is in effect, any deviation of such policy from the requirements of Article 14) and to cure such failure within twenty (20) days after the earlier of (i) receipt of written notice of such failure or (ii) Lessee having knowledge thereof;
- (d) Lessee shall fail to observe or perform any term, covenant or condition of Lessee under this Lease, the Participation Agreement or any other Operative Document to which it is a party (other than those described in other clauses of this definition of Accelerated Purchase Event), or any representation or warranty set forth in this Lease or in any other Operative Document or in any document entered into in connection herewith or therewith or in any document, certificate or financial or other statement delivered in connection herewith or therewith shall be false or inaccurate in any Material way, and such failure or misrepresentation or breach of warranty shall remain uncured for a period of thirty (30) days after receipt of written notice of such failure, falsity, or inaccuracy; provided, that if such failure to perform is not capable of being cured within such period but is capable of being cured within one hundred eighty (180) days after the occurrence of such failure and Lessee is proceeding diligently to cure such failure, Lessee shall be entitled to an additional period (not to exceed one hundred eighty (180) days from the date of such failure) to cure such failure;

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- (e) Lessee or any of Lessee's Subsidiaries (i) shall fail to make any payment or payments due under any of the Loan Documents on the final maturity date specified therein, (ii) shall fail to make any payment or payments due under any of the Loan Documents prior to the final maturity date specified therein and such failure shall continue beyond any period of grace provided with respect thereto and as a result thereof the due date for payment of all or any substantial sums owing under the Loan Documents shall have been accelerated, or (iii) shall fail to pay when due upon any other indebtedness of \$10,000,000 or more (whether such other indebtedness has become due by reason of acceleration or otherwise);
- (f) Lessee or any of Lessee's Material Subsidiaries (except with respect to clause (v) below) shall (i) apply for or consent to the appointment of a receiver, trustee, liquidator or custodian of itself or of all or a substantial part of its property, (ii) admit in writing its inability to pay its debts generally as they mature, (iii) make a general assignment for the benefit of it or any of its creditors, (iv) be dissolved or liquidated in full or in part, (v) no longer be Solvent or be unable to pay its debts generally as they mature, (vi) commence a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or consent to any such relief or to the appointment of or taking possession of its property by any official in an involuntary case or other proceeding commenced against it, or (vii) take any action for the purpose of effecting any of the circumstances described in clauses (i) through (vi) of this subsection;
- (g) proceedings for the appointment of a receiver, trustee, liquidator or custodian of Lessee or any of Lessee's Material Subsidiaries or of all or a substantial part of the property thereof, or an involuntary case or other proceedings seeking liquidation, reorganization or other relief with respect to Lessee or any of Lessee's Material Subsidiaries or the debts thereof under any bankruptcy, insolvency or other similar law now or hereafter in effect shall be commenced and an order for relief entered or such proceeding shall not be dismissed or discharged within sixty (60) days of commencement;
- (h) a final non-appealable judgment or order for the payment of money in excess of \$10,000,000 (exclusive of amounts which are covered by insurance issued by an insurer satisfying the requirements set forth in Section 10.1(f) of the Participation Agreement) shall be rendered against Lessee or any of its Subsidiaries and the same shall remain undischarged and unpaid for a period of thirty (30) days during which execution shall not be effectively stayed;

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- (i) any Reportable Event occurs which constitutes grounds for the termination of any Employee Benefit Plan by the PBGC or for the appointment of a trustee by the PBGC to administer any Employee Benefit Plan, or any Employee Benefit Plan shall be terminated with unfunded liabilities within the meaning of Title IV of ERISA or a trustee shall be appointed by the PBGC to administer any Employee Benefit Plan, in each case which could reasonably be expected to have a Material Adverse Effect;
- (j) any Change of Control shall occur;
- (k) Lessee shall breach any obligations it may have under Articles 15 through 22 to purchase the Property as and when required by such provisions to do so;
- (l) Lessee shall abandon all or any material portion of the Property (as used in this context, "abandon" means that Lessee shall have relinquished possession and control to such an extent as to indicate that Lessee no longer has a present intent to resume the use of, or to lease or sell its interest in or purchase the interest of Lessor in, the Property or the applicable portion thereof); or



- (m) an Environmental Violation shall occur that, in the reasonable opinion of Lessor and the Required Participants, based on an Environmental Audit, constitutes a Significant Event and Lessee shall not, within thirty (30) days after notice from Lessor, have delivered any Early Termination Notice with respect thereto required of Lessee pursuant to Section 16.1 hereof or, if such an Early Termination Notice has been delivered, Lessee's purchase of the Property shall not have been consummated on the Early Termination Date specified therein pursuant to Section 16.2 hereof;
- (n) the acceleration of all amounts payable by Lessee under the Loan Documents because of any "Event of Default" under, and as defined in, any of the Loan Documents; or
- (o) Lessee shall fail to provide either Cash Collateral at least one hundred twenty (120) days prior to the expiration of a Letter of Credit or a substitute Letter of Credit at least twenty (20) Business Days prior to the expiration of a Letter of Credit as required by Section 7.1 of the Participation Agreement.

17.2 **Remedies.**

17.2.1 Lease Events of Default. As used herein, "Lease Event of Default" means (1) any failure of Lessee constituting a Lease Event of Default as described in Section 15.4, or (2) any failure of Lessee after any Accelerated Purchase Event (hereinafter defined), for any reason whatsoever (whether such failure shall be voluntary or involuntary or come about or be effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body), to purchase or cause the purchase of Lessor's interest in the Property and any and to pay or cause the payment of the full Asset Termination Value for such interest, as provided in Section 20.1, within the ten day period immediately following such Accelerated Purchase Event (the "Buy-It-Or-Else Period"). The foregoing is not intended to preclude an acceleration of Lessee's obligation to purchase the Lessor's interest in the Property pursuant to Section 20.3 because of an Accelerated Purchase Event, but rather is intended to provide Lessee with the opportunity during the Buy-It-Or-Else Period to purchase Lessor's interest in the Property before losing possession of the Property or being deemed in default under this Lease. Thus, the Buy-It-Or-Else Period will not extend any time for curing or avoiding an Accelerated Purchase Event as set forth below, and after any Buy-It-Or-Else Period expires, regardless of whether any Accelerated Purchase Event is then continuing, Lessor may proceed immediately to exercise remedies as provided herein.

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17.2.2 Application of Collateral. At any time when any Accelerated Purchase Event has occurred and is continuing, Lessor or Agent shall be entitled, regardless of whether Lessee shall have requested or required it pursuant to Section 17.6, to (1) draw upon any Letter of Credit and apply the proceeds drawn thereunder to the Lessee Obligations as of the date of the drawing, (2) withdraw any Cash Collateral then pledged pursuant to the Cash Collateral Agreement and apply the same as of the date of the withdrawal to the Lessee Obligations, and (3) retain and apply against the Lessee Obligations all sums which Lessor would, absent such Accelerated Purchase Event, be required to pay to, or turn over to, Lessee pursuant to the terms of this Lease or other Operative Documents. Any sums applied against the Lessee Obligations pursuant to this Section will reduce the Asset Termination Value payable upon any subsequent purchase and sale of the Property pursuant to this Lease.

17.2.3 Other Remedies. Without limiting the foregoing, subject to the provisions of Sections 15.4 above, after any Lease Event of Default, Lessor may do one or more of the following as Lessor in its sole discretion shall determine, without limiting any other right or remedy Lessor may have on account of such Lease Event of Default (including, without limitation, the right of Lessor to require Lessee to purchase the Property as set forth in Section 20.3):

- (a) Lessor may, by notice to Lessee, rescind or terminate this Lease only as to all of the Property as of the date specified in such notice; however, (i) no reletting, reentry or taking of possession of the Property (or any portion thereof) by Lessor will be construed as an election on Lessor's part to terminate this Lease unless a written notice of such intention is given to Lessee, (ii) notwithstanding any reletting, reentry or taking of possession, Lessor may at any time thereafter elect to terminate this Lease for a continuing Lease Event of Default, (iii) no act or thing done by Lessor or any of its agents, representatives or employees and no agreement accepting a surrender of the Property shall be valid unless the same be made in writing and executed by Lessor and (iv) no termination pursuant to this Section shall terminate Lessee's right to cure such Lease Event of Default set forth in Section 17.6 hereof by purchasing the Property pursuant to Section 20.1 hereof prior to such time as a foreclosure upon or sale of the Property has been completed.

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- (b) Lessor may (i) demand that Lessee, and Lessee shall upon the written demand of Lessor, return the Property promptly to Lessor in the manner and condition required by, and otherwise in accordance with all of the provisions of, Articles 8, 9 and 10 hereof as if the Property were being returned at the end of the Term, and Lessor shall not be liable for the reimbursement of Lessee for any costs and expenses incurred by Lessee in connection therewith and (ii) without prejudice to any other remedy which Lessor may have for possession of the Property, and to the extent and in the manner permitted by Applicable Law, enter upon the Property and take immediate possession of (to the exclusion of Lessee) the Property or any part thereof and expel or remove Lessee and any other Person who may be occupying the Property, by summary proceedings or otherwise, all without liability to Lessee for or by reason of such entry or taking of possession, whether for the restoration of damage to property caused by such taking or otherwise and, in addition to Lessor's other damages, to the extent and in the manner permitted by Applicable Law with respect to remedies for a breach of a real estate lease, Lessee shall be responsible for all costs and expenses incurred by Lessor and/or the Agent or the Participants in connection with any reletting, including, without limitation, brokers' fees and all costs of any alterations or repairs made by Lessor. The proceeds of any reletting of the Property prior to the termination of this Lease shall be applied to the Lessee Obligations under this Lease (with an associated reduction in the Asset Termination Value) on the date of receipt by Lessor.
- (c) Lessor may sell all or any part of the Property at public or private foreclosure sale, as Lessor may determine, free and clear of any rights Lessee may otherwise have in the Property, and without any duty to account to Lessee with respect to such action or inaction or any proceeds with respect thereto except as expressly required by Section 3 of the Participation Agreement, in which event (i) Lessee's obligation to pay Basic Rent hereunder for periods commencing after the date of such sale shall be terminated or proportionately reduced, as the case may be; and (ii) if Lessor shall so elect, demand that Lessee pay to Lessor, and Lessee shall pay to Lessor, on the date of such sale, as liquidated damages for loss of a bargain and not as a penalty (the parties agreeing that Lessor's actual damages would be difficult to predict, but the aforementioned liquidated damages represent a reasonable approximation of such amount) (in lieu of Basic Rent due for periods commencing on or after the Payment Date coinciding with such date of sale (or, if the sale date is not a Payment Date, the Payment Date next preceding the date of such sale)), an amount equal to (A) the excess, if any, of (1) the Asset Termination Value calculated as of such Payment Date prior to any application of the Net Foreclosure Proceeds resulting from the sale (and including all Rent due and unpaid to and including such Payment Date), over (2) the Net Foreclosure Proceeds; plus (B) interest at the Default Rate on the foregoing amount from such Payment Date until the date of payment, and any excess of the sale proceeds over such Asset Termination Value and any other sums owing by Lessee under the Operative Documents shall be remitted to Lessee. Promptly after Lessee's payment of the full amount of such liquidated damages, Lessor will convey its remaining interest in the Property (if any) by the delivery of a deed in the form contemplated in Section 19.1, but such deed will be expressly subject to the rights of any purchaser at such foreclosure.
- (d) Lessor may, at its option, elect not to terminate the Lease with respect to the Property, but continue to collect all Basic Rent, Supplemental Rent, and all other amounts due Lessor (together with all costs of collection) and enforce Lessee's obligations under this Lease as and when the same become due, or are to be performed, and at the option of Lessor, upon any abandonment of the Property by Lessee or re-entry of same by Lessor, Lessor may, in its sole and absolute discretion, elect not to terminate this Lease and may make such reasonable alterations and necessary repairs in order to relet the Property, and relet the Property or any part thereof for such term or terms (which may be for a term extending beyond the Term of this Lease) and at such rental or rentals and upon such other terms and conditions as Lessor in its reasonable discretion may deem advisable; and upon each such reletting all rentals actually received by Lessor from such reletting shall be applied to Lessee Obligations hereunder and the other Operative Documents in such order, proportion and priority as Lessor may elect in Lessor's sole and absolute discretion (with an associated reduction in the Asset Termination Value) as the date of receipt by Lessor. If such rentals received from such reletting during any period be less than the Rent with respect to the Property to be paid during that period by Lessee hereunder, Lessee shall pay any deficiency, as calculated by Lessor, to Lessor on the next Payment Date.

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- (e) Lessor may exercise any other right or remedy that may be available to it under the Operative Documents, or proceed by appropriate court action (legal or equitable) to enforce the terms hereof or to recover damages for the breach hereof. Separate suits may be brought to collect any such damages for any period(s), and such suits shall not in any manner prejudice Lessor's right to collect any such damages for any subsequent period(s), or Lessor may defer any such suit until after the expiration of the Term, in which event such suit shall be deemed not to have accrued until the expiration of the Term.
- (f) Lessor may collect the Other Lease Rents and Mortgaged Property as provided in Section 7.2(e) of this Lease and the amounts so collected by Lessor shall be applied to the Lessee Obligations (with an associated reduction in the Asset Termination Value) on the date of receipt by Lessor.

(g) In addition to having any other right or remedy available at law or in equity, Lessor shall have the option of proceeding against the Mortgaged Property either (i) proceeding under the UCC and exercising such rights and remedies as may be provided to a "Secured Party" by the UCC to sell all or any portion of the Mortgaged Property which is personal property (including, without limitation, taking possession of and selling such property in accordance with the UCC) as part of and in conjunction with any foreclosure of the Mortgaged Property, or (ii) treating such property the same as real property and proceeding with respect to both the real and personal property constituting the Mortgaged Property in accordance with Lessor's rights, powers and remedies with respect to the real property (in which event the default provisions of the UCC shall not apply except to the extent, if any, required by Applicable Law). If Lessor shall elect to proceed under the UCC, then ten (10) days' notice of sale delivered to Lessee in accordance with the Lease shall be deemed reasonable notice and the reasonable expenses of retaking, holding, preparing for sale, selling and the like incurred by Lessor shall include, but not be limited to, attorneys' fees and legal expenses. At Lessor's request, Lessee shall assemble the personal property and make it available to Lessor at a place designated by Lessor which is reasonably convenient to both parties. The net proceeds of any sale of the Mortgaged Property pursuant to the foregoing minus the expenses of retaking, holding, preparing for sale, selling and the like incurred by Lessor, shall be applied against the Lessee Obligations (with an associated reduction in the Asset Termination Value) as of the date of the sale.

17.3 **Waiver of Certain Rights.** If this Lease shall be terminated pursuant to Section 17.2, Lessee waives, to the fullest extent permitted by law, (a) any notice of re-entry or the institution of legal proceedings to obtain re-entry or possession; (b) any right of redemption, re-entry or repossession; (c) the benefit of any laws now or hereafter in force exempting property from liability for rent or for debt or limiting Lessor with respect to the election of remedies; and (d) any other rights which might otherwise limit or modify any of Lessor's rights or remedies under this Article 17.

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17.4 **Power of Sale and Foreclosure.** In the event that a court of competent jurisdiction rules that this Lease constitutes a mortgage, deed of trust or other secured financing as is the intent of the parties pursuant to Section 7, and subject to the availability of such remedy under Applicable Law, then Lessor and Lessee agree that (i) upon the occurrence of any Lease Event of Default, Lessor, either by judicial action or through Trustee, may institute and maintain an action for foreclosure of the Property, to the extent provided by law, after proper notice and lapse of such time as may be required by law, to sell the Property at the time and place of sale fixed by Lessor or Trustee in said notice of sale, either as a whole, or in separate lots or parcels or items and in such order as Lessor may elect, at auction to the highest bidder for cash in lawful money of the United States payable at the time of sale; accordingly, it is acknowledged that A POWER OF SALE HAS BEEN GRANTED IN THIS INSTRUMENT; A POWER OF SALE MAY ALLOW LESSOR TO TAKE THE PROPERTY AND SELL IT WITHOUT GOING TO COURT IN A FORECLOSURE ACTION UPON DEFAULT BY LESSEE UNDER THIS INSTRUMENT, and (ii) upon the occurrence of a Lease Event of Default, Lessor, in lieu of or in addition to exercising any power of sale hereinabove given, may proceed by a suit or suits in equity or at law, whether for a foreclosure hereunder, or for the sale of the Property or against Lessee on a recourse basis for the Asset Termination Value, or for specific performance of any covenant or agreement herein contained or in aid of the execution of any power herein granted, or for the appointment of a receiver pending any foreclosure hereunder or the sale of the Property, or for the collection of the Other Rents as provided in Section 7.2(e), or for the enforcement of any other appropriate legal or equitable remedy. (In the event Lessor obtains a judgment against Lessee for the payment in full of Asset Termination Value and Lessee pays the full amount of such judgment, Lessor will promptly thereafter convey its remaining interest in the Property (if any) by the delivery of a deed in the form contemplated in Section 19.1, but such deed will be expressly subject to the rights of any purchaser at any foreclosure sale contemplated by the foregoing provisions.) The parties hereto intend that, in addition to any other debt or obligation secured by the lien and security interests granted pursuant to Section 7.2, such lien and security interests shall secure unpaid balances of Rent and Supplemental Rent and, if and to the extent expressly provided in the documents evidencing the extension of credit, to other extensions of credit made by Lessor to Lessee after this Lease is delivered to the appropriate recording offices of Colorado, whether made pursuant to an obligation of Lessee or otherwise, and such Rent and Supplemental Rent shall be secured to the same extent as if such future payment obligations of Rent and Supplemental Rent were on account of obligatory advances to be made under a construction loan; provided such Lessee Obligations secured hereby at any one time shall not exceed the maximum principal sum permitted by the laws of Colorado. The Net Foreclosure Proceeds of any sale of the Mortgaged Property or any portion thereof pursuant to this Subsection shall be applied to the Lessee Obligations (with an associated reduction in the Asset Termination Value) as of the date of the foreclosure sale. The Lessor shall disburse such proceeds in accordance with Section 13.19 of the Participation Agreement.

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17.5 **Remedies Cumulative.** No right or remedy herein conferred upon or reserved to Lessor or Agent is intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given hereunder or now or hereafter existing under Applicable Law or in equity; provided, however, neither Lessor nor Agent shall exercise any right to evict Lessee from the Property or to terminate Lessee's right of occupancy hereunder before the occurrence of a Lease Event of Default ( i.e., after an Accelerated Purchase Event and the expiration of the Buy-It-Or-Else Period following such Accelerated Purchase Event). In no event shall Lessor, in the exercise of the remedies provided in this Lease (including, without limitation, the appointment of a receiver and the entry of such receiver or Lessor on to all or any part of the Mortgaged Property), be deemed a "mortgagee in possession," and Lessor shall not in any way be made liable to Lessee for any act, either of commission or omission, in connection with the exercise of such remedies in accordance with the Operative Documents. In addition to other remedies provided in this Lease, Lessor shall be entitled, to the extent permitted by Applicable Law or in equity, to injunctive relief in case of the violation, or attempted or threatened violation, of any of the covenants, agreements, conditions or provisions of this Lease, or to a decree compelling performance of any of the other covenants, agreements, conditions or provisions of this Lease to be performed by Lessee.

17.6 **Lessee's Right to Direct Application of Cash Collateral or Letter of Credit Proceeds and to Cure.** Notwithstanding any provision contained in the Lease or any other Operative Agreement, Lessee shall have the right:

17.6.1 to direct Lessor or Agent to apply any Cash Collateral then pledged under the Cash Collateral Agreement to reduce the Lessee Obligations (with a concurrent reduction in the Asset Termination Value) by delivery of written notice to the Lessor and the Agent, in which case Lessor and/or Agent will comply with such directions to the extent they can do so without violating any automatic stay in bankruptcy or other legal requirements within three Business Days after receipt of Lessee's directions;

17.6.2 to direct Lessor or Agent to draw upon the Letter of Credit and apply any amounts that are thereupon or have theretofore been drawn upon any Letter of Credit, (and that have not already been applied), to be applied to reduce the Lessee Obligations (with a concurrent reduction in the Asset Termination Value) by delivery of written notice to the Lessor and the Agent, in which case Lessor and/or Agent will comply with such directions to the extent they can do so without violating any automatic stay in bankruptcy or other legal requirements within three Business Days after receipt of Lessee's directions;

17.6.3 to cure any Lease Event of Default by exercising the Purchase Option and paying the full Purchase Option Price at any time prior to the earlier of (i) the scheduled Expiration Date (i.e., initially the fifth anniversary of the Effective Date and the extended scheduled Expiration Date in the event of a renewal of the term as herein provided), (ii) the date of any foreclosure of the liens and security interests as provided in Section 17.4, or (ii) one hundred twenty (120) days after such Lease Event of Default first occurs;

provided, however, that no such "cure" by Lessee or anything in this Section shall (a) relieve or reduce the obligation of Lessee to fully indemnify, protect, save and keep harmless each Indemnitee as provided in the various provisions of Section 13 of the Participation Agreement, or (b) preclude a draw by Lessor or Agent under any Letter of Credit after any Accelerated Purchase Event, or (c) preclude any other action by Lessor or Agent to maintain, perfect or enforce any lien, pledge or security interest granted to it under and pursuant to the Operative Documents or to protect, preserve or maintain any property covered by any such lien, pledge or security interest.

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ARTICLE 18.

18.1 **Lessor's Right to Cure Breaches by Lessee.** Lessor, without waiving or releasing any obligation, Potential Lease Default, Accelerated Purchase Event, or Lease Event of Default, may (but shall be under no obligation to) remedy any breach of this Lease by Lessee for the account and at the sole cost and expense of Lessee, including the failure by Lessee to maintain the insurance required by Article 14, and may, to the fullest extent permitted by law, and notwithstanding any right of quiet enjoyment in favor of Lessee, enter upon the Property for such purpose and take all such action thereon as may be necessary or appropriate therefor. No such entry shall be deemed an eviction of Lessee. All out-of-pocket costs and expenses so incurred (including fees and expenses of counsel), together with interest thereon at the Default Rate from the date on which such sums or expenses are paid by Lessor, shall be paid by Lessee to Lessor on demand, as Supplemental Rent.

18.2 **Duty of Lessor.** In the event that a court of competent jurisdiction rules that this Lease constitutes a mortgage, deed of trust or other secured financing, as is the intent of the parties pursuant to Section 7, Lessor's sole duty with respect to the custody, safekeeping and physical preservation of any Mortgaged Property in its possession, under Section 9-207 of the UCC or otherwise, shall be to deal with it in the same manner as Lessor deals with similar property for its own account. Neither Lessor, any Participant nor any of their respective directors, officers, employees or beneficiaries shall be liable for failure to demand, collect or realize upon any of the Mortgaged Property or for any delay in doing so or shall be under any obligation to sell or otherwise dispose of any Mortgaged Property upon the request of Lessee or any other Person or to take any other action whatsoever with regard to the Mortgaged Property or any part thereof.

- 18.3 **Powers of Lessor.** Lessor may, without affecting the personal liability of any person for payment of any indebtedness or performance of any obligations secured hereby and without liability therefor and without notice: (a) release, or direct the Trustee to release, all or any part of the Mortgaged Property; (b) consent to the making of any map or plat thereof; and (c) join in any grant of easement thereon, any declaration of covenants and restrictions, or any extension agreement or any agreement subordinating the lien or charge of this Lease.
- 18.4 **Powers Coupled With an Interest** All powers, authorizations and agencies contained in this Lease are coupled with an interest and are irrevocable until this Lease is terminated and the Lien created hereby is released.
- 18.5 **Trustee** In the event that a court of competent jurisdiction rules that this Lease constitutes a mortgage, deed of trust or other secured financing as is the intent of the parties pursuant to Section 7, the powers and authorities of the Trustee, and of any successor Trustee, shall be governed by the terms of this Lease and the statutes of Colorado relating to Public Trustees which may be in effect from time to time. The Trustee named herein or any successor trustee shall be clothed with the full power to act in accordance with the Operative Documents when action herein shall be required by this Lease and to execute (i) any conveyance of the Mortgaged Property upon or following a foreclosure sale and (ii) any reconveyance or release of the Mortgaged Property from the lien and security interests granted by Lessee pursuant to Section 7.2 upon full satisfaction of the Lessee Obligations secured by such lien and security interests. In the event that the substitution of the Trustee shall become necessary for any reason, the substitution of one trustee in the place of the Trustee herein named in accordance with the Operative Documents shall be sufficient. The necessity of the Trustee herein named, or any successor in trust, making oath or giving bond is expressly waived.

The Trustee or any one acting in his stead, shall have, in his discretion, authority to employ all proper agents and attorneys in the execution of this Lease and/or in the conducting of any sale made pursuant to the terms hereof, and to pay for such services rendered out of the proceeds of the sale of the Trust properly, should any be realized; and if no sale be made, then Lessee hereby undertakes and agrees to pay the cost of such services rendered to said Trustee.

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- 18.6 **Filing of Financing Statements.** Pursuant to Section 9-509 of the UCC, Lessee authorizes Lessor to file financing statements with respect to the Mortgaged Property without the signature of Lessee in such form and in such filing offices as Lessor reasonably determines appropriate to perfect the security interests of Lessor under this Lease. To the fullest extent permitted by Applicable Law, carbon, photographic or other reproduction of this Lease shall be sufficient as a financing statement for filing in any jurisdiction.
- 18.7 **Lessee's Waiver of Rights.** Except as otherwise set forth herein, to the fullest extent permitted by law, Lessee waives the benefit of all laws now existing or that may subsequently be enacted providing for (i) any appraisal before sale of any portion of the Mortgaged Property, (ii) any extension of the time for the enforcement of the collection of the indebtedness or the creation or extension of a period of redemption from any sale made in collecting such debt and (iii) exemption of the Mortgaged Property from attachment, levy or sale under execution or exemption from civil process. Except as otherwise set forth herein, to the full extent Lessee may do so, Lessee agrees that Lessee will not at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter, in force providing for any appraisal, valuation, stay, exemption, extension or redemption, reinstatement or requiring foreclosure of this Lease before exercising any other remedy granted hereunder and Lessee, for Lessee and its successors and assigns, and for any and all Persons ever claiming any interest in the Mortgaged Property, to the extent permitted by law, hereby waives and releases all rights of redemption, reinstatement, valuation, appraisal, stay of execution, notice of election to mature or declare due the whole of the secured indebtedness and marshalling in the event of foreclosure of the liens hereby created.

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- 18.8 **Multiple Security.** If (a) the Mortgaged Property shall consist of one or more parcels, whether or not contiguous and whether or not located in the same county, or (b) in addition to this Lease, Lessor shall now or hereafter hold one or more additional mortgages, liens, deeds of trust or other security (directly or indirectly) for the obligations upon other property, in the State in which the Mortgaged Property is located or (whether or not such property is owned by Lessee or by others) or (c) both the circumstances described in clauses (a) and (b) shall be true, then to the fullest extent permitted by law, Lessor may, in its sole discretion, commence or consolidate in a single foreclosure action all foreclosure proceedings against all such collateral securing the Lessee Obligations (including the Mortgaged Property), which action may be brought or consolidated in the courts of any county in which the Property is located. Lessee acknowledges that the right to maintain a consolidated foreclosure action is a specific inducement to Lessor to extend the Lessee Obligations and Lessee expressly and irrevocably waives any objections to the commencement or consolidation of the foreclosure proceedings in a single action and any objections to the laying of venue or based on the grounds of forum non convenes which it may now or hereafter have. Lessee further agrees that if Lessor shall be prosecuting one or more foreclosure or other proceedings against a portion of the Mortgaged Property or against any collateral other than the Mortgaged Property, which collateral directly or indirectly secures the Lessee Obligations, or if Lessor shall have obtained a judgment of foreclosure and sale or similar judgment against such collateral, then, whether or not such proceedings are being maintained or judgments were obtained in or outside the State in which the Mortgaged Property is located, Lessor may commence or continue foreclosure proceedings and exercise its other remedies granted in this Lease against all or any part of the Mortgaged Property and Lessee waives any objections to the commencement or continuation of a foreclosure of Lessee's right, title, and interest in the Mortgaged Property in accordance with the Operative Documents or exercise of any other remedies hereunder in accordance with the Operative Documents based on such other proceedings or judgments, and waives any right to seek to dismiss, stay, remove, transfer or consolidate either any action under this Lease or such other proceedings on such basis in the county where the Property is located. Neither the commencement nor continuation of proceedings to foreclose this Lease nor the exercise of any other rights hereunder nor the recovery of any judgment by Lessor in any such proceedings shall prejudice, limit or preclude Lessor's right to commence or continue one or more foreclosure or other proceedings or obtain a judgment against any other Mortgaged Property (either in or outside the State in which the Mortgaged Property is located) which directly or indirectly secures the Lessee Obligations, and Lessee expressly waives any objections to the commencement of, continuation of, or entry of a judgment in such other proceedings or exercise of any remedies in such proceedings based upon any action or judgment connected to this Lease, and Lessee also waives any right to seek to dismiss, stay, remove, transfer or consolidate either such other proceedings or any action under this Lease on such basis in the county where the Property is located.
- 18.9 **Partial Release; Full Release.** Lessor may release, in accordance with the Operative Documents, for such consideration or none, as it may require, any portion of the Mortgaged Property without, as to the remainder of the Mortgaged Property, in any way impairing or affecting the lien, security interest, and priority herein provided for Lessor compared to any other lien holder or secured party. Further, upon full satisfaction of all obligations which are secured by this Lease, Lessor shall execute and deliver to Lessee such documents and instruments as may be required to release the lien and security interest created by this Lease.
- 18.10 **Certain Rights of Lessor.** Except as provided in the Operative Documents, Lessor, with the express written consent of Lessee may at any time or from time to time renew or extend this Lease, or alter or modify the same in any way, or Lessor may waive any of the terms, covenants or conditions hereof in whole or in part and may release any portion of the Mortgaged Property or any other security, and grant such extensions and indulgences in relation to the Lessee Obligations secured hereby as Lessor may determine without the consent of any other person and without any obligation to give notice of any kind thereto and without in any manner affecting the priority of the lien hereof on any part of the Mortgaged Property.

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## ARTICLE 19.

- 19.1 **Provisions Relating to Lessee's Termination of this Lease or Exercise of Purchase Option or Obligation and Conveyance Upon Remarketing and Conveyance Upon Certain Other Events.**
- (a) Whenever Lessor is required by the terms of this Lease to convey its right, title and interest in the Property (or a portion thereof in the event of Lessee's exercise of the Partial Purchase Option), Lessor shall execute and deliver to Lessee (or to Lessee's designee) at Lessee's cost and expense a deed in recordable form, which shall be expressly subject to all then valid and subsisting encumbrances other than the Mortgage or other Lessor Liens. The deed shall disclaim any and all warranties other than title warranties of Lessor against Lessor Liens, and it shall state that it is intended to convey the rights, titles and interests of Lessor in and to the Property in its then "AS IS" physical condition. Lessor and Lessee will also cooperate (at Lessee's expense) by executing documents in addition to (and not inconsistent with) such deed as reasonably required, and consistent with local custom, in order to allow Lessee or any purchaser designated by it to obtain title insurance at the time of the delivery of such deed. However, if Lessor tenders a deed consistent with the requirements of the preceding sentence, its rights to receive payments of the Asset Termination Value and other amounts (if any) set forth in Article 16 or Sections 17.6, 20.1, 20.2, 20.3 or 22.1, as applicable, will be independent of its obligation to so cooperate. Further, if Lessor does deliver other documents with such a deed at Lessee's request or with Lessee's knowledge and consent, then Lessee must defend, indemnify and hold harmless Lessor from and against any and all Claims (other than Lessor Liens) arising under such other documents.

- (b) If Lessee properly exercises the Remarketing Option, then Lessee shall, on the Expiration Date, and at its own cost, transfer possession of the Property to any independent purchaser thereof, by surrendering the same into the possession of Lessor or such purchaser, as the case may be, free and clear of all Liens other than Lessor Liens, in good condition (as modified by Modifications permitted by this Lease), ordinary wear and tear excepted, in compliance with Applicable Law, and in "broom-swept clean" condition. Lessee shall cooperate reasonably with Lessor and the independent purchaser of the Property in order to facilitate the purchase by such purchaser of the Property which cooperation shall include the following, all of which Lessee shall do on or before the Expiration Date: providing all books and records regarding the maintenance and ownership of the Property and all know-how, data and technical information relating thereto, providing a current copy of any "as built" plans and specifications for any Improvements relating to the Property, granting or assigning all licenses necessary for the operation and maintenance of the Property and cooperating reasonably in seeking and obtaining all necessary Governmental Action. The obligations of Lessee under this paragraph shall survive the expiration or termination of this Lease.

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## ARTICLE 20.

- 20.1 **Purchase Option.** Without limitation of any other obligation Lessee may have to purchase the Property under the terms of this Lease, unless Lessee shall have given notice of its intention to exercise the Remarketing Option and Lessor shall have entered into a binding contract to sell the Property to a third party in accordance with such Remarketing Option, Lessee shall have the option (exercisable by giving Lessor irrevocable written notice (the "**Purchase Notice**") of Lessee's election to exercise such option) to purchase, or to designate a third party to purchase, the Property on the date specified in such Purchase Notice. The purchase price shall be equal to the Asset Termination Value on the date of the conveyance (the "**Purchase Option Price**"). The date specified in the Purchase Notice for the purchase of the Property shall not be less than thirty (30) days following the delivery of the Purchase Notice to Lessor and in any event not later than the Expiration Date. If Lessee exercises its option to purchase the Property pursuant to this Section 20.1 (the "**Purchase Option**"), Lessor shall transfer to Lessee all of Lessor's right, title and interest in and to the Property as of the date specified in the Purchase Notice upon receipt of the Purchase Option Price, in accordance with Section 19.1(a). Lessee may designate a third party to purchase the Property under the Purchase Option without assigning all of Lessee's rights hereunder to the third party under Section 25.1 hereof and without the consent of Lessor; provided, however, that notwithstanding any such designation, only Lessee (not the third party) will be entitled to enforce the Purchase Option against Lessor, and Lessee shall remain primarily liable for the payment and performance required of any such third party in connection with the exercise of the Purchase Option.
- 20.2 **Expiration Date Purchase Obligation.** Unless (a) Lessee shall have properly exercised the Purchase Option pursuant to Section 20.1 and purchased the Property pursuant thereto, or (b) Lessee shall have properly exercised the Remarketing Option and shall have fulfilled all of the conditions of clauses (a) through (k) of Section 22.1 hereof, Lessee shall purchase from Lessor, and Lessor shall assign to Lessee without recourse, on the Expiration Date of the Term (as such Term may be extended, if Lessee properly exercises the Renewal Option pursuant to Section 21.1) all of Lessor's right, title and interest in the Property (subject to all existing Liens, other than the Mortgage and Lessor Liens) for an amount equal to the Asset Termination Value. Lessee may designate, in a notice given to Lessor not less than ten (10) Business Days prior to the closing of such purchase (time being of the essence), the transferee or transferees to whom the conveyance shall be made (if other than to Lessee), in which case such conveyance shall (subject to the terms and conditions set forth herein) be made to such designee; provided, however, that such designation of a transferee or transferees shall not cause Lessee to be released, fully or partially, from any of its obligations under this Lease, including, without limitation, the obligation to pay Lessor an amount equal to the Asset Termination Value that was not fully and finally paid by such designee on such Expiration Date.
- 20.3 **Acceleration of Purchase Obligation.** Following any Accelerated Purchase Event (other than an Accelerated Purchase Event which constitutes a Limited Recourse Default) Lessee shall be obligated to purchase Lessor's interest in the Property for an amount equal to the Asset Termination Value (regardless of any prior election by Lessee to exercise or not exercise its Purchase Option pursuant to Section 20.1) upon any date designated in a notice given by Lessor, which date is not earlier than ten (10) days from the date such notice (also an "**Early Termination Date**"), demanding that Lessee purchase the Property (or the remaining portion thereof) in accordance with the provisions of Article 19 and this Section 20.3.

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- 20.4 **Cash Collateral.** Without limiting the rights of Lessee to require the application of Cash Collateral on and subject to the terms and conditions of Section 17.6 above and Section 3 of the Participation Agreement, the parties agree that, to the extent that the Depository Bank holds any collateral pursuant to the Cash Collateral Agreement under Sections 7.1(b) or 7.1(c) of the Participation Agreement, and if under the Cash Collateral Agreement (or any Attachment thereto or Notice thereunder), the Agent is entitled to withdraw cash collateral under the Cash Collateral Agreement, which is to be applied to any of the Lessee Obligations hereunder or under any of the Operative Documents (whether in connection with the exercise of the Purchase Option, any purchase obligation or the exercise of the Remarketing Option or otherwise) Agent shall at the request of Lessor make demand on the Depository Bank for the immediate delivery of the appropriate sum under the Cash Collateral Agreement. Such funds will be applied as provided in Section 3 of the Participation Agreement to the Lessee Obligations (with an associated reduction in the Asset Termination Value) and will be allocated as provided in Section 3 of the Participation Agreement.

20.5 **Letters of Credit.** Without limiting the rights of Lessee to require draws upon any Letter of Credit and the application of such proceeds on and subject to the terms and conditions of Section 17.6 above and Section 3 of the Participation Agreement, the parties agree that, if a Letter of Credit has been established and is outstanding under Sections 7.1(b) or 7.1(c) of the Participation Agreement, and if the conditions set forth in Section 7 of the Participation Agreement for drawing under such Letter of Credit have been met, Agent shall at the request of Lessor draw on such Letter of Credit; and in such event, amounts drawn under the Letter of Credit will be applied as provided in Section 3 of the Participation Agreement to the Lessee Obligations (with an associated reduction in the Asset Termination Value) and will be allocated as provided in Section 3 of the Participation Agreement.

20.6 **Partial Purchase Option Exercisable After Subdivision.**

(a) Lessor and Lessee subdivided the Land Interest into two (2) parcels, and Lessee may, in Lessor's name, but at Lessee's sole cost and expense, further subdivide the Land Interest into not more than two (2) additional parcels in one or more transactions (each such parcel, together with any buildings or other improvements, Fixtures and Modifications located on such parcel, a "Subdivided Parcel"), in compliance with all Requirements of Law, provided that (i) no Potential Lease Default has occurred and is continuing, (ii) such subdivision does not, in the good faith judgment of Lessor, materially impair the value, utility or remaining useful life of any Subdivided Parcel, (iii) Lessee's obligations and the interests and Liens of Lessor, the Agent and the Participants arising under this Lease and the other Operative Documents remain in full force and effect and are not diminished or subordinated in any respect as a result of such subdivision, (iv) any new easements or restrictive covenants which will be required to maintain the value of each Subdivided Parcel after the subdivision are in form and scope satisfactory to Lessor, and (v) any obligations of Lessor with respect to such subdivision are paid or performed by Lessee at Lessee's sole cost and expense. Lessor shall allocate the Asset Termination Value among the Subdivided Parcels in accordance with the methodology set forth on Schedule V to the Participation Agreement, which shall be the purchase price applicable to each Subdivided Parcel under this Section 20.6 (the "Partial Purchase Option Price").

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(b) Lessee shall have the option (exercisable by giving Lessor irrevocable written notice (the "Partial Purchase Notice") of Lessee's election to exercise such option) without terminating this Lease to purchase, or to designate a third party to purchase, any Subdivided Parcel for the Partial Purchase Option Price applicable to such Subdivided Parcel on the date specified in such Partial Purchase Notice, which shall be a Payment Date (the "Partial Purchase Date"). Lessee shall deliver any Partial Purchase Notice to Lessor not less than thirty (30) days prior to the Partial Purchase Date. If Lessee exercises its option to purchase any Subdivided Parcel pursuant to this Section 20.6 (a "Partial Purchase Option"), so long as no Potential Lease Default has occurred and is continuing, Lessor shall transfer to Lessee all of Lessor's right, title and interest in and to the Subdivided Parcel specified in any Partial Purchase Notice as of the Partial Purchase Date upon receipt of the Partial Purchase Option Price applicable to such Subdivided Parcel and all Rent and other amounts then due and payable under this Lease and any other Operative Document, in accordance with Section 20.6(c).

(c) Lessee may designate a third party to purchase a Subdivided Parcel under the Partial Purchase Option without assigning all of Lessee's rights hereunder to the third party under Section 25.1 hereof and without the consent of Lessor; provided, however, that notwithstanding any such designation, only Lessee (not the third party) will be entitled to enforce the Partial Purchase Option against Lessor, and Lessee shall remain primarily liable for the payment and performance required of any such third party in connection with the exercise of the Partial Purchase Option. Upon payment to Lessor of the Partial Purchase Option Price with respect to any Subdivided Parcel, the Lessee Obligations and the Asset Termination Value shall be reduced by the amount of the Partial Purchase Option Price paid.

(d) In connection with Lessee's exercise of a Partial Purchase Option with respect to any Subdivided Parcel, upon the applicable Partial Purchase Date and upon tender by Lessee of the amounts set forth in Section 20.6(b), Lessor shall execute and deliver to Lessee (or to Lessee's designee) at Lessee's cost and expense a deed in recordable form, which shall be expressly subject to the Permitted Exceptions (other than Lessor Liens) and to any other then valid and subsisting encumbrances other than the Mortgage or other Lessor Liens. The deed shall disclaim any and all warranties other than title warranties of Lessor against Lessor Liens, and it shall state that it is intended to convey the rights, titles and interests of Lessor in and to the Subdivided Parcel in its then "AS IS" physical condition. Lessor and Lessee will also cooperate (at Lessee's expense) by executing documents in addition to (and not inconsistent with) such deed as reasonably required, and consistent with local custom, in order to allow Lessee or any purchaser designated by it to obtain title insurance at the time of the delivery of such deed. However, if Lessor tenders a deed consistent with the requirements of the preceding sentence, its rights to receive payments of the amounts set forth in Section 20.6(b) will be independent of its obligation to so cooperate. Further, if Lessor does deliver any other document with such a deed at Lessee's request or with Lessee's knowledge and consent, then Lessee must defend, indemnify and hold harmless Lessor from and against any and all Claims (other than Lessor Liens) arising under such other documents.

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ARTICLE 21

21.1 **Renewal.**



- (a) Subject to the conditions set forth herein, Lessee, at any time after the first anniversary of the Effective Date, shall have the option (the "Renewal Option") by written request (the "Renewal Request") to Lessor, each Participant and the Agent given not later than ninety (90) days prior to the then Expiration Date to renew the Term for a five-year period commencing on the date following the Expiration Date then in effect. No later than the date (the "Renewal Response Date") which is thirty (30) days after such request has been delivered to each of Lessor, each Participant and the Agent, Lessor will notify Lessee in writing (with a copy to the Agent) whether or not it consents to such Renewal Request (which consent may be granted or denied in its sole discretion and may be conditioned on receipt of such financial information or other documentation as may be specified by Lessor including without limitation a satisfactory appraisal of the Property), provided that if Lessor shall fail to notify Lessee on or prior to the Renewal Response Date, it shall be deemed to have denied such Renewal Request. The renewal of the Term contemplated by any Renewal Request shall become effective as of the Expiration Date then in effect on or after the Renewal Response Date on which Lessor shall have consented to such Renewal Request; provided that such renewal shall be subject to and conditioned upon the following:
- (i) on both the Expiration Date then in effect and the date of the Renewal Request, (x) no Potential Lease Default, Accelerated Purchase Event, or Lease Event of Default shall have occurred and be continuing, and (y) Lessor and the Agent shall have received a Responsible Officer's Certificate of Lessee as to the matters set forth in clause (x) above,
- (ii) Lessee shall not have exercised the Remarketing Option, and
- (iii) the Expiration Date shall not be extended for more than one (1) five-year period pursuant to this Section 21.1.
- (b) The renewal of this Lease shall be on the same terms and conditions as are set forth in this Lease for the original Term, with such modifications thereto, if any, as the parties hereto and to the other Operative Documents may negotiate based upon the current credit information regarding Lessee, interest rates and such other factors as Lessor may consider relevant.

## ARTICLE 22

22.1 **Option to Remarket.** Subject to the fulfillment of each of the conditions set forth in this Section 22.1, Lessee shall have the option (the "Remarketing Option") to market for Lessor and to require Lessor to complete the sale of all, but not less than all, of Lessor's interest in the Property on the date specified by the Lessee, which date shall be after Lessee's exercise of the Remarketing Option and on or prior to the Expiration Date. Lessee's effective exercise and consummation of the Remarketing Option shall be subject to the due and timely fulfillment of each of the following provisions as of the dates set forth below:

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- (a) Not later than one hundred eighty (180) days prior to the Expiration Date (or such other date as is specified in Section 15.4 of this Lease), Lessee shall give to Lessor written notice of Lessee's exercise of the Remarketing Option. (Any failure to give such notice shall be deemed an election by Lessee to purchase the Property under Section 20.1.)
- (b) Unless Lessee is exercising the Remarketing Option pursuant to Section 15.4, Lessee shall deliver to Lessor an Environmental Audit of the Property together with its notice of exercise of the Remarketing Option. Such Environmental Audit shall be prepared by an environmental consultant selected by Lessor in Lessor's reasonable discretion and shall contain conclusions reasonably satisfactory to Lessor as to the environmental status of the Property. If such Environmental Audit indicates any material exceptions reasonably requiring remedy or further investigation, Lessee shall have also delivered a Phase Two environmental assessment by such environmental consultant prior to the Expiration Date showing the completion of the remedying of such exceptions in compliance with Applicable Law.
- (c) On the date of Lessee's notice to Lessor of Lessee's exercise of the Remarketing Option and all times thereafter on or before the Expiration Date, no Lease Event of Default, Accelerated Purchase Event, or Potential Lease Default (other than a Limited Recourse Default) shall exist.
- (d) Lessee shall have completed in all Material respects all Modifications, restoration and rebuilding of the Property pursuant to Sections 11.1 and 15.1 (as the case may be) and shall have fulfilled in all Material respects all of the conditions and requirements in connection therewith pursuant to said Sections, in each case by the date on which Lessor receives Lessee's notice of Lessee's exercise of the Remarketing Option (time being of the essence), regardless of whether the same shall be within Lessee's control. Lessee shall have also paid the cost of all Modifications commenced prior to the Expiration Date. Lessee shall not have been excused pursuant to Section 13.1 from complying with any Applicable Law that involved the extension of the ultimate imposition of such Applicable Law beyond the last day of the Term. Any Liens (other than Lessor Liens) on the Property that were contested by Lessee shall have been removed before the Expiration Date.

- (e) During the Marketing Period, Lessee shall, as nonexclusive agent for Lessor, may attempt to sell Lessor's interest in the Property on or prior to the Expiration Date (without diminishing Lessee's obligation to consummate the sale on the Expiration Date pursuant to any other provision of this Lease) for the highest purchase price Lessee can obtain therefore, which price shall not be less than the Fair Market Sales Value. Lessee will not be required to incur any out-of-pocket expenses in connection with such efforts except to the extent, if any, Lessor agrees to permit the reimbursement of the same from sales proceeds. But Lessee shall make the Property available for inspection by prospective purchasers, shall promptly upon request permit inspection of any maintenance records relating to the Property by Lessor, any Participant and any potential purchasers, and shall otherwise do all things necessary to sell and deliver possession of the Property to any purchaser.
- (f) Lessee shall submit all bids to Lessor, the Agent and the Participants, and Lessor will have the right to review the same and the right to submit any one or more bids. All bids shall be on an all-cash basis unless Lessor, the Agent and the Participants shall otherwise agree in their sole discretion. Lessee shall procure bids from one or more bona fide prospective purchasers and shall deliver to Lessor, the Agent and the Participants not less than ninety (90) days prior to the Expiration Date a binding written unconditional (except as set forth below), irrevocable offer by such purchaser or purchasers offering the highest bid to purchase the Property. No such purchaser shall be Lessee, or any Subsidiary or Affiliate of Lessee. The written offer must specify the Expiration Date as the closing date unless Lessor, the Agent and the Participants shall otherwise agree in their sole discretion.

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- (g) In connection with any such sale of the Property, Lessee will provide to the purchaser any "seller's" indemnities, representations and warranties regarding title, absence of Liens (except Lessor Liens) and the condition of the Property as may be negotiated between Lessee and the purchaser. Lessee shall have obtained all required governmental and regulatory consents and approvals and shall have made all filings as required by Applicable Law in order to carry out and complete the transfer of the Property and Lessor shall reasonably cooperate, at no expense to Lessor, with Lessee to obtain said items. As to Lessor, any such sale shall be made on an "as is, with all faults" basis without representation or warranty by Lessor other than the absence of Lessor Liens. Any agreement as to such sale shall be made subject to Lessor's rights under this Section 22.1.
- (h) Lessee shall pay to the Agent at least one (1) Business Day prior to the Expiration Date (or to such other Person as the Agent shall notify Lessee in writing, or in the case of Supplemental Rent, to the Person entitled thereto) an amount equal to the Residual Value Guarantee Amount, plus all Rent and all other amounts under this Lease and the other Operative Documents which have accrued or will accrue prior to or as of the Expiration Date, in the type of funds specified in Section 3.4 hereof.
- (i) If the net selling price of the Property (i.e., the price computed net of all expected prorations, credits, costs and expenses of the sale, whether incurred by Lessor or Agent, including without limitation, the cost of any title insurance, surveys, environmental reports, appraisals, transfer taxes, Lessor's and the Agent's reasonable attorneys' fees, commissions, escrow fees, recording fees, and all applicable documentary and other transfer taxes) (the "Net Selling Price") is less than the difference between (A) the Asset Termination Value (computed before any application of any payment of the Residual Value Guarantee Amount) minus (B) the Residual Value Guarantee Amount, then Lessee shall have caused to be delivered to Lessor, the Agent and each Participant the appraisal required by Section 13.2 of the Participation Agreement thirty (30) Business Days prior to the Expiration Date and shall pay to the Agent on or prior to the Expiration Date (or to such other person as the Agent shall notify Lessee in writing) the amounts required to be paid pursuant to Section 13.2 of the Participation Agreement.
- (j) Unless Lessor itself elects not to complete the sale because of an insufficient sales price as provided below, the purchase of the Property shall be consummated on or before the Expiration Date and only following the payment by Lessee pursuant to paragraphs (i) and (j) above and contemporaneously with Lessee's surrender of the Property pursuant to Section 19.1(b), and all proceeds of the sale of the Property shall be paid directly to Lessor for application and distribution as provided in Section 3 of the Participation Agreement.

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- (k) Lessee shall not be entitled to exercise or consummate the Remarketing Option if a circumstance that would permit Lessor to require Lessee to repurchase the Property under Section 16.2 exists and is continuing.

If one or more of the foregoing provisions shall not be fulfilled as of the date set forth above, or the Property is not purchased as aforesaid (other than because of an election by Lessor not to complete the sale as provided in the next sentence), then Lessor shall declare by written notice to Lessee the Remarketing Option to be null and void as to the Property, in which event all of Lessee's rights under this Section 22.1 shall immediately terminate and Lessee shall be obligated to purchase all of Lessor's interest in the Property pursuant to Section 20.2 on the Expiration Date.

In the event, but only in the event, Lessee pays the Residual Value Guarantee Amount and otherwise satisfies or claims to have satisfied all of the foregoing conditions, yet the Net Sales Price to be paid for Lessor's interest in the Property because of Lessee's exercise of the Remarketing Option will be less than the remaining Asset Termination Value (computed after application of the payment of any Shortfall Amount actually paid and the Residual Value Guarantee Amount pursuant to Section 13 of the Participation Agreement), Lessor may elect to decline to complete the sale of the Property. In that event, Lessee will assign all rights, titles and interests it has in and to the Property to Lessor, and this Lease will terminate on the Expiration Date without a sale of the Property and without any requirement that Lessor or Agent account to Lessee for Net Sales Proceeds received thereafter.

Notwithstanding the foregoing, neither the exercise by the Lessee of the Remarketing Option, the failure of the Lessee to cause a sale of the Property pursuant to this Article 22, or any other provision of this Article 22, shall waive, modify, or in any manner limit the rights of Lessee to purchase (or causing its Affiliate or other third party to purchase) the Property for the Asset Termination Value pursuant any other express provision hereof; provided, (i) that if Lessee exercises any such purchase right after having exercised the Remarketing Option, Lessee shall bear all costs arising out of or attributable to the cessation of remarketing efforts, including any costs, expenses, damages or liability which may be alleged by any prospective purchaser of the Property, and (ii) the sale to Lessee or its designee occurs prior to the date on which Lessor enters into a binding contract to sell the Property to a third party pursuant to the Remarketing Option.

Except as expressly set forth herein, Lessee shall have no right, power or authority to bind Lessor in connection with any proposed sale of the Property.

- 22.2 **Certain Obligations Continue.** During the Marketing Period, the obligation of Lessee to pay Rent (including the installment of Basic Rent due on the fifth anniversary of the Effective Date or at the end of a Renewal Term, or on the Expiration Date, as the case may be) shall continue undiminished until the earlier of the sale of the Property pursuant to the Remarketing Option or the termination of this Lease in accordance with the terms hereof. Lessor shall have the right, but shall be under no duty, to solicit bids, to inquire into the efforts of Lessee to obtain bids or otherwise to take action in connection with any such sale, other than as expressly provided in this Article 22.

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- 22.3 **Support Obligations.** In the event that this Lease is terminated without purchase of the Property by Lessee (or its designee), Lessee shall provide Lessor, effective on the Expiration Date, with (i) all permits, certificates of occupancy, governmental licenses and authorizations necessary to use and operate the Property for its intended purposes (to the extent such items are transferable or may be obtained by Lessee on behalf of another party), (ii) such easements, licenses, rights-of-way and other rights and privileges in the nature of an easement as are reasonably necessary or desirable in connection with the use, repair, access to or maintenance of the Property as Lessor shall request, and (iii) a services agreement covering such services as Lessor may request in order to use and operate the Property for its intended purposes at such rates (not in excess of arm's length fair market rates) as shall be acceptable to Lessor and Lessee. All assignments, licenses, easements, agreements and other deliveries required by clauses (i) and (ii) of this Section 22.3 shall be in form satisfactory to Lessor and shall be fully assignable (including both primary assignments and assignments given in the nature of security) without payment of any fee, cost or other charge.

#### ARTICLE 23

- 23.1 **Holding Over.** If Lessee shall for any reason remain in possession of the Property after the expiration or earlier termination of this Lease (unless the Property is conveyed to Lessee), such possession shall be as a tenancy at sufferance during which time Lessee shall continue to pay Supplemental Rent that would be payable by Lessee hereunder were the Lease then in full force and effect and Lessee shall continue to pay Basic Rent at an annual rate equal to 110% of the average rate of Basic Rent payable hereunder during the Term. Such Basic Rent shall be payable from time to time upon demand by Lessor. During any period of tenancy at sufferance, Lessee shall, subject to the second preceding sentence, be obligated to perform and observe all of the terms, covenants and conditions of this Lease, but shall have no rights hereunder other than the right, to the extent given by law to tenants at sufferance, to continue its occupancy and use of the Property. Nothing contained in this Article 23 shall constitute the consent, express or implied, of Lessor to the holding over of Lessee after the expiration or earlier termination of this Lease (unless the Property is conveyed to Lessee), and nothing contained herein shall be read or construed to relieve Lessee of its obligations to purchase or remarket the Property on the Expiration Date pursuant to Article 20 or Article 22 or as preventing Lessor from maintaining a suit for possession of the Property or exercising any other remedy available to Lessor at law or in equity or hereunder.

#### ARTICLE 24

24.1 **Risk of Loss.** During the Term the risk of loss of or decrease in the enjoyment and beneficial use of the Property as a result of the damage or destruction thereof by fire, the elements, casualties, thefts, riots, wars or otherwise is assumed by Lessee, and Lessor shall in no event be answerable or accountable therefor.

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#### ARTICLE 25.

##### 25.1 **Subletting and Assignment.**

- (a) Lessee may assign with recourse this Lease or any of its rights or obligations hereunder in whole or in part to any Person, in which case Lessee shall guarantee performance of the obligations of such assignee under this Lease by a guaranty in form and substance reasonably acceptable to Lessor and the Required Participants.
- (b) Lessee may, without the consent of Lessor, sublease the Property or portion thereof to any Person, provided, that such sublease (i) shall not materially and adversely affect any of Lessor's interests, rights or remedies under the Lease or Lessor's title to the Property, (ii) shall be made subject to and subordinated to this Lease and to the rights of Lessor hereunder, and shall expressly provide for the surrender of the Property (or portion thereof) if, after a Lease Event of Default has occurred, the Lease is terminated and shall expressly provide for termination at or prior to the earlier of the applicable Expiration Date or other date of termination of this Lease, (iii) shall be assigned to Lessor as collateral for Lessee's obligations under this Lease and the other Operative Documents, and (iv) shall not permit the Property, or portion thereof, to be used for any purpose other than for administration, manufacturing, design research and development and warehouse facilities which are not more burdensome than Lessee's use.
- (c) Except as provided in Section 25.1(b), Lessee shall not sublease the Property or any portion thereof to any Person without the prior written consent of Lessor, which consent shall not be unreasonably withheld so long as no Lease Event of Default has occurred and is continuing. Further, so long as no Lease Event of Default has occurred and is continuing, within twenty (20) Business Days after Lessee delivers to Lessor notice of a proposed sublease, including a copy of the proposed sublease agreement, Lessor shall either consent to such sublease on the terms specified in such sublease agreement or give notice to Lessee of the reasons for withholding its consent. If Lessor does consent or if Lessor's consent is not required, and it is requested by Lessee or Lessor, as the case may be, then Lessor, Lessee and the applicable sublessee shall, at Lessee's expense, execute and deliver a subordination, nondisturbance and attornment agreement with respect to any such sublease extending beyond the Expiration Date or other date of termination of this Lease in form reasonably satisfactory to Lessor, Lessee and the sublessee.
- (d) No assignment, sublease or other relinquishment of possession of the Property shall in any way discharge or diminish any of Lessee Obligations to Lessor hereunder and Lessee shall remain directly and primarily liable under this Lease as to the Property, or portion thereof, so assigned or sublet.

#### ARTICLE 26

26.1 **Estoppel Certificates.** At any time and from time to time upon not less than twenty (20) days' prior request by Lessor or Lessee (the "Requesting Party"), the other party (whichever party shall have received such request, the "Certifying Party") shall furnish to the Requesting Party (but not more than four times per year unless required to satisfy the requirements of any sublessees and only to the extent that the required information has been provided to the Certifying Party by the other party) a certificate signed by an individual having the office of vice president or higher in the Certifying Party certifying that this Lease is in full force and effect (or that this Lease is in full force and effect as modified and setting forth the modifications); the dates to which the Basic Rent and Supplemental Rent have been paid; to the best knowledge of the signer of such certificate, whether or not the Requesting Party is in default under any of its obligations hereunder (and, if so, the nature of such alleged default); and such other matters under this Lease as the Requesting Party may reasonably request. Any such certificate furnished pursuant to this Article 26 may be relied upon by the Requesting Party, and any existing or prospective mortgagee, purchaser or lender, and any accountant or auditor, of, from or to the Requesting Party (or any Affiliate thereof).

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#### ARTICLE 27

27.1 **Right to Inspect.** During the Term, Lessee shall upon reasonable notice from Lessor (except that no notice shall be required if a Lease Event of Default has occurred and is continuing), permit Lessor, the Agent and their respective authorized representatives to inspect the Property during normal business hours, provided that such inspections shall not unreasonably interfere with Lessee's business operations at the Property.

27.2 **No Waiver.** No failure by Lessor or Lessee to insist upon the strict performance of any term hereof or to exercise any right, power or remedy upon a default hereunder, and no acceptance of full or partial payment of Rent during the continuance of any such default, shall constitute a waiver of any such default or of any such term. To the fullest extent permitted by law, no waiver of any default shall affect or alter this Lease, and this Lease shall continue in full force and effect with respect to any other then existing or subsequent default.

#### ARTICLE 28

28.1 **Acceptance of Surrender.** No surrender to Lessor of this Lease or of all or any portion of any Property or of any part of any thereof or of any interest therein shall be valid or effective unless agreed to and accepted in writing by Lessor and, prior to the payment or performance of all obligations owed to the Participants under the Participation Agreement or the other Operative Documents and termination of the Participants' Commitments, the Agent, and no act by Lessor or the Agent or any representative or agent of Lessor or the Agent, other than a written acceptance, shall constitute an acceptance of any such surrender.

#### ARTICLE 29

29.1 **No Merger of Title.** There shall be no merger of this Lease or of the leasehold estate created hereby by reason of the fact that the same Person may acquire, own or hold, directly or indirectly, in whole or in part, (a) this Lease or the leasehold estate created hereby or any interest in this Lease or such leasehold estate, or (b) the fee estate in the Property, except as may expressly be stated in a written instrument duly executed and delivered by the appropriate Person.

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#### ARTICLE 30

301 **Notices.** All notices, demands, requests, consents, approvals and other communications hereunder shall be in writing and delivered (i) personally, (ii) by a nationally recognized overnight courier service, (iii) by mail (by registered or certified mail, return receipt requested, postage prepaid) or (iv) by facsimile, addressed to the respective parties, as follows:

**If to Lessee:**

Quantum Corporation  
501 Sycamore Drive  
Milpitas, California 95035

Attention: Mary Springer, Treasurer  
Telephone.: (408) 944-4452  
Facsimile: (408) 944-6501

with a copy to:

Wilson Sonsini Goodrich & Rosati, P.C.  
650 Page Mill Road  
Palo Alto, California 94304-1050  
Attention: Real Estate Department/DSS

**If to Lessor:**

SELCO Service Corporation  
66 South Pearl Street  
Albany, NY 12207

Attention: Donald C. Davis, Vice President  
Telephone.: (720) 304-1061  
Facsimile: (720) 304-1414

**If to the Agent::**

KeyBank National Association  
601 108th Avenue NE, Fifth Floor  
Bellevue, WA 98004

Attn: Robert Boswell  
Telephone.: (425) 709-4580  
Facsimile: (425) 709-4565

or such additional parties and/or other address as such party may hereafter designate (provided, however, in no event shall either party be obligated to notify, in the aggregate, more than five (5) designees of the other party), and shall be effective upon receipt or refusal thereof.

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## ARTICLE 31

- 31.1 **Miscellaneous.** Anything contained in this Lease to the contrary notwithstanding, all claims against and liabilities of Lessee or Lessor arising from events commencing prior to the expiration or earlier termination of this Lease shall survive such expiration or earlier termination. If any term or provision of this Lease or any application thereof shall be declared invalid or unenforceable, the remainder of this Lease and any other application of such term or provision shall not be affected thereby. If any right or option of Lessee provided in this Lease, including any right or option described in Articles 15, 16, 20, 21 or 22, would, in the absence of the limitation imposed by this sentence, be invalid or unenforceable as being in violation of the rule against perpetuities or any other rule of law relating to the vesting of an interest in or the suspension of the power of alienation of property, then such right or option shall be exercisable only during the period which shall end twenty-one (21) years after the date of death of the last survivor of the descendants of Franklin D. Roosevelt, the former president of the United States, Henry Ford, the deceased automobile manufacturer, and John D. Rockefeller, the founder of the Standard Oil Company, known to be alive on the date of the execution, acknowledgment and delivery of this Lease.
- 31.2 **Amendments and Modifications.** Subject to the requirements, restrictions and conditions set forth in the Participation Agreement, neither this Lease, any Lease Supplement nor any provision hereof may be amended, waived, discharged or terminated except by an instrument in writing in recordable form signed by Lessor and Lessee. In the event of any conflict or inconsistency between the terms hereof and the terms of the Participation Agreement, the Participation Agreement shall control.
- 31.3 **Successors and Assigns.** All the terms and provisions of this Lease shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.
- 31.4 **Headings and Table of Contents.** The headings and table of contents in this Lease are for convenience of reference only and shall not limit or otherwise affect the meaning hereof.
- 31.5 **Counterparts.** This Lease may be executed in any number of counterparts, each of which shall be an original, but all of which shall together constitute one and the same instrument.
- 31.6 **Governing Law.** EXCEPT TO THE EXTENT OTHERWISE REQUIRED BY APPLICABLE LAW, THIS LEASE SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES, EXCEPT AS TO MATTERS RELATING TO THE CREATION OF THE LEASEHOLD ESTATE HEREUNDER AND THE EXERCISE OF RIGHTS AND REMEDIES WITH RESPECT THERETO, WHICH SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE IN WHICH SUCH ESTATE IS LOCATED. WITHOUT LIMITING THE FOREGOING, IN THE EVENT THAT THIS LEASE IS DEEMED TO CONSTITUTE A FINANCING, WHICH IS THE INTENTION OF THE PARTIES, THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES, SHALL GOVERN THE CREATION, TERMS AND PROVISIONS OF THE INDEBTEDNESS EVIDENCED HEREBY, BUT THE LIEN CREATED HEREBY AND THE ENFORCEMENT OF SAID LIEN SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE IN WHICH SUCH ESTATE IS LOCATED.

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- 31.7 **Limitations on Recourse.** The parties hereto agree that Lessor shall have no personal liability whatsoever to Lessee or its respective successors and assigns for any claim based on or in respect of this Lease or any of the other Operative Documents or arising in any way from the transactions contemplated hereby or thereby; provided, however, that Lessor shall be liable in its individual capacity (a) for its own willful misconduct or gross negligence (or negligence in the handling of funds), (b) for liabilities that may result from the incorrectness of any representation or warranty expressly made by it in Section 8.1 of the Participation Agreement or (c) for any Taxes based on or measured by any fees, commission or compensation received by it for acting as Lessor as contemplated by the Operative Documents. It is understood and agreed that, except as provided in the preceding proviso: (i) Lessor shall have no personal liability under any of the Operative Documents as a result of acting pursuant to and consistent with any of the Operative Documents; (ii) all obligations of Lessor to Lessee are solely nonrecourse obligations except to the extent that it has received payment from others and are enforceable solely against Lessor's interest in the Property; and (iii) all such personal liability of Lessor is expressly waived and released as a condition of, and as consideration for, the execution and delivery of the Operative Documents by Lessor. Notwithstanding anything contained herein, the restriction stated in the preceding provisions of this Section 31.7 shall not apply to liability of Lessor arising because of a breach of Lessor's obligation to remove Lessor Liens or failure to disburse proceeds from sale of the Property in accordance with the Operative Documents.
- 31.8 **Original Executed Counterpart.** The single executed original of this Lease marked "THIS COUNTERPART IS THE ORIGINAL EXECUTED COUNTERPART" on the signature page thereof and containing the receipt of the Agent therefor on or following the signature page thereof shall be the Original Executed Counterpart of this Lease (the "Original Executed Counterpart"). To the extent that this Lease constitutes chattel paper, as such term is defined in the Uniform Commercial Code as in effect in any applicable jurisdiction, no security interest in this Lease may be created through the transfer or possession of any counterpart other than the Original Executed Counterpart.

31.9 **Usury Savings Clause.** Nothing continued in this Lease or the other Operative Documents shall be deemed to require the payment of interest or other charges by Lessee or any other Person in excess of the amount which may lawfully be charged under any applicable usury laws. In the event that Lessor or any other Person shall collect moneys under this Lease or any other Operative Document which are deemed to constitute interest (including, without limitation, the Basic Rent or Supplemental Rent) which would increase the effective interest rate to a rate in excess of that permitted to be charged by Applicable Law, all such sums deemed to constitute interest in excess of the legal rate shall, upon such determination, at the option of the Person to whom such payment was made, be returned to the Person making such payment or credited against other amounts owed by the person making such payment.

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31.10 **Effect on Original Lease.** Lessee and Lessor agree that this Lease and **Exhibit A** and **Appendix I** attached hereto shall replace in their entirety, without notation, the Original Lease and Exhibit A and Appendix I attached thereto and the First Amended Lease and Exhibit A and Appendix I attached thereto; provided, however, that with respect to the period prior to the date hereof nothing contained herein shall (i) operate as a waiver of any right, power or remedy of Lessor, the Agent or any Participant under the Original Lease or any other Operative Document or (ii) extinguish or impair any obligations of Lessee under the Original Lease or any other Operative Document except to the extent any such obligation is actually satisfied by Lessee.

31.11 **Leasehold Deed of Trust.** Lessor hereby consents to the execution and recordation of that certain Leasehold Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing, of even date herewith, executed by Lessee, as Grantor, in favor of KeyBank National Association, as Administrative Agent, as Beneficiary, to the Public Trustee of the County of El Paso ("Leasehold Deed of Trust"), granting a security interest and mortgage or deed of trust or lien on Lessee's interest in the Property to secure the Lessee obligations to Beneficiary under the under the Loan Documents. The Leasehold Deed of Trust is junior and subordinate to this Lease.

[SIGNATURE PAGE FOLLOWS]

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IN WITNESS WHEREOF, the parties have caused this Lease be duly executed and delivered as of the date first above written.

SELCO SERVICE CORPORATION, an Ohio corporation, as Lessor

By: /s/Lawrence Cooper

Name: Lawrence Cooper

Title: Assistant Secretary

QUANTUM CORPORATION, a Delaware corporation, as Lessee

By: /s/Michael J.Lambert

Name: Michael J. Lambert

Title: Executive Vice President and CFO

[ATTACH NOTARIAL ACKNOWLEDGMENTS]

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**THIS COUNTERPART IS THE ORIGINAL EXECUTED COUNTERPART**

Receipt of this original counterpart of the foregoing Lease is hereby acknowledged as of December 17, 2002.

KEYBANK NATIONAL ASSOCIATION, as Agent

By: /s/Robert W. Boswell

Name: Robert W. Boswell

Title: Vice President

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**SCHEDULE 1**

**TO THE LEASE**

**Legal Description of the Land Interest**

LOTS 1 AND 2, FAIRLANE TECHNOLOGY PARK FILING NO. 4A, COUNTY OF EL PASO, STATE OF COLORADO

1.

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**EXHIBIT A TO  
THE LEASE**

**LEASE SUPPLEMENT**

(Memorandum of Master Lease, Deed of Trust,  
Security Agreement and Fixture Filing)

Prepared by and upon recording return to:

Timothy N. Brown, Esq.  
Crosby, Heafey, Roach & May  
Two Embarcadero, Suite 2000  
San Francisco, CA 94111

THIS LEASE SUPPLEMENT (and Memorandum of Master Lease, Deed of Trust, Security Agreement and Fixture Filing) (this "Lease Supplement") dated as of December 17, 2002, between SELCO Service Corporation, an Ohio corporation, solely in its capacity as lessor principal office at 66 South Pearl Street, Albany, New York 12207 (the "Lessor"), and QUANTUM CORPORATION, a Delaware corporation, having a principal office at 501 Sycamore Drive, Milpitas, California 95035 ("Lessee").

WHEREAS, Lessor is the fee owner of the Land Interest described on **Schedule 1** hereto and wishes to lease the Land Interest and Improvements thereon or which may thereafter be constructed thereon pursuant to any construction agreement or the Lease to Lessee (the Land Interest and Improvements being collectively called the "Property");

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **Definitions; Interpretation.** For purposes of this Lease Supplement, capitalized terms used herein and not otherwise defined herein shall have the meanings assigned to them in Appendix 1 to the Master Lease, dated as of December 17, 2002 (the "Lease"), between Lessee and Lessor; and the rules of interpretation set forth in Appendix 1 to the Lease shall apply to this Lease Supplement.
2. **The Property.** Attached hereto as Schedule I is the description of a certain Land Interest. Effective upon the execution and delivery of this Lease Supplement by Lessor and Lessee, the Property shall be subject to the terms and provisions of the Lease. Subject to the terms and conditions of the Lease, Lessor hereby leases to Lessee for the Term (as defined below) of the Lease, Lessor's interest in the Property, and Lessee hereby agrees, expressly for the direct benefit of Lessor, to lease from Lessor for the Term, Lessor's interest in the Property.

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3. **Parties and Addresses.** The Lease is between Lessor, whose principal office is at 66 South Pearl Street, Albany, New York 12207, and Lessee, whose principal office is 501 Sycamore Drive, Milpitas, California 95305.
  4. **Lease Term.** The term of this Lease (the "Term") shall begin on December 17, 2002, and shall end on December 17, 2007, unless the Term is renewed or earlier terminated in accordance with the provisions of the Lease. The Lease contains one option period for a five year period, which give Lessee the right, subject to the terms thereof, to extend the term of the Lease.
  5. **Ownership of the Property.**
    - (a) It is the intent of the parties hereto that: (i) the Lease constitutes an "operating lease" pursuant to Statement of Financial Accounting Standards No. 13, as amended, for purposes of Lessee's financial reporting, and (ii) for purposes of Federal, state and local income tax, the transaction contemplated hereby and by the Lease is a financing arrangement and preserves ownership in the Property in Lessee. Nevertheless, Lessee acknowledges and agrees that neither the Agent, Lessor nor any Participant has made any representations or warranties to Lessee concerning the tax, accounting or legal characteristics of the Operative Documents and that Lessee has obtained and relied upon such tax, accounting and legal advice concerning the Operative Documents as it deems appropriate. Accordingly, and notwithstanding any provision of this Lease to the contrary, Lessor and Lessee agree and declare that:
      - (i) the transactions contemplated hereby are intended to have a dual, rather than a single, form; and
      - (ii) all references in this Lease to the "lease" of the Property which fail to reference such dual form do so as a matter of convenience only and do not reflect the intent of Lessor and Lessee as to the true form of such arrangements.



(b) Anything to the contrary in the Operative Documents notwithstanding, Lessor and Lessee intend that with respect to the nature of the transactions evidenced by the Lease in the context of the exercise of remedies under the Operative Documents, including, without limitation, in the case of any insolvency or receivership proceedings or a petition under the United States bankruptcy laws or any other applicable insolvency laws or statute of the United States of America or any State or Commonwealth thereof affecting Lessee, Lessor or any Participant or any enforcement or collection actions, as follows:

(i) the transactions evidenced by the Lease are loans made by Lessor and the Participants as unrelated third party lenders to Lessee secured by the Property,

(ii) the obligations of Lessee under the Lease to pay Basic Rent and Supplemental Rent or Asset Termination Value in connection with any purchase of the Property pursuant to the Lease shall be treated as payments of interest on and principal of, respectively, loans from Lessor and the Participants to Lessee, and

(iii) the Lease grants a security interest and mortgage or deed of trust or lien, as the case may be, in the Property and the collateral described in the Property to Lessor, the Agent and the Participants to secure the Lessee Obligations.

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(c) Specifically, without limiting the generality of anything contained in this Section 5, Lessor and Lessee further intend and agree that, for purposes of filing federal, state and local returns, reports and other statements relating to income or franchise taxes, or any other taxes imposed upon or measured by income, (i) Lessee shall be entitled to take any deduction, credit, allowance or other reporting position consistent with its status as owner of the Property; and (ii) neither Lessor nor the Participants shall take a position on their respective federal, state and local returns, reports and other statements relating to income or franchise taxes that is inconsistent with Lessee's status as owner of the Property, provided that Lessor and any Participant may take a position that is inconsistent with Lessee's status as owner of the Property if: (x) there has been a change in law or regulation so requiring as supported by an opinion of counsel reasonably acceptable to Lessee that there is not substantial authority for such a consistent reporting position; or (y) (A) there has been an administrative or judicial holding that Lessee is not the owner of the Property for such tax purposes, (B) Lessee has no right to contest such holding pursuant to Section 13.5 of the Participation Agreement, and (C) Lessee's lack of right to contest is not the result of an Indemnitee's waiver of its right to indemnification pursuant to Section 13.5(f)(iii) of the Participation Agreement or failure of the amount at issue to exceed the minimum amount set forth in Section 13.5(f)(iv)(B) of the Participation Agreement.

#### 6. **Grant of Lien.**

(a) Specifically, without limiting the generality of Section 5, Lessor and Lessee further intend and agree that, for the purpose of securing the payment of the principal sum of Fifty Million Dollars (\$50,000,000), together with interest thereon calculated at the rate provided in the Participation Agreement and the other Lessee Obligations, Lessee hereby grants, bargains, mortgages, conveys, sells, assigns and sets over to the Public Trustee of the County of El Paso, as trustee ("Trustee"), and its successors and assigns, for the benefit of Lessor, the Agent and the Participants, WITH POWER OF SALE AND RIGHT OF ENTRY AND POSSESSION:

(i) all right, title and interest of Lessee in and to the Property (including the Land Interest, Improvements, Fixtures, Equipment and Appurtenant Rights) and the reversions, remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, at law as well as in equity, of Lessee of, in and to the same, including, without limitation, all credits, options, deposits, rights of first offer, rights of first refusal, extension rights and expansion rights relating thereto;

(ii) all right, title and interest of Lessee in and to the Land Interest and Improvements in any way hereafter belonging, relating or appertaining to the Property;

(iii) all right, title and interest of Lessee in, to and under (i) all books and records, and (ii) all inventory, accounts, cash receipts, deposit accounts, accounts receivable, general intangibles, chattel paper (whether electronic or tangible), notes, drafts, letter of credit rights, supporting obligations, trade names, trademarks and service marks arising from or related or used in connection with the ownership, management, leasing, sale or operation of the Property;

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(iv) all right, title and interest of Lessee in and to (i) all refunds, awards, tax abatements, rebates, reserves, deferred payments, deposits, and payments of any kind payable by an Governmental Authority or any insurance or utility company with respect to the Property, and (ii) all reserves, deferred payments, deposit accounts, refunds, cost savings and payments of any kind with respect to the Property or any part thereof; provided, however, that except during the continuation of any Lease Event of Default, Lessee may collect, apply and retain any of the foregoing in accordance with Section 6(f) below;

(v) all right, title and interest of Lessee in and to all insurance policies (including title insurance policies) required to be maintained by Lessee pursuant to the Lease for loss of the Property, including the right to collect, receive and disburse to Lessee such proceeds in accordance with the Operative Documents; provided, however, that except during the continuation of any Lease Event of Default, Lessee may collect, apply and retain any of the foregoing in accordance with Section 6(f) below;

(vi) all awards and other compensation, including the interest payable thereon and the right to collect and receive the same for the taking by eminent domain, condemnation or otherwise, of all or any part of the Property or any easement or other real property right therein; provided, however, that except during the continuation of any Lease Event of Default, Lessee may collect, apply and retain any of the foregoing in accordance with Section 6(f) below;

(vii) all right, title and interest of Lessee in and to (i) all consents, licenses, building permits, certificates of occupancy and other governmental or quasi-governmental approvals relating to construction, completion, occupancy, use or operation of any of the Improvements or any other part of the Property and (ii) all plans and specifications relating to the ownership or leasing of the Improvements;

(viii) all right, title and interest in, to and under any leases, subleases or licenses of the Property, any license, concession, management, mineral or other agreements of a similar kind that permit the use or occupancy of the Property or any part thereof for any purpose, in return for any payment, permit the extraction or taking of any gas, oil, water or other minerals from the Property or any part thereof in return for payment of any fee, rent or royalty, now or hereafter entered into by Lessee (collectively, the "Other Leases"), together with all estate, rights, title, interest, benefits, powers and privileges of Lessee, as lessor, under the Other Leases including, without limitation, the immediate and continuing right to make claim for, receive, collect and receipt for all charges, fees, income, issues, profits, receipts, rents, revenues or royalties payable under any of the Other Leases (collectively, the "Other Lease Rents") and all estate, right, title and interest of Lessee thereunder, including all cash, securities or letters of credit delivered or deposited thereunder to secure performance by Lessee of its obligations thereunder; provided, however, that except during the continuation of any Lease Event of Default, Lessee may collect, apply and retain any of the foregoing in accordance with Section 6(f) below;

(ix) all proceeds, both cash and non-cash, of the foregoing;

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(x) all of the foregoing property and rights and interests now owned or held or subsequently acquired by Lessee and described in the foregoing clauses (i) through (ix) are collectively referred to as the "Mortgaged Property"). The grant provided hereby shall be deemed a deed of trust, security agreement and fixture filing pursuant to the laws of the State of Colorado governing deeds of trust and security agreements.

- (b) It also is the intention of the parties hereto that this Lease Supplement shall constitute a "Security Agreement" within the meaning of the UCC and grants a security interest in the Mortgaged Property which is subject to the UCC and described herein to Lessor and the Participants. Lessee and Lessor agree, to the extent permitted by law, that this Lease Supplement upon recording or registration in the real estate records of the proper office shall constitute a financing statement filed as a "fixture filing" within the meaning of Sections 9-102 and 9-502 of the UCC. Lessee's Federal Tax Identification Number is 94-2665054.
- (c) Notwithstanding any other provision hereof, Lessor shall not be deemed to have accepted any property other than cash in satisfaction of any obligation of Lessee or Lessor, unless Lessee shall make an express written election of said remedy under Section 9-620(b) of the UCC, or other Applicable Law.
- (d) Specifically, without limiting the generality of anything contained in Section 7 of the Lease, Lessor and Lessee further intend and agree that (i) the possession by Lessor or any of its agents of notes and such other items of Mortgaged Property as constitute instruments, money, negotiable documents or chattel paper shall be deemed to be "possession by the secured party" for purposes of perfecting the security interest pursuant to Section 9-334 of the UCC; and (ii) for any deposit account within the meaning of Section 9-102 of the UCC, the execution and delivery of an Account Control Agreement by the Depository Bank and Lessee in the form attached to the Participation Agreement, shall perfect a security interest in any such deposit account pursuant to that Section. Lessor and Lessee shall, to the extent consistent with this Lease, take such actions and execute, deliver, file and record such other documents, financing statements, mortgages and deeds of trust as may be necessary to ensure that, if the Lease were deemed to create a security interest in any item of the Mortgaged Property, such security interest would be deemed to be a perfected security interest of first priority under Applicable Law and will be maintained as such throughout the Term.
- (e) Intentionally Deleted.
- (f) The assignment of the Other Leases and the Other Lease Rents is a present and absolute assignment, not an assignment for security purposes only, and Lessor's right to the Other Leases and Other Lease Rents is not contingent upon, and may be exercised without possession of, the Property.

(i) If no Lease Event of Default has occurred and is continuing, Lessee shall have a revocable license to collect and retain the Other Lease Rents as they become due and to collect, retain, use and apply the Mortgaged Property in any manner not expressly prohibited by the Lease. Upon the occurrence and during the continuance of any Lease Event of Default, such license shall automatically terminate, and Lessor may collect and apply the Other Lease Rents and Mortgaged Property pursuant to Section 17.2.3(f), of the Lease without further notice to Lessee or any other Person and without taking possession of the Property. All Other Lease Rents collected by Lessee during a Lease Event of Default shall be held by Lessee as trustee in a constructive trust for the benefit of Lessor for so long as a Lease Event of Default shall exist. Lessee hereby irrevocably authorizes and directs the sublessees under the Other Leases, without any need on their part to inquire as to whether a Lease Event of Default has actually occurred or is then existing, to rely upon and comply with any notice or demand by Lessor for the payment to Lessor of any rental or other sums which may become due under the Other Leases or for the performance of any of the sublessees' undertakings under the Other Leases. Collection of any Other Lease Rents or Mortgaged Property by Lessor shall not cure or waive any default or notice of default hereunder or invalidate any acts done pursuant to such notice, but shall be immediately deemed applied by Lessor to pay Lessee Obligations in such order as Lessor shall determine in accordance with the Operative Documents (with the associated reduction in the Asset Termination Value) on the date such sums are received by Lessor.

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(ii) The foregoing irrevocable assignment shall not cause Lessor to be (A) a mortgagee in possession; (B) responsible or liable for (1) the control, care, management or repair of the Property or for performing any of Lessee's obligations or duties under the Other Leases, (2) any waste committed on the Property by the sublessees under any of the Other Leases or by any other Persons, (3) any dangerous or defective condition of the Property, or (4) any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any sublessee, licensee, employee, invitee or other Person; or (C) responsible for or impose upon Lessor any duty to produce rents or profits. Lessor, in the absence of gross negligence or willful misconduct on its part, shall not be liable to Lessee as a consequence of (y) the exercise or failure to exercise any of the rights, remedies or powers granted to Lessor hereunder or (z) the failure or refusal of Lessor to perform or discharge any obligation, duty or liability of Lessee arising under the Other Leases.

7. **Power of Sale and Foreclosure.** Without limiting any other remedies set forth in the Lease, in the event that a court of competent jurisdiction rules that the Lease constitutes a mortgage, deed or trust or other secured financing, as is the intent of the parties pursuant to Section 5 and subject to the availability of such remedy under Applicable Law, then Lessor and Lessee agree that (i) upon the occurrence of any Lease Event of Default, Lessor, either by judicial action or through Trustee, may institute and maintain an action for foreclosure of the Property, to the extent provided by law, after proper notice and lapse of such time as may be required by law, to sell the Property at the time and place of sale fixed by Lessor or Trustee in said notice of sale, either as a whole, or in separate lots or parcels or items and in such order as Lessor may elect, at auction to the highest bidder for cash in lawful money of the United States payable at the time of sale; accordingly, it is acknowledged that A POWER OF SALE HAS BEEN GRANTED IN THIS INSTRUMENT; A POWER OF SALE MAY ALLOW LESSOR TO TAKE THE PROPERTY AND SELL IT WITHOUT GOING TO COURT IN A FORECLOSURE ACTION UPON DEFAULT BY LESSEE UNDER THIS INSTRUMENT, and (ii) upon the occurrence of a Lease Event of Default, Lessor, in lieu of or in addition to exercising any power of sale hereinabove given, may proceed by a suit or suits in equity or at law, whether for a foreclosure hereunder, or for the sale of the Property or against Lessee on a recourse basis for the Asset Termination Value, or for specific performance of any covenant or agreement herein contained or in aid of the execution of any power herein granted, or for the appointment of a receiver pending any foreclosure hereunder or the sale of the Property, or for the collection of the Other Rents as provided in Section 7.2(e) of the Lease or for the enforcement of any other appropriate legal or equitable remedy. (In the event Lessor obtains a judgment against Lessee for the payment in full of Asset Termination Value and Lessee pays the full amount of such judgment, Lessor will promptly thereafter convey its remaining interest in the Property (if any) by the delivery of a deed in the form contemplated in Section 19.1, but such deed will be expressly subject to the rights of any purchaser at any foreclosure sale contemplated by the foregoing provisions.) The parties hereto intend that, in addition to any other debt or obligation secured by the Lien and security interests granted pursuant to Section 5, such lien and security interests shall secure unpaid balances of Rent and Supplemental Rent and, if and to the extent expressly provided in the documents evidencing the extension of credit, to other extensions of credit made by Lessor to Lessee after this Lease is delivered to the appropriate recording offices of Colorado, whether made pursuant to an obligation of Lessee or otherwise, and such Rent and Supplemental Rent shall be secured to the same extent as if such future payment obligations of Rent and Supplemental Rent were on account of obligatory advances to be made under a construction loan; provided such Lessee Obligations secured hereby at any one time shall not exceed the maximum principal sum permitted by the laws of Colorado. The Net Foreclosure Proceeds of any sale of the Mortgaged Property or any portion thereof pursuant to this Subsection shall be applied to the Lessee Obligations (with an associated reduction in the Asset Termination Value) as of the date of the foreclosure sale. Lessor shall disburse such proceeds in accordance with Section 13.19 of the Participation Agreement.

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8. **UCC Remedies.** Without limiting any other remedies set forth in the Lease, in the event that a court of competent jurisdiction rules that the Lease constitutes a mortgage, deed or trust or other secured financing, as is the intent of the parties pursuant to Section 5, and subject to the availability of such remedy under Applicable Law, if a Lease Event of Default shall occur, then in addition to having any other right or remedy available at law or in equity, Lessor shall have the option of either (i) proceeding under the UCC and exercising such rights and remedies as may be provided to a "Secured Party" by the UCC to sell all or any portion of the Mortgaged Property which is personal property (including, without limitation, taking possession of and selling such property in accordance with the UCC) as part of and in conjunction with any foreclosure of the Mortgaged Property, or (ii) treating such property the same as real property and proceeding with respect to both the real and personal property constituting the Mortgaged Property in accordance with Lessor's rights, powers and remedies with respect to the real property (in which event the default provisions of the UCC shall not apply except to the extent, if any, required by Applicable Law). If Lessor shall elect to proceed under the UCC, then ten (10) days' notice of sale delivered to Lessee in accordance with the Lease shall be deemed reasonable notice and the reasonable expenses of retaking, holding, preparing for sale, selling and the like incurred by Lessor shall include, but not be limited to, attorneys' fees and legal expenses. At Lessor's request, Lessee shall assemble the personal property and make it available to Lessor at a place designated by Lessor which is reasonably convenient to both parties. The net proceeds of any sale of the Mortgaged Property pursuant to the foregoing minus any reasonable expenses of retaking, holding, preparing for sale, selling and the like incurred by Lessor, shall be applied against the Lessee Obligations (with an associated reduction in the Asset Termination Value) as of the date of the sale.
9. **Remedies Cumulative.** The remedies herein provided shall be cumulative and in addition to (and not in limitation of) any other remedies available at law, equity or otherwise, including, without limitation, any foreclosure remedies. In no event shall Lessor, in the exercise of the remedies provided in this Lease Supplement (including, without limitation, the appointment of a receiver and the entry of such receiver or Lessor on to all or any part of the Mortgaged Property), be deemed a "mortgagee in possession," and Lessor shall not in any way be made liable to Lessee for any act, either of commission or omission, in connection with the exercise of such remedies.

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10. **Lessor's Right to Cure Breaches by Lessee.** Lessor, without waiving or releasing any obligation, Potential Lease Default, Accelerated Purchase Event or Lease Event of Default, may (but shall be under no obligation to) remedy any breach of the Lease by Lessee for the account and at the sole cost and expense of Lessee, including the failure by Lessee to maintain the insurance required by Article 14 of the Lease, and may, to the fullest extent permitted by law, and notwithstanding any right of quiet enjoyment in favor of Lessee, enter upon the Property for such purpose and take all such action thereon as may be necessary or appropriate therefor. No such entry shall be deemed an eviction of Lessee. All out-of-pocket costs and expenses so incurred (including fees and expenses of counsel), together with interest thereon at the Default Rate from the date on which such sums or expenses are paid by Lessor, shall be paid by Lessee to Lessor on demand, as Supplemental Rent.
11. **Duty of Lessor.** In the event that a court of competent jurisdiction rules that the Lease constitutes a mortgage, deed or trust or other secured financing, as is the intent of the parties pursuant to Section 5, Lessor's sole duty with respect to the custody, safekeeping and physical preservation of any Mortgaged Property in its possession, under Section 9-207 of the UCC or otherwise, shall be to deal with it in the same manner as Lessor deals with similar property for its own account. Neither Lessor, any Participant nor any of their respective directors, officers, employees or beneficiaries shall be liable for failure to demand, collect or realize upon any of the Mortgaged Property or for any delay in doing so or shall be under any obligation to sell or otherwise dispose of any Mortgaged Property upon the request of Lessee or any other Person or to take any other action whatsoever with regard to the Mortgaged Property or any part thereof.
12. **Powers of Lessor.** Lessor may, without affecting the personal liability of any person for payment of any indebtedness or performance of any Lessee Obligations secured hereby and without liability therefor and without notice: (a) release, or direct the Trustee to release, all or any part of the Mortgaged Property; (b) consent to the making of any map or plat thereof; and (c) join in any grant of easement thereon, any declaration of covenants and restrictions, or any extension agreement or any agreement subordinating the lien or charge of this Lease Supplement.
13. **Powers Coupled with an Interest.** All powers, authorizations and agencies contained in this Lease Supplement are coupled with an interest and are irrevocable until this Lease Supplement is terminated and the lien created hereby is released.

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14. **Trustee.** In the event that a court of competent jurisdiction rules that the Lease constitutes a mortgage, deed of trust or other secured financing, as is the intent of the parties pursuant to Section 5, the powers and authorities of the Trustee, and of any successor Trustee, shall be governed by the terms of the Lease and the statutes of Colorado relating to Public Trustees which may be in effect from time to time. The Trustee named herein or any successor trustee shall be clothed with the full power to act in accordance with the Operative Documents when action herein shall be required by the Lease and to execute (i) any conveyance of the Mortgaged Property upon or following a foreclosure sale and (ii) any reconveyance or release of the Mortgaged Property from the lien and security interests granted by Lessee pursuant to Section 5 upon full satisfaction of the Lessee Obligations secured by such lien and security interests. In the event that the substitution of the Trustee shall become necessary for any reason, the substitution of one trustee in the place of the Trustee herein named in accordance with the Operative Documents shall be sufficient. The necessity of the Trustee herein named, or any successor in trust, making oath or giving bond is expressly waived.

The Trustee or any one acting in his stead, shall have, in his discretion, authority to employ all proper agents and attorneys in the execution of this Lease Supplement and/or in the conducting of any sale made pursuant to the terms hereof, and to pay for such services rendered out of the proceeds of the sale of the Trust properly, should any be realized; and if no sale be made, then Lessee hereby undertakes and agrees to pay the cost of such services rendered to said Trustee.

15. **Filing of Financing Statements.** Pursuant to Section 9-509 of the UCC, Lessee authorizes Lessor to file financing statements with respect to the Mortgaged Property without the signature of Lessee in such form and in such filing offices as Lessor reasonably determines appropriate to perfect the security interests of Lessor under this Lease Supplement. A carbon, photographic or other reproduction of this Lease Supplement shall be sufficient as a financing statement for filing in any jurisdiction.
16. **Purchase Option.** Articles 15 through 22 of the Lease contains various purchase options and marketing rights, which may be exercised by Lessee during the various periods specified in the Lease, subject to the terms and conditions set forth therein.

17. **Priority.**

(a) THIS LEASE IS SUPERIOR TO A DEED OF TRUST DATED AS OF DECEMBER 17, 2002, IN FAVOR OF KEYBANK NATIONAL ASSOCIATION, AS AGENT (THE "AGENT"), UNDER THE PARTICIPATION AGREEMENT, DATED AS OF DECEMBER 17, 2002 (THE "PARTICIPATION AGREEMENT"), AMONG SELCO SERVICES CORPORATION, AS LESSOR (THE "LESSOR"), AGENT AND THE PARTICIPANTS.

(b) THIS LEASE IS SUPERIOR TO A LEASEHOLD DEED OF TRUST, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING DATED AS OF DECEMBER 17, 2002, IN FAVOR OF KEYBANK NATIONAL ASSOCIATION, AS ADMINISTRATIVE AGENT (THE "ADMINISTRATIVE AGENT"), UNDER THE CREDIT AGREEMENT, DATED AS OF DECEMBER 17, 2002 (THE "PARTICIPATION AGREEMENT"), AMONG LESSEE, THE ADMINISTRATIVE AGENT AND THE OTHER FINANCIAL INSTITUTIONS LISTED AS PARTIES THERETO.

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(c) NOTICE IS HEREBY GIVEN THAT NEITHER LESSOR, ANY PARTICIPANT NOR THE AGENT IS OR SHALL BE LIABLE FOR ANY LABOR, SERVICES OR MATERIALS FURNISHED OR TO BE FURNISHED TO LESSEE, OR TO ANYONE HOLDING THE PROPERTY OR ANY PART THEREOF THROUGH OR UNDER LESSEE, AND THAT NO MECHANICS' OR OTHER LIENS FOR ANY SUCH LABOR, SERVICES OR MATERIALS SHALL ATTACH TO OR AFFECT THE INTEREST OF LESSOR IN AND TO THE PROPERTY.

18. **Lessee's Waiver of Rights.** Except as otherwise set forth herein to the fullest extent permitted by law, Lessee waives the benefit of all laws now existing or that may subsequently be enacted providing for (i) any appraisal before sale of any portion of the Mortgaged Property, (ii) any extension of the time for the enforcement of the collection of the indebtedness or the creation or extension of a period of redemption from any sale made in collecting such debt and (iii) exemption of the Mortgaged Property from attachment, levy or sale under execution or exemption from civil process. Except as otherwise set forth herein, to the full extent Lessee may do so, Lessee agrees that Lessee will not at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter, in force providing for any appraisal, valuation, stay, exemption, extension or redemption, reinstatement or requiring foreclosure of this Lease Supplement before exercising any other remedy granted hereunder and Lessee, for Lessee and its successors and assigns, and for any and all Persons ever claiming any interest in the Mortgaged Property, to the extent permitted by law, hereby waives and releases all rights of redemption, reinstatement, valuation, appraisal, stay of execution, notice of election to mature or declare due the whole of the secured indebtedness and marshalling in the event of foreclosure of the liens hereby created.

19. **Multiple Security.** If (a) the Mortgaged Property shall consist of one or more parcels, whether or not contiguous and whether or not located in the same county, or (b) in addition to this Lease Supplement, Lessor shall now or hereafter hold one or more additional mortgages, liens, deeds of trust or other security (directly or indirectly) for the obligations upon other property, in the State in which the Mortgaged Property is located or (whether or not such property is owned by Lessee or by others) or (c) both the circumstances described in clauses (a) and (b) shall be true, then to the fullest extent permitted by law, Lessor may, in its sole discretion, commence or consolidate in a single foreclosure action all foreclosure proceedings against all such collateral securing the Lessee Obligations (including the Mortgaged Property), which action may be brought or consolidated in the courts of any county in which the Property is located. Lessee acknowledges that the right to maintain a consolidated foreclosure action is a specific inducement to Lessor to extend the Lessee Obligations and Lessee expressly and irrevocably waives any objections to the commencement or consolidation of the foreclosure proceedings in a single action and any objections to the laying of venue or based on the grounds of forum non conveniens which it may now or hereafter have. Lessee further agrees that if Lessor shall be prosecuting one or more foreclosure or other proceedings against a portion of the Mortgaged Property or against any collateral other than the Mortgaged Property, which collateral directly or indirectly secures the Lessee Obligations, or if Lessor shall have obtained a judgment of foreclosure and sale or similar judgment against such collateral, then, whether or not such proceedings are being maintained or judgments were obtained in or outside the State in which the Mortgaged Property is located, Lessor may commence or continue foreclosure proceedings and exercise its other remedies granted in the Lease and this Lease Supplement against all or any part of the Mortgaged Property, and Lessee waives any objections to the commencement or continuation of a foreclosure of Lessee's right, title and interest in the Mortgaged Property in accordance with the Operative Documents or exercise of any other remedies hereunder in accordance with the Operative Documents based on such other proceedings or judgments, and waives any right to seek to dismiss, stay, remove, transfer or consolidate either any action under this Lease Supplement or such other proceedings on such basis in the county where the Property is located. Neither the commencement nor continuation of proceedings to foreclose this Lease Supplement nor the exercise of any other rights hereunder nor the recovery of any judgment by Lessor in any such proceedings shall prejudice, limit or preclude Lessor's right to commence or continue one or more foreclosure or other proceedings or obtain a judgment against any other Mortgaged Property (either in or outside the State in which the Mortgaged Property is located) which directly or indirectly secures the Lessee Obligations, and Lessee expressly waives any objections to the commencement of, continuation of, or entry of a judgment in such other proceedings or exercise of any remedies in such proceedings based upon any action or judgment connected to this Lease Supplement, and Lessee also waives any right to seek to dismiss, stay, remove, transfer or consolidate either such other proceedings or any action under this Lease Supplement in the county where the Property is located on such basis.

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20. **Partial Release; Full Release.** Lessor may release, in accordance with the Operative Documents, for such consideration or none, as it may require, any portion of the Mortgaged Property without, as to the remainder of the Mortgaged Property, in any way impairing or affecting the lien, security interest, and priority herein provided for Lessor compared to any other lien holder or secured party. Further, upon full satisfaction of all Lessee Obligations which are secured by this Lease Supplement, Lessor shall execute and deliver to Lessee such documents and instruments as may be required to release the lien and security interest created by this Lease Supplement.
21. **Certain Rights of Lessor.** Except as provided in the Operative Documents, Lessor, with the express written consent of Lessee, may at any time or from time to time renew or extend this Lease Supplement, or alter or modify the same in any way, or Lessor may waive any of the terms, covenants or conditions hereof in whole or in part and may release any portion of the Mortgaged Property or any other security, and grant such extensions and indulgences in relation to the Lessee Obligations secured hereby as Lessor may determine without the consent of any other person and without any obligation to give notice of any kind thereto and without in any manner affecting the priority of the lien hereof on any part of the Mortgaged Property.
22. **Ratification.** Except as specifically modified hereby, the terms and provisions of the Lease are hereby ratified and confirmed and remain in full force and effect.
23. **Original Executed Counterpart.** The single executed original of this Lease Supplement marked "THIS COUNTERPART IS THE ORIGINAL EXECUTED COUNTERPART" on the signature page thereof and containing the receipt of the Agent therefor on or following the signature page thereof shall be the Original Executed Counterpart of this Lease Supplement (the "Original Executed Counterpart"). To the extent that this Lease Supplement constitutes chattel paper, as such term is defined in the UCC as in effect in any applicable jurisdiction, no security interest in this Lease Supplement may be created through the transfer or possession of any counterpart other than the Original Executed Counterpart.

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24. **GOVERNING LAW.** EXCEPT TO THE EXTENT OTHERWISE REQUIRED BY APPLICABLE LAW, THE LEASE SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES, EXCEPT AS TO MATTERS RELATING TO THE CREATION OF THE LEASEHOLD ESTATE THEREUNDER AND THE EXERCISE OF RIGHTS AND REMEDIES WITH RESPECT THERETO, WHICH SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE IN WHICH THE ESTATE IS LOCATED. WITHOUT LIMITING THE FOREGOING, IN THE EVENT THAT THE LEASE IS DEEMED TO CONSTITUTE A FINANCING, WHICH IS THE INTENTION OF THE PARTIES, THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES, SHALL GOVERN THE CREATION, TERMS AND PROVISIONS OF THE INDEBTEDNESS EVIDENCED HEREBY, BUT THE LIEN CREATED HEREBY AND THE ENFORCEMENT OF SAID LIEN SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE IN WHICH THE ESTATE IS LOCATED.
25. **Counterpart Execution.** This Lease Supplement may be executed in any number of counterparts and by each of the parties hereto in separate counterparts, all such counterparts together constituting but one and the same instrument.

[SIGNATURE PAGE FOLLOWS]

12.

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IN WITNESS WHEREOF, each of the parties hereto has caused this Lease Supplement to be duly executed by an officer thereunto duly authorized as of the date and year first above written.

SELCO SERVICE CORPORATION, an Ohio corporation, as Lessor

By: /s/Lawrence Cooper

Name: Lawrence Cooper

Title: Assistant Secretary

QUANTUM CORPORATION, a Delaware corporation, as Lessee

By: /s/Michael J.Lambert

Name: Michael J. Lambert

Title: Executive Vice President and CFO

[ATTACH NOTARIAL ACKNOWLEDGMENTS]

13.

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THIS COUNTERPART IS THE ORIGINAL EXECUTED COUNTERPART

Receipt of this original counterpart of the foregoing Lease is hereby acknowledged as of December 17, 2002.

KEYBANK NATIONAL ASSOCIATION, as Agent

By: /s/Robert W. Boswell

Name: Robert W. Boswell

Title: Vice President

14.

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**SCHEDULE I TO THE**

**LEASE SUPPLEMENT**

**Property Description**

LOTS 1 AND 2, FAIRLANE TECHNOLOGY PARK FILING NO. 4A, COUNTY OF EL PASO, STATE OF COLORADO

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Prepared by and upon recording return to:

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Two Embarcadero Center, Suite 2000  
San Francisco, California 94111

**MASTER LEASE,  
DEED OF TRUST WITH ABSOLUTE ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE  
FILING**

dated as of December 17, 2002,

**SELCO SERVICE CORPORATION,**

as Lessor

and

**QUANTUM CORPORATION,**

as Lessee

**Specialty Storage Product Group Facilities**

This Lease has been executed in counterparts. To the extent, if any, that this Lease constitutes chattel paper (as such term is defined in the Uniform Commercial Code as in effect in any applicable jurisdiction), no lien on this Lease may be created through the transfer or possession of any counterpart other than the original counterpart containing the receipt therefor executed by the Agent on the signature page hereof.

**THIS LEASE IS INTENDED TO CONSTITUTE AN OPERATING LEASE FOR FINANCIAL ACCOUNTING PURPOSES, BUT IS NOT INTENDED TO CONSTITUTE A TRUE LEASE FOR INCOME TAX PURPOSES. SEE ARTICLE 7.**

THIS LEASE IS SUPERIOR TO A DEED OF TRUST DATED AS OF DECEMBER 17, 2002, IN FAVOR OF KEYBANK NATIONAL ASSOCIATION, AS AGENT (THE "AGENT"), UNDER THE PARTICIPATION AGREEMENT, DATED AS OF DECEMBER 17, 2002 (THE "PARTICIPATION AGREEMENT"), AMONG LESSEE, SELCO SERVICE CORPORATION, AS LESSOR (THE "LESSOR"), THE AGENT AND THE PARTICIPANTS THEREIN IDENTIFIED.

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APPENDICES

Schedule 1 Legal Description of Land Interest

EXHIBITS

Exhibit A Form of Lease Supplement

SCHEDULE

Appendix 1 Definition and Interpretation

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**PARTICIPATION AGREEMENT**  
**DATED AS OF DECEMBER 17, 2002**  
**AMONG**  
**QUANTUM CORPORATION,**  
**AS LESSEE**  
**SELCO SERVICE CORPORATION,**  
**AS LESSOR AND AS A PARTICIPANT,**  
**COMERICA BANK-CALIFORNIA,**  
**FLEET NATIONAL BANK AND**  
**KEYBANK NATIONAL ASSOCIATION**  
**AS PARTICIPANTS,**  
**AND**  
**KEYBANK NATIONAL ASSOCIATION,**  
**AS AGENT**

**SPECIALTY STORAGE PRODUCT GROUP FACILITIES**

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THIS PARTICIPATION AGREEMENT, dated as of December 17, 2002 (this "Participation Agreement"), is entered into by and among **QUANTUM CORPORATION**, a Delaware corporation, as Lessee (together with its permitted successors and assigns, the "Lessee"); **SELCO SERVICE CORPORATION**, an Ohio corporation, as Lessor (together with its permitted successors and assigns, the "Lessor"); **COMERICA BANK-CALIFORNIA, FLEET NATIONAL BANK** and **KEYBANK NATIONAL ASSOCIATION** as Participants (together with their permitted successors and assigns and **SELCO SERVICE CORPORATION**, in its capacity as a Participant, each a "Participant" and collectively the "Participants"); and **KEYBANK NATIONAL ASSOCIATION** (in such capacity, together with its successors in such capacity, the "Agent") for the Participants.

- A. In accordance with the terms of the Participation Agreement dated as of August 22, 1997, among Lessee, Lease Plan North America, Inc., as lessor and a participant (the "Original Lessor"), ABN AMRO Bank N.V., San Francisco International Branch, as a participant, and ABN AMRO Bank N.V., San Francisco International Branch, as agent (the "Original Agent"), as amended by the First Amendment to Participation Agreement dated as of June 26, 1998, the Second Amendment to Participation Agreement dated as of December 18, 1998, the Third Amendment to Participation Agreement dated as of August 31, 1999, and the Fourth Amendment to Participation Agreement dated as of November 8, 1999 (said participation agreement, as so amended, the "Original Participation Agreement"), and the lease and the other operative documents executed thereunder,
- (i) Original Lessor purchased certain parcels of land designated by Lessee located in Colorado Springs, Colorado;
  - (ii) Using Advances from Original Lessor, Lessee, as Construction Agent, built administration, manufacturing, design, research and development and warehouse facilities on such parcels of land for Original Lessor, acquired certain items of Equipment to be used in connection with such Improvements and leased, as Lessee, such Equipment, Improvements and Land Interest from Original Lessor; and
  - (iii) Original Lessor obtained financing from the Original Participants of the funding of the costs of acquisition of such Land Interest, the construction of the Improvements and the acquisition of such Equipment through the purchase of Participation Interests.
- B. In accordance with the terms of the Amended and Restated Participation Agreement dated July 12, 2000, (as amended by the First Amendment to Amended and Restated Participation Agreement dated as of March 28, 2001, and by the Second Amendment to Amended and Restated Participation Agreement dated as of April 19, 2002, the "Amended Participation Agreement") Lessee, Lessor, and The Bank of Nova Scotia, as a participant and as agent (the "Successor Agent"), and Union Bank of California, N.A., as a participant, and KeyBank National Association, as a participant, amended the Original Participation Agreement in certain respects, and at the same time Lessor acquired Original Lessor's interests in the Land Interest, Improvements, Fixtures and Equipment and Lessor and certain participants acquired the participation interests of ABN AMRO Bank N.V., San Francisco International Branch.

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- C. Lessee and Participants have requested that the Amended Participation Agreement be entirely amended and restated and that the Participants refinance the existing synthetic lease contemplated therein (the "Existing Synthetic Lease") by entering into this Participation Agreement and other Operative Documents.

In consideration of the mutual agreements contained in this Participation Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree that the Amended Participation Agreement shall be amended and restated as of the date hereof to read in its entirety as follows:

## SECTION 1

### DEFINITIONS; INTERPRETATION

Unless the context shall otherwise require, capitalized terms used and not defined herein shall have the meanings assigned thereto in **Appendix 1** hereto for all purposes hereof; and the rules of interpretation set forth in **Appendix 1** hereto shall apply to this Participation Agreement.

## SECTION 2

### CLOSING DATE

The closing date (the "Closing Date") shall occur on the earliest date on which all the conditions precedent thereto set forth in Sections 6.1 and 6.2 hereof shall have been satisfied or waived by the applicable parties as set forth therein.

## SECTION 3

### FUNDING OF REFINANCING ADVANCE

Section 3.1 **Lessor Commitment.** Subject to the conditions and terms hereof, Lessor shall on the Closing Date make the Refinancing Advance (out of funds provided by the Participants) for the purpose of refinancing the Existing Synthetic Lease. The Refinancing Advance will be applied to repay the various holders of interests in the principal balance of the Existing Synthetic Lease, and on the Closing Date Lessee will repay any other amounts owed by it under the Existing Synthetic Lease.

Section 3.2 **Participants' Commitments.** Subject to the terms and conditions hereof, each Participant severally shall purchase a Participation Interest in the Refinancing Advance being made by Lessor at the request of Lessee by making available to Lessor on the Closing Date an amount in immediately available funds equal to such Participants' Commitment Percentage of the amount of the Refinancing Advance being funded on the Closing Date. Notwithstanding any other provision hereof, no Participant shall be obligated to purchase its Participation Interest in the Refinancing Advance if (i) the amount of such purchase would exceed its Participant's Commitment, or (ii) the Refinancing Advance exceeds \$50,000,000 in aggregate.

Section 3.3 **Procedures for Refinancing Advance.** Lessee shall give Lessor and Agent prior written notice not later than 10:00 a.m., San Francisco time, three (3) Business Days prior to the proposed Closing Date, pursuant to the Funding Request substantially in the form of **Exhibit A** (the "Funding Request"), specifying or confirming with respect to such Refinancing Advance:

- (i) the proposed Closing Date,
- (ii) the amount of the Refinancing Advance (\$50,000,000),
- (iii) the initial Offshore Rate Period Election, including the duration of the first Interest Period,
- (iv) the Persons to whom the Refinancing Advance is to be paid.

Agent shall promptly forward a copy of such Funding Request to each Participant. Subject to the satisfaction or waiver of the conditions precedent to the Refinancing Advance set forth in Section 6, each Participant shall purchase its Participation Interest in the Refinancing Advance by making available to Lessor its proportionate share of the Refinancing Advance in immediately available federal funds by wire transfer to Agent for deposit to Lessee's demand deposit account with Agent not later than 12:00 noon, San Francisco time, on the Closing Date. Upon (i) Lessee's receipt of the funds provided by the Participants with respect to the Refinancing Advance, and (ii) satisfaction or waiver of the conditions precedent to the Refinancing Advance set forth in Section 6, Lessee shall pay the Refinancing Advance to the Successor Agent in accordance with the terms and provisions of the Amended Participation Agreement.

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Section 3.4 **Intentionally deleted.**

Section 3.5 **Allocation of Commitments.** **Schedule I** hereto contains an allocation for each Participant of (i) the amount of its Commitment to fund the purchase of its Tranche A Participation Interest ("Tranche A Participation Interest Commitment"), (ii) the amount of its Commitment to purchase its Tranche B Participation Interest ("Tranche B Participation Interest Commitment"), (iii) in the case of Lessor as the Tranche C Participant, the amount of its Commitment to fund the equity investment representing its Tranche C Participation Interest ("Tranche C Participation Interest Commitment"), (iv) the amount of its Commitment (and allocation to its Tranche A Participation Interest Commitment, Tranche B Participation Interest Commitment and, in the case of Lessor, Tranche C Participation Interest Commitment), and (v) the percentage referred to in the definition of the term "Participation Interest." Lessee, Lessor and the other Participants have approved all such allocations and percentages. **Schedule I** shall be amended as required to reflect changes in the allocations set forth thereon due to the addition of additional Participants pursuant to Section 12.1.

Section 3.6 **Intentionally deleted.**

Section 3.7 **Intentionally deleted.**

Section 3.8 **Interest Rates; Yield; Payment Dates; and Calculations Related to the Initial Adjustment and the Adjusted Lease Balance.**

- (a) The nonequity portion of the Adjusted Lease Balance (consisting of the Adjusted Tranche A Balance and the Tranche B Balance) shall bear interest during each Interest Period at a rate per annum equal to the Effective Rate for such Interest Period plus the Applicable Margin. The equity portion of the Adjusted Lease Balance (consisting of the Tranche C Balance) shall accrue equity yield (the "Yield") during each Interest Period at a rate equal to the Effective Rate plus the Applicable Margin.
- (b) If all or a portion of (i) the Adjusted Lease Balance (including the Adjusted Tranche A Balance, the Tranche B Balance and the Tranche C balance), (ii) any interest or Yield payable thereon or (iii) any other amount payable by Lessee hereunder or under the Lease is not paid when due (whether at the stated maturity, by acceleration or otherwise), such overdue amount shall bear interest at a rate per annum which is equal to the Overdue Rate.
- (c) All interest and Yield accruing during each Interest Period shall be due and payable as Basic Rent in arrears on the last day of such Interest Period, except as follows:

(i) Any interest or Yield accruing at the Overdue Rate pursuant to subsection (c) of this Section 3.8 shall be payable from time to time on demand.

(ii) Any prepayment of any part of the Adjusted Lease Balance shall be accompanied by accrued interest and Yield to the date of such prepayment on the amount of the Adjusted Lease Balance so prepaid.

(iii) For each Interest Period after Lessee pays the Initial Adjustment, an amount (the "Initial Adjustment Amortization") will accrue equal to the sum of (1) the Adjusted Tranche A (KeyBank) Percentage, times the interest accruing during such Interest Period on the Adjusted Tranche A Balance, plus (2) the product of 47.53927% times the interest accruing during such Interest Period on the Tranche B Balance, plus (3) the Yield accruing during such Interest Period on the Tranche C Balance. In no event, however, will the accrual of Initial Adjustment Amortization for any Interest Period exceed the Remaining Unamortized Initial Adjustment, if any, determined as of the last day of such period (before the deduction of such Initial Adjustment Amortization and after any Proportionate Reductions which may occur on such date as described in the next clause). The Initial Adjustment Amortization accruing during each Interest Period will be deducted automatically from the Remaining Unamortized Initial Adjustment on the Payment Date upon which such Interest Period ends, and at the same time, a corresponding, equal credit (the "Basic Rent Credit") against accrued interest and Yield on the Adjusted Lease Balance will be given as if Lessee had made an additional timely payment of Basic Rent equal to such Initial Adjustment Amortization. Thus, the actual out-of-pocket payment of Basic Rent required of Lessee for each Interest Period will equal the total interest and Yield accruing as described in clauses (a) above, less the Initial Adjustment Amortization which accrues during such Interest Period.

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(d) When any Lease Related Payment is applied to reduce the Lease Balance, the Remaining Unamortized Initial Adjustment will also be reduced automatically by a percentage equal to a fraction, the numerator of which is the dollar amount of the reduction of the Lease Balance resulting from such application, and denominator of which is the Adjusted Lease Balance just prior to the reduction. At the same time, the Lease Balance will be deemed further reduced by a sum equal to the dollar amount (if any) by which the Remaining Unamortized Initial Adjustment is automatically reduced. Such further reduction of the Lease Balance and the corresponding automatic reduction of the Remaining Unamortized Initial Adjustment when a Lease Related Payment is applied to the Lease Balance are referenced herein as "Proportionate Reductions." (The following examples are provided only to illustrate the types of calculations required for Proportionate Reductions:

Example #1: Assume that prior to the application of property insurance proceeds resulting from a Casualty, the Lease Balance is \$50,000,000 and the Remaining Unamortized Lease Balance is \$2,000,000, leaving an Adjusted Lease Balance of \$48,000,000. Assume also that \$12,000,000 of property insurance proceeds [*i.e.*, a Lease Related Payment] are paid to Agent and applied against the Lease Balance, thereby reducing the Lease Balance to \$38,000,000 and also reducing the Adjusted Lease Balance from \$48,000,000 to \$36,000,000 [a reduction of 25%]. Under these assumptions, the Remaining Unamortized Initial Adjustment will be reduced automatically by 25%, from \$2,000,000 to \$1,500,000, which is a reduction of \$500,000. At the same time, the Lease Balance will be further reduced by \$500,000, from \$38,000,000 to \$37,500,000. In this example, the "Proportionate Reductions" are the automatic \$500,000 reduction of the Remaining Unamortized Initial Adjustment and \$500,000 reduction of the Lease Balance. After giving effect to all of these adjustments, the Adjusted Lease Balance will equal the \$37,500,000 Lease Balance, less the \$1,500,000 Remaining Unamortized Initial Adjustment, or \$36,000,000.

Example #2: Assume that immediately following the application of insurance proceeds as described in the preceding example, Lessee purchases Lessor's interest in the Property pursuant to the Lease and pays (in addition to any Basic Rent or other Supplemental Rent then due) a purchase price equal to the Adjusted Lease Balance, or \$36,000,000. The \$36,000,000 payment will initially reduce the Lease Balance to \$1,500,000 and also reduce the Adjusted Lease Balance from \$36,000,000 to \$0 [a reduction of 100%]. Under these assumptions, the Remaining Unamortized Initial Adjustment will be reduced automatically by 100%, from \$1,500,000 to \$0, which is a reduction of \$1,500,000. At the same time, the Lease Balance will be further reduced by same dollar amount, from \$1,500,000 to \$0. In this example, the "Proportionate Reductions" are the automatic \$1,500,000 reduction of the Remaining Unamortized Initial Adjustment and \$1,500,000 reduction of the Lease Balance.)

(e) As reasonably requested by Lessee from time to time, Lessor will provide Lessee with a confirmation of the amount of, and a calculation in reasonable detail of, the Remaining Unamortized Initial Adjustment and of the Lease Balance, the Tranche A Balance, the Adjusted Lease Balance and allocation of the Adjusted Lease Balance among the Adjusted Tranche A Balance, the Tranche B Balance and the Tranche C Balance.

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### Section 3.9 **Computation of Interest and Yield.**

(a) Whenever it is calculated on the basis of the Alternate Base Rate, interest and Yield shall be calculated on the basis of a 365- (or 366-, as the case may be) day year for the actual days elapsed; and, otherwise, interest and Yield shall be calculated on the basis of a 360-day year for the actual days elapsed. Agent shall as soon as practicable after the commencement of each Interest Period notify Lessor, Lessee and the Participants of each determination of a Offshore Rate. Any change in the interest rate or Yield rate on the Refinancing Advance resulting from a change in the Alternate Base Rate or the Eurocurrency Reserve Requirements shall become effective as of the opening of business on the day on which such change becomes effective. Agent shall as soon as practicable notify Lessor, Lessee and the Participants of the effective date and the amount of each such change in interest rate or Yield rate.

- (b) Each determination of an interest rate or Yield rate by Agent pursuant to any provision of this Participation Agreement shall be conclusive and binding on Lessor, Lessee and the Participants in the absence of manifest error. Agent shall, at the request of such parties, deliver to such parties a statement showing the quotations used by Agent in determining any interest rate pursuant to Section 3.9(a).

**Section 3.10 Allocation and Timing of Payments; the Account.**

- (a) If, other than by a distribution received from Agent as hereinafter provided, any Participant (including Lessor) receives any Lease Related Payment, or if any Participant realizes the equivalent of a Lease Related Payment by way of offset against other amounts it owes to Lessee, then such Participant must promptly pay an equal amount to Agent for application and distribution as provided in this Participation Agreement. Any such payment to Agent will be considered a payment on account of the Lessee Obligations, and any such payment received by Agent from any Participant and any other Lease Related Payment made directly to Agent shall reduce the Lease Balance, unless and except to the extent applied to satisfy Lessee's obligation for Basic Rent or for other Supplemental Rent.
- (b) Also, a payment to Agent of any amount made by or on behalf of Lessee on account of the Lessee Obligations (including payments made by Participants to Agent in respect of Lease Related Payments as provided above) shall be considered effective to satisfy Lessee's liability for such amount (regardless of whether Lessee owes the amount to Agent, Lessor or another Participant according to the Operative Documents) upon the date of receipt of the same by Agent in immediately available funds if such receipt by Agent occurs on a Business Day before noon San Francisco time, and otherwise on the next following Business Day after such receipt by Agent. Without limiting the foregoing, any delay by Agent following Agent's receipt of a payment on account of the Lease Obligations in distributing the payment to Participants (including any delay authorized by the following provisions of this Section 3 or by Section 11.10 below) will not defer or impair the effectiveness of the payment for purposes of determining whether Lessee has satisfied the Lessee Obligations and for purposes of computing Basic Rent accruals or other amounts owing by Lessee under the Operative Documents. Lessor and other Participants agree that Lessee may pay or cause the payment of any Lease Related Payment directly to Agent for distribution as provided herein, after which Lessee will have no obligation to account to Lessor or other Participants for any failure of Agent to distribute such Lease Related Payment in accordance with the requirements of this Agreement.

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- (c) Except as otherwise provided in Sections 3.11--3.23, Agent may apply payments made to it on account of the Lease Obligations to cover accrued, unpaid Basic Rent, to repay and reduce the Lease Balance or to cover other Supplemental Rent then due in any order Agent deems appropriate and in the best interests of Participants, collectively.
- (d) Except as provided in Sections 3.11--3.23, (1) each Lease Related Payment (including any prepayment) made to Agent or to Lessor which constitutes a repayment by or on behalf of Lessee of the Adjusted Lease Balance or any part thereof shall be allocated among, and ratably reduce, the Adjusted Tranche A Balance, the Tranche B Balance and the Tranche C Balance, and (2) each such repayment and all other payments representing interest or Yield on the Adjusted Lease Balance shall be distributed pro rata among the Tranche A Participants, Tranche B Participants and the Tranche C Participant according to the respective Participation Interests of each such Participant. Any such repayment or payment that is, according to this Participation Agreement, to be applied or distributed "pro rata" to Tranche A Participants will be made to such Participants without priority of one over the other (except as provided in the next clause (e), regarding adjustments required because of the Basic Rent Credits) in the proportion to their respective Tranche A Participation Interests in such payment. Any such repayment or payment that is, according to this Participation Agreement, to be applied or distributed "pro rata" to Tranche B Participants will be made to such Participants without priority of one over the other (except as provided in the next clause (e)) in the proportion to their respective Tranche B Participation Interests in such payment. Any such repayment or payment that is, according to this Participation Agreement, to be applied or distributed "pro rata" to both Tranche A Participants and Tranche B Participants will be made to such Participants without priority of one over the other (except as provided in the next clause (e)) in the proportion to the sum of their respective Tranche A Participation Interests and Tranche B Participation Interests in such payment.
- (e) For purposes of determining the proper distribution of payments of Basic Rent among Participants, any Basic Rent Credit given on any Payment Date pursuant to Section 3.8(c)(iii) will be considered as a receipt or realization of a payment of Basic Rent equal to such Basic Rent Credit by KeyBank National Association, in its capacity as a Tranche A Participant and Tranche B Participant. Thus, on the Payment Date upon which any Basic Rent Credit becomes effective, KeyBank National Association will be required by subsection (a) above to pay to Agent an amount equal to such credit for distribution (along with actual payment of Basic Rent made by Lessee) as provided in Section 3.12. In the event KeyBank National Association fails to pay such amounts to Agent, the remedies of the other Participants shall be solely against KeyBank National Association and not against Lessee. (The following example is provided only to illustrate the types of calculations required with respect to Basic Rent Credits and the distribution of Basic Rent among Participants:



**Example:** Assume that the total interest and Yield accruing as described in Section 3.8(a) on the Adjusted Lease Balance for a given Interest Period is \$100,000, and \$52,000 of Initial Adjustment Amortization also accrues for such Interest Period, resulting in a Basic Rent Credit of \$52,000, of which \$5,000 is attributable to Yield accrued on the Tranche C Balance and the remainder is attributable to interest accrued on the Adjusted Tranche A Balance and on the Tranche B Balance. Assume also that Lessee makes a timely payment of Basic Rent for such Interest Period in the amount of the remaining \$48,000 payable by Lessee (after application of the Basic Rent Credit). Under these assumptions, KeyBank National Association, as a Participant, will be deemed to have received a direct payment of Basic Rent of \$52,000, which in accordance with subsection (a) of this Section must be paid over to Agent. Such amount, together with the \$48,000 of Basic Rent actually paid by Lessee, will give Agent \$100,000 to be distributed in accordance with Section 3.12. Section 3.12 will require that Agent distribute the \$47,000 to KeyBank National Association and \$48,000 to other Tranche A Participants and Tranche B Participants, and then distribute the remaining \$5,000 to Lessor as the Tranche C Participant.)

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- (f) Subject to any contrary requirements of Applicable Law and to the rights of the Participants under other provisions of the Operative Documents or provisions of other agreements binding upon Lessee (including the Loan Documents), if Agent or Lessor should receive Lease Related Payments in excess of all then outstanding Lessee Obligations, then Agent or Lessor (as the case may be) must pay such excess to, or as directed by, Lessee.
- (g) If any payment under the Operative Documents, other than the Initial Adjustment or payments representing the repayment of the Lease Balance or any part thereof, becomes due and payable on a day other than a Business Day, such payment shall be extended to the next succeeding Business Day. If any payment of the Initial Adjustment or representing a repayment of the Lease Balance or any part thereof becomes due and payable on a day other than a Business Day, the maturity thereof shall be extended to the next succeeding Business Day unless the result of such extension would be to extend such payment into another calendar month, in which event such payment shall be made on the immediately preceding Business Day. In the case of any extension or shortening of the due date of any payment which will reduce the Adjusted Lease Balance pursuant to the preceding two sentences, interest or Yield thereon shall be payable at the then applicable rate during such extension or until such shortened due date, as the case may be.
- (h) The Agent may, if it so desires to do so, establish an account (the "Account") into which Agent shall deposit all Lease Related Payments or other payments, receipts and other consideration of any kind whatsoever received by Agent pursuant to this Participation Agreement, the Lease and any other Operative Document. Agent shall make distributions of such payments, receipts and other consideration (and, if an Account is used, from the Account) pursuant to the requirements of Sections 3.11--3.23 hereof.

Section 3.11 **The Initial Adjustment.** The payments of Initial Adjustment will not reduce the Lease Balance, but will reduce the Adjusted Lease Balance. The payment of the Initial Adjustment shall be applied and distributed by Agent as promptly as possible (it being understood that any such payment received by Agent on a timely basis and in accordance with the provisions of the Lease shall be applied and distributed on the date received in the funds so received) to KeyBank National Association, as a Tranche A Participant, whereupon the entire reduction in the Adjusted Tranche A Balance resulting from such payment shall be allocated to and reduce the Participation Interest of KeyBank National Association in the Adjusted Lease Balance. As subsequent accruals of Initial Adjustment Amortization are deducted from the Remaining Unamortized Initial Adjustment, thereby increasing the Adjusted Lease Balance, the entire amount of the increases will be allocated to and increase the Participation Interest of KeyBank National Association in the Adjusted Tranche A Balance.

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Section 3.12 **Basic Rent.** Payments of Basic Rent will not reduce the Lease Balance or Adjusted Lease Balance. Each payment (or portion thereof) of Basic Rent shall be applied and distributed by Agent as promptly as possible (it being understood that any payments of such component of Basic Rent received by Agent on a timely basis and in accordance with the provisions of the Lease shall be applied and distributed on the date received in the funds so received) in the following order of priority:

- (a) first, pro rata among the Tranche A Participants and the Tranche B Participants until the aggregate of all payments of Basic Rent which they have received equals the aggregate of all interest which has accrued on the Tranche A Balance and Tranche B Balance pursuant to Section 3.8(a), and
- (b) second, to Lessor as the Tranche C Participant as the payment of the Yield on the Tranche C Participation Interest.

Section 3.13 **Proceeds of a Purchase by Lessee.** Any payment of all or part of the Asset Termination Value received by Agent (whether by way of offset against the Cash Collateral or by reason of the application of the Cash Collateral or of proceeds drawn under the Letter of Credit or otherwise) as a result of:

- (a) the purchase of Lessor's interest in all of the Property in connection with Lessee's exercise of its Purchase Option under Section 20.1 of the Lease, or
- (b) Lessee's compliance with its obligation to purchase Lessor's interest in the Property in accordance with Section 20.2 of the Lease, or
- (c) the payment of the Asset Termination Value in accordance with Sections 16.2(b), 16.3 or 16.4 of the Lease, or

(d) Lessee failing to fulfill one or more of the conditions to exercise of the Remarketing Option pursuant to Section 22.1 of the Lease and Agent's receipt pursuant to the next-to-last paragraph of Section 22.1 of the Lease of the Asset Termination Value in accordance with Section 20.2 of the Lease, shall be applied and distributed by Agent as promptly as possible (it being understood that any such payment received by Agent on a timely basis and in accordance with the provisions of the Lease shall be applied and distributed on the date on which such funds are so received) in the following order of priority:

(1) first, without reduction of the Lease Balance, to cover any Excepted Payments owed by Lessee, with distributions made in accordance with Section 3.17;

(2) second, without reduction of the Lease Balance, to cover any accrued, unpaid Basic Rent, with distributions made in accordance with Section 3.8;

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(3) third, with a corresponding reduction of the Lease Balance, to repay the Adjusted Tranche A Balance and the Tranche B Balance, with distributions made pro rata among the Tranche A Participants and the Tranche B Participants until their Participation Interests in the Adjusted Tranche A Balance and the Tranche B Balance have been repaid in full, and

(4) fourth, with a corresponding reduction to the Lease Balance, to repay the Tranche C Balance, with distributions to Lessor (as the Tranche C Participant); and

(5) finally, after the Lease Balance has been repaid in full by the foregoing allocations, any remaining balance of such a payment (e.g., any amounts attributable to interest accruing on past due payments of Basic Rent) will be distributed as Agent determines to be appropriate under this Agreement and the other Operative Documents, taking into account the reasons why such remaining balance exists.

Section 3.14 **Residual Value Guarantee Amount Payment by Lessee.** The payment by Lessee of the Residual Value Guarantee Amount to Agent in accordance with Section 15.4 or Article XXII of the Lease, in the event of Lessee's exercise of the Remarketing Option, shall be applied and distributed by Agent as promptly as possible (it being understood that any such payment received by Agent on a timely basis in accordance with the provisions of the Lease shall be applied and distributed on the date on which such funds are so received) to repay the Adjusted Tranche A Balance, with a corresponding reduction of the Lease Balance and with distributions made pro rata among the Tranche A Participants.

Section 3.15 **Sales Proceeds of Remarketing of Property.** Any payments received by Agent as proceeds from a sale of the Property because of Lessee's exercise of the Remarketing Option pursuant to Article XXII of the Lease, together with any payment made by Lessee as a result of an appraisal pursuant to Section 13.2 of this Participation Agreement, shall be applied and distributed by Agent as promptly as possible (it being understood that any such payment received by Agent on a timely basis and in accordance with the provisions of the Lease shall be applied and distributed on the date on which the funds are so received) in the same order of priority and with the same application to the Lease Balance as is listed in Section 3.13, except that if the aggregate amount of such sales proceeds and any such payment made by Lessee exceeds the Adjusted Lease Balance and all amounts otherwise due or owing by Lessee under this Agreement, under the Lease or under any of the other Operative Documents, then such excess shall be promptly distributed to, or as directed by, Lessee.

Section 3.16 **Supplemental Rent.** All payments of Supplemental Rent received by Agent (excluding any amounts applied and distributed pursuant to the other provisions of this Section 3) shall be distributed promptly by Agent upon receipt thereof to the Persons entitled thereto pursuant to the Operative Documents. Supplemental Rent shall not, except as provided in the other provisions of this Section 3, reduce the Lease Balance or Adjusted Lease Balance.

Section 3.17 **Excepted Payments.** Notwithstanding any other provision of this Participation Agreement or the Operative Documents, any Excepted Payment received at any time by Agent shall be distributed promptly to the Person entitled to receive such Excepted Payment pursuant to the Operative Documents. Excepted Payments shall not reduce the Lease Balance or Adjusted Lease Balance.

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Section 3.18 **Distribution of Payments During the Continuation of an Accelerated Purchase Event.** Notwithstanding the foregoing provisions of Sections 3.11 through 3.15, this section 3.18 will govern the application of any and all Lease Related Payments, other than Excepted Payments, paid to or realized by Lessor or Agent during the continuation of an Accelerated Purchase Event. All such amounts shall, if received by Lessor, be paid to Agent as promptly as possible and shall be applied and distributed by Agent as promptly as possible (it being understood that any such payment received by Agent on a timely basis and in accordance with the provisions of the Operative Documents shall be applied and distributed on the date received in the funds so received) in the following order of priority:

(a) first, without reduction of the Lease Balance, so much of such payment or amount as shall be required to reimburse Lessor or Agent for any costs incurred by them to enforce the Operative Documents against Lessee or to or enforce, protect, preserve or maintain any Security or property covered thereby (including, to the extent not previously reimbursed, those costs incurred in connection with any duties of Agent as Agent) and any unpaid ongoing fees of Lessor and Agent shall be distributed to each of them for its own account;

- (b) second, without reduction of the Lease Balance, so much of such payments or amounts as shall be required to repay the then existing or prior Participants for payments made by them to reimburse Lessor for costs incurred by Lessor pursuant to Section 18.1 of the Lease (to the extent such Participants have not already been repaid such amounts) and to pay such then existing or prior Participants the amounts payable to them pursuant to any expense reimbursement or indemnification provisions of the Operative Documents shall be distributed to each such Participant without priority of one over the other in accordance with and proportion to the amounts of such payment or payments payable to each such Person;
- (c) third, in the same order of priority and with the same application to the Lease Balance that is listed in Section 3.13, until the entire Adjusted Lease Balance has been repaid and all amounts otherwise due or owing by Lessee under this Agreement, the Lease or any of the other Operative Documents have been paid in full;
- (d) lastly, to, or as directed by, Lessee or as otherwise required by Applicable Law.

Section 3.19 **Proceeds from any Foreclosure of the Mortgage.** As among Lessor, Agent and Participants, it is understood and agreed that proceeds of any foreclosure sale under the Mortgage which are received by Agent shall be applied and distributed by Agent as promptly as possible (it being understood that any such payment received by Agent on a timely basis and in accordance with the provisions of the Operative Documents shall be applied and distributed on the date received in the funds so received) in the following order of priority:

- (a) first, so much of such payment or amount as shall be required to reimburse Agent for any cost incurred by it in connection with its duties of Agent and for any unpaid ongoing fees of Agent shall be retained by Agent for its own account;

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- (b) second, pro rata among the Tranche A Participants and the Tranche B Participants until they have been repaid in full their Participation Interests, including their Tranche A Participation Interests and the Tranche B Participation Interests;
- (c) lastly, to, or as directed by, Lessor or as otherwise required by law.

With the understanding that any such foreclosure sale will be subject in all respects to (and thus will not cut off or otherwise affect) the Lease and Lessee's rights under the other Operative Documents, Lessee agrees that it will have no claim to or interest in any such foreclosure proceeds. Further, Lessee agrees that as between it and Lessor and its successors and assigns (including the purchaser at any such foreclosure sale), neither the Lease Balance nor the Adjusted Lease Balance will be reduced by any such foreclosure proceeds. Thus, neither Basic Rent, nor Asset Termination Value nor the Residual Value Guarantee Amount nor any other amount, the calculation of which is dependent upon the Lease Balance or the Adjusted Lease Balance, will be reduced by reason of any such foreclosure or distributions made pursuant to this section, and all such amounts will be calculated after any foreclosure under the Mortgage as if there had been no foreclosure. Further, after any such foreclosure, Lessee's obligations under the Operative Documents will continue to be secured by the Letter of Credit or any Cash Collateral Agreement to the same extent and in the same manner as before the foreclosure, and any purchaser at such foreclosure sale will acquire all rights of Lessor and the Participants under this Agreement and the Lease, including (1) the right to receive payments of Basic Rent and any repayments of the Lease Balance made after the foreclosure by or on behalf of Lessee pursuant to the Lease or this Agreement, and (2) the right to be indemnified by Lessee for claims, damages or expenses arising after the foreclosure to the same extent that Lessor or other Participants would have been entitled to indemnity hereunder if they had suffered such claims, damages or expenses and there had been no foreclosure.

Section 3.20 **Partial Purchase Option Price.** Any Partial Purchase Option Price paid to Agent shall be applied and distributed by Agent as promptly as possible (it being understood that any such payment received by Agent on a timely basis and in accordance with the provisions of the Lease shall be applied and distributed on the date received in the funds so received) in the following order of priority:

- (a) first, without reduction of the Lease Balance, so much of such payment or amount as shall be required to reimburse Lessor or Agent for any costs incurred by Lessor or Agent in connection with the sale for which such Partial Purchase Option Price is paid (to the extent such costs are not otherwise paid or reimbursed by Lessee as provided in the Lease);
- (b) second, without reduction of the Lease Balance, to cover any other amounts (excluding the Adjusted Lease Balance) then due and payable by Lessee under this Agreement, the Lease or any of the other Operative Documents, with distributions made among Lessor and other Participants in accordance with other provisions of this Section 3, until all such amounts have been paid in full;
- (c) third, to prepay the Adjusted Lease Balance and any Basic Rent accrued on the portion of the Adjusted Lease Balance so prepaid and any Funding Losses associated with such prepayment, with distributions of said amount made pro rata among all Participants (including Lessor) in proportion to their Participation Interests in the amounts so paid, and with any reduction of the Adjusted Lease Balance applied ratably to each of the Adjusted Tranche A Balance, the Tranche B Balance and the Tranche C Balance, until the entire Adjusted Lease Balance and all accrued Basic Rent and any such Funding Losses have been paid in full; and

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- (d) lastly, the balance, if any, shall be promptly distributed to, or as directed by, Lessee.

Section 3.21 **Other Payments.** Any sums received by Agent, Lessor or another Participant for which provision as to the application thereof is expressly made in an Operative Document, but not elsewhere in this Section 3, shall be applied and distributed forthwith by Agent, Lessor or such other Participant (as applicable) to the Person and for the purpose for which such payment was made in accordance with the terms of such Operative Document.

Section 3.22 **Casualty and Condemnation Amounts.** Any Net Proceeds made to Lessor or Agent as a result of a Casualty or Condemnation pursuant to Section 15.1 of the Lease (but excluding any amounts payable pursuant to Section 16.2 of the Lease) shall, if no Accelerated Purchase Event exists, be paid over to Lessee for (and over the course of) the rebuilding or restoration of that portion of the Property affected by such Casualty or Condemnation as necessary to cover the actual, out-of-pocket cost to Lessee of such rebuilding or restoration. (Pending the payment of such amounts to Lessee for rebuilding or restoration or the application and distribution of such amounts as set forth below in this Section, any such amounts will be held in an interest bearing deposit account maintained by Agent, and the interest that accrues on such account pending disbursement from such account will accrue to the benefit of Lessee and be added to and applied in the same manner as the principal deposited therein. So long as Net Proceeds are held in such an account, they will not be considered Lease Related Payments for purposes of this Agreement.) Notwithstanding the foregoing, but without limiting Lessee's obligation to rebuild and restore the Property as provided in the Lease, any such amounts shall, upon request by Lessee, be applied and distributed by Lessor or Agent as set forth below in this Section. Also, if an Accelerated Purchase Event exists, then during the continuance of such Accelerated Purchase Event, all such amounts (not only those in excess of the cost of rebuilding or restoration) shall, at the option of Agent, either be held and used for rebuilding or restoration or applied and distributed as set forth below in this Section.

Following any determination that any Net Proceeds paid to Lessor or Agent as a result of a Casualty or Condemnation pursuant to the Lease (but excluding any amounts payable pursuant to Sections 15.4 or 16.2 of the Lease, the application and distribution of which will be governed by other provisions of this Section 3) need not and will not be paid to Lessee or held by Agent or Lessor for rebuilding or restoration as aforesaid; however, all such Net Proceeds which constitute Lease Related Payments (as provided in the definition thereof), will be applied and distributed by Agent or Lessor as promptly as possible following such a determination in the following order of priority:

- (a) first, without reduction of the Lease Balance, so much of such amounts as shall be required to reimburse Lessor or Agent for any costs incurred by Lessor or Agent in connection with the Casualty or Condemnation which generated such amounts (to the extent such costs are not otherwise paid or reimbursed by Lessee as provided in the Lease);

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- (b) second, without reduction of the Lease Balance, to cover any other amounts (excluding the Adjusted Lease Balance) then due and payable by Lessee under this Agreement, the Lease or any of the other Operative Documents, with distributions made among Lessor and other Participants in accordance with other provisions of this Section 3, until all such amounts have been paid in full;
- (c) third, to prepay the Adjusted Lease Balance and any Basic Rent accrued on the portion of the Adjusted Lease Balance so prepaid and any Funding Losses associated with such prepayment, with distributions of said amount made pro rata among all Participants (including Lessor) in proportion to their Participation Interests in the amounts so paid, and with any reduction of the Adjusted Lease Balance applied proportionately to each of the Adjusted Tranche A Balance, the Tranche B Balance and the Tranche C Balance, until the entire Lease Balance and all accrued Basic Rent and any such Funding Losses have been paid in full; and
- (d) lastly, the balance, if any, shall be promptly distributed to, or as directed by, Lessee.

Section 3.23 **Credits for Available Cash Collateral and Letter of Credit Proceeds.** Notwithstanding any other provision in this Participation Agreement, the Lease or any other Operative Document to the contrary, Lessee, Agent, the Participants and Lessor agree that upon the maturity or acceleration of Lessee's obligation to pay the Asset Termination Value, Residual Value Guarantee Amount or Purchase Option Price, any and all amounts of Cash Collateral previously deposited by Lessee pursuant to the Cash Collateral Agreement and any or all proceeds drawn on the Letter of Credit may be applied by Agent to satisfy Lessee's obligation to pay the Asset Termination Value, Purchase Option Price or Residual Value Guarantee, as applicable. Further, Lessee itself may direct and require such application of the Cash Collateral or the proceeds of the Letter of Credit at any time, provided that (1) Lessee gives such direction by an irrevocable, unconditional written notice to Agent and the Participants (including Lessor), and (2) no such direction by Lessee will be effective with regard to such amounts or proceeds which have already been returned or paid to Lessee or offset or applied by Agent, Lessor or any other Participant against any Lessee Obligations. If, at the time Lessee gives any such direction, any such amounts of Cash Collateral or proceeds of the Letter of Credit which have not previously been paid or returned to Lessee or offset or applied against Lessee Obligations are not actually available for payment of the Asset Termination Value, Purchase Option Price or Residual Value Guarantee for reasons attributable to Lessor, Agent or any Participant, then Lessee will nonetheless be entitled to a credit against such payment for such unavailable amounts or proceeds; provided, however, that Lessee assigns to Agent (for the benefit of Lessor and Participants) all right, title and interest of Lessee in and to such unavailable amounts or proceeds. For purposes of the preceding sentence, "reasons attributable to Lessor, Agent or any Participant" shall include, without limitation, any fraud or misapplication of funds by Lessor, Agent or any Participant or the filing by or against Lessor, Agent or any Participant of any insolvency, bankruptcy, dissolution, liquidation, reorganization or similar proceeding.

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## SECTION 4

### FEES

Section 4.1 **Administrative Fee.** Lessee shall pay an administrative fee (the "Administrative Fee") to Agent for its own account payable annually on each anniversary of the Closing Date as specified in the Fee Letter.

Section 4.2 **Overdue Fees.** If all or a portion of any fee due hereunder shall not be paid when due, such overdue amount shall bear interest, payable by Lessee on demand, at a rate per annum equal to the Default Rate from the date of such nonpayment until such amount is paid in full (as we after as before judgment).

## SECTION 5

### CERTAIN INTENTIONS OF THE PARTIES

Section 5.1 **Nature of Transaction.**

- (a) It is the intent of the parties hereto that: (i) the Lease constitutes an "operating lease" pursuant to Statement of Financial Accounting Standards No. 13, as amended, for purposes of Lessee's financial reporting, and (ii) for purposes of federal, state and local income or franchise taxes and for any other tax imposed on or measured by income, the transaction contemplated hereby is a financing arrangement and preserves ownership in the Property in Lessee. Nevertheless, Lessee acknowledges and agrees that neither Agent, Lessor nor any Participant has made any representations or warranties to Lessee concerning the tax, accounting or legal characteristics of the Operative Documents and that Lessee has obtained and relied upon such tax, accounting and legal advice concerning the Operative Documents as it deems appropriate. Notwithstanding any provision of this Participation Agreement to the contrary, the parties hereto agree and declare that: (i) the transactions contemplated by the Lease are intended to have a dual, rather than single, form; and (ii) all references in this Participation Agreement to the "lease" of the Property which fail to reference such dual form do so as a matter of convenience only and do not reflect the intent of the parties hereto as to the true form of such arrangements. The parties hereto agree that, in accordance with their intentions expressed herein and the substance of the transactions contemplated hereby, Lessee (and not Lessor) shall be treated as the owner of the Property for federal, state, and local income and property tax purposes and the Lease shall be treated as a financing arrangement. Lessee shall be entitled to take any deduction, credit, allowance or other reporting, filing or other tax position consistent with such characterizations. Lessor and the Participants shall file any federal, state or local income tax returns, reports or other statements in a manner which is consistent with the foregoing provisions of this Section 5.1; provided, that Lessor and any Participant may take a position that is inconsistent with Lessee's status as owner of the Property if: (x) there has been a change in law or regulation so requiring as supported by an opinion of counsel reasonably acceptable to Lessee that there is not substantial authority for such a consistent reporting position; or (y) (A) there has been an administrative or judicial holding that Lessee is not the owner of the Property for such tax purposes, (B) Lessee has no right to contest such holding pursuant to Section 13.5 of the Participation Agreement, and (C) Lessee's lack of right to contest is not the result of an Indemnitee's waiver of its right to indemnification pursuant to [Section 13.5(f)(iii) of the Participation Agreement or failure of the amount at issue to exceed the minimum amount set forth in Section 13.5(f)(iv)(B) of the Participation Agreement.

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- (b) Specifically, without limiting the generality of subsection (a) of this Section 5.1, the parties hereto intend and agree that with respect to the nature of the transactions evidenced by the Lease in the context of the exercise of remedies under the Operative Documents, including, without limitation, in the case of any insolvency or receivership proceedings or a petition under the United States bankruptcy laws or any other applicable insolvency laws or statute of the United States of America or any State or Commonwealth thereof affecting Lessee, Lessor or any Participant or any enforcement or collection actions, (i) the transactions evidenced by the Operative Documents are loans made by Lessor and the Participants as unrelated third party lenders to Lessee secured by the Property and the Collateral, (ii) the obligations of Lessee under the Lease to pay Basic Rent and Supplemental Rent or Asset Termination Value in connection with any purchase of the Property pursuant to the Lease shall be treated as payments of interest on and principal of, respectively, loans from Lessor and the Participants to Lessee, (iii) the Lease grants a security interest and deed of trust or lien, as the case may be, in the Property and the collateral described in the Mortgage to Lessor, Agent and the Participants to secure Lessee's performance and payment of all amounts under the Lease and the other Operative Documents.

Section 5.2 **Amounts Due Under Lease.** Subject to Section 3.19, but anything else herein or elsewhere to the contrary notwithstanding, it is the intention of Lessee, Lessor, the Participants and Agent that: (i) the amount and timing of installments of Basic Rent due and payable from time to time from Lessee under the Lease shall be equal to the aggregate payments due to the Participants in respect of their Participation Interests on each Payment Date; (ii) if Lessee elects the Purchase Option or becomes obligated to purchase the Property under the Lease, the entire Adjusted Lease Balance and the Participants' Participation Interests therein, all fees and all of the interest on overdue amounts thereon and all other obligations of Lessee owing to Lessor, the Participants and Agent shall be paid in full by Lessee; (iii) if Lessee properly elects the Remarketing Option, Lessee shall only be required to pay to Lessor the proceeds of the sale of the Property, the Residual Value Guarantee Amount and any amounts due pursuant to Section 13 of this Participation Agreement and Section 22.2 of the Lease (which aggregate amounts may be less than the Asset Termination Value); and (iv) upon a Lease Event of Default resulting in an acceleration of Lessee's obligation to purchase the Property under the Lease, the amounts then due and payable by Lessee under the Lease shall include all amounts necessary to pay in full the Asset Termination Value, plus all other amounts then due from Lessee to the Participants, Agent and Lessor under the Operative Documents.

## CONDITIONS PRECEDENT TO REFINANCING ADVANCE

Section 6.1 **Conditions Precedent--Documentation.** The obligation of Lessor to make the Refinancing Advance in respect of such Property on the Closing Date and the obligation of each Participant to purchase its Participation Interest in, and to make available to Lessor its related portion of, the Refinancing Advance on the Closing Date are subject to satisfaction or waiver of the following conditions precedent and the conditions precedent set forth in Section 6.2 (it being understood that Lessor's obligation to make the Refinancing Advance shall not be subject to the conditions precedent set forth in this Section 6.1 or Section 6.2 to the extent such conditions are actions required of Lessor) on or prior to the Closing Date:

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- (a) **Funding Request.** Prior to the Closing Date, Agent and Lessor shall have received a fully executed counterpart of the Funding Request, appropriately completed by Lessee, in accordance with Section 3.3.
- (b) **Operative Documents.** Each of the Operative Documents to be entered into on the Closing Date shall have been duly authorized, executed and delivered by the parties thereto, and shall be in full force and effect, including, without limitation, (i) this Participation Agreement, (ii) the Lease, (iii) the Mortgage, (v) the Assignment of Lease and Consent to Assignment, (vi) the Cash Collateral Agreement and (vii) the Letter of Credit. If Cash Collateral is selected by Lessee pursuant to Section 7.1, such Cash Collateral shall have been deposited pursuant to the Cash Collateral Agreement. No Potential Lease Default or Lease Event of Default shall exist thereunder and be continuing (both before and after giving effect to the transactions contemplated by the Operative Documents), and Lessor, Agent and each Participant shall each have received a fully executed copy of each of such Operative Documents (other than the Lease, of which Agent shall receive the original and Lessor and the Participants shall receive specimens). On or prior to the Closing Date, the Operative Documents (or memoranda thereof), any supplements thereto and any financing statements in connection therewith required under the Uniform Commercial Code shall have been recorded, registered and filed, if necessary, in such manner as to enable Lessee's counsel to render its opinion referred to in clauses 6.1(ij(A) and (B) below.
- (c) **Environmental Certificate.** Agent, each Participant and Lessor shall have received an Environmental Certificate substantially in the form of Exhibit C (an "Environmental Certificate") with respect to the Property, provided that such Environmental Certificate shall be delivered not less than five (5) Business Days prior to the Closing Date and shall have been approved by Agent, the Required Participants and Lessor, and accompanied by the Environmental Audit for the Property prepared by Harding Lawson Associates, dated August 13, 1997 and a Phase I Update and Sampling Analysis report by Harding ESE, dated March 9, 2000.
- (d) **Financial Statements.** Lessee shall have delivered to Agent copies of Lessee's Financial Statements as described in Section 8.3(m) and an duly executed Compliance Certificate in the form attached as Exhibit L.
- (e) **Survey and Title Insurance.** Lessee shall have delivered (i) an ALTA (1992) owners title insurance policy with extended coverage over the general exceptions, insuring fee title in Lessor to the Property, subject only to the Permitted Exceptions and (ii) an ALTA (1992) Loan Policy insuring Agent that the Lien of the Mortgage is a first and primary lien in Lessor's interest in the Master Lease and in the fee title to the Property, subject only to the Master Lease and the Permitted Exceptions, and (iii) an ALTA (1992) Leasehold Policy insuring leasehold title in Lessee, such policies each in an amount not less than the Refinancing Advance and to be reasonably satisfactory to Lessor, Agent and the Participants with extended coverage, access, tax parcel, variable rate, future advances, usury, comprehensive, doing business, mechanics liens and zoning endorsements and such other endorsements as and to the extent available in such jurisdiction where the Property is located, if requested by Agent.

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- (f) **Evidence of Recording and Filing.** On the Closing Date, Agent shall have received evidence reasonably satisfactory to it that each of the Lease Supplement, the Assignment of Lease and Consent to Assignment and the Mortgage shall have been or are being recorded with the appropriate Governmental Authorities in the order in which such documents are listed in this clause, and the UCC Financing Statements with respect to the Property shall have been or are being filed with the appropriate Governmental Authorities.
- (g) **Evidence of Insurance.** Agent, Lessor and each Participant shall have received evidence of insurance with respect to the Property required to be maintained pursuant to the Lease, setting forth the respective coverages, limits of liability, carrier, policy number and period of coverage and naming Lessor as an additional insured thereunder.
- (h) **Unrestricted Cash Certificate.** On the Closing Date, Lessee shall have delivered to Agent, Lessor and each Participant a certificate in form and substance satisfactory to Agent certifying that Lessee and its Subsidiaries on a consolidated basis held unrestricted cash (and cash equivalents) of \$100,000,000 or more as of the last day of the month immediately preceding the Closing Date.
- (i) **Taxes.** All taxes, fees and other charges in connection with the execution, delivery, recording, filing and registration of the Operative Documents shall have been paid or provisions for such payment shall have been made to the satisfaction of Agent, each Participant and Lessor.

- (j) **Opinions of Counsel.** On the Closing Date, (i) Lessee shall have delivered to Agent, each Participant and Lessor (A) an opinion of Wilson, Sonsini, Goodrich & Rosati, counsel to Lessee, as to the matters set forth in **Exhibit D**; and (B) an opinion of local counsel licensed to practice in the jurisdiction where the Property is located as to the matters set forth in **Exhibit E**; and (ii) Lessor shall have delivered to Agent and each Participant (A) an opinion of special counsel in the form set forth on **Exhibit F**; and (B) an opinion of internal counsel to Lessor to the effect and in the form set forth in **Exhibit G**.
- (k) **Approvals.** All necessary (or, in the reasonable opinion of Lessor, the Participants or Agent or any of their respective counsel, advisable) Governmental Actions and covenants and approvals of or by any Governmental Authority or other Person, in each case required by any Requirement of Law, covenant or restriction affecting the Property or the transactions contemplated thereby to have been obtained by such date shall have been obtained or made and be in full force and effect.
- (l) **Litigation.** No action or proceeding shall have been instituted, nor shall any action or proceeding be threatened, before any Governmental Authority, nor shall any order, judgment or decree have been issued or proposed to be issued by any Governmental Authority (i) to set aside, restrain, enjoin or prevent the full performance of this Participation Agreement, the Lease or any other Operative Document or any transaction contemplated hereby or thereby or (ii) which is reasonably likely to have a Material Adverse Effect.

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- (m) **Requirements of Law.** In the reasonable opinion of Lessor, the Participants, Agent and their respective counsel, the transactions contemplated by the Operative Documents do not and will not violate any Requirement of Law and do not and will not subject Lessor, Agent or any Participant to any adverse regulatory or tax prohibitions or constraints.
- (n) **Responsible Officer's Certificate of Lessee.** On or prior to the Closing Date, Lessor, each Participant and Agent shall each have received a Responsible Officer's Certificate, dated as of the Closing Date, of Lessee stating that (i) each and every representation and warranty of Lessee contained in the Operative Documents to which it is a party is true and correct on and as of the Closing Date; (ii) no Potential Lease Default or Lease Event of Default under the Lease has occurred and is continuing; (iii) each Operative Document to which Lessee is a party is in full force and effect with respect to it; and (iv) Lessee has duly performed and complied with all covenants, agreements and conditions contained herein or in any Operative Document required to be performed or complied with by it on or prior to the Closing Date.
- (o) **Lessee's Resolutions and Incumbency Certificate, Etc.** Lessor, each Participant and Agent shall each have received (i) a certificate of the Secretary or an Assistant Secretary of Lessee attaching and certifying as to (A) the resolutions of the Board of Directors of Lessee, duly authorizing the execution, delivery and performance by Lessee of documents and agreements of the type represented by each Operative Document to which it is or will be a party, (B) its articles of incorporation and bylaws, and (C) the incumbency and signature of persons authorized to execute and deliver on its behalf the Operative Documents to which it is a party, and (ii) good standing certificates from the appropriate officer of the states of California, Colorado and Delaware.
- (p) **Intentionally Deleted.**
- (q) **No Material Adverse Effect.** As of the Closing Date, there shall not have occurred any Material adverse change in Lessee's and its Subsidiaries' capital structure, ownership or consolidated assets, liabilities, results of operations, or financial condition taken as a whole from that set forth or contemplated in the most recent Financial Statements referred to in Section 8.3(m), and no event or condition shall have occurred that would result in a Material Adverse Effect.
- (r) **Responsible Officer's Certificate of Lessor.** On or prior to the closing Date, Lessee, Agent and each Participant shall have received a certificate of an authorized officer of Lessor, dated as of the Closing Date, stating that (i) each and every representation and warranty of Lessor contained in the Operative Documents to which it is a party is true and correct on and as of the Closing Date, (ii) each Operative Document to which Lessor is a party is in full force and effect with respect to it, and (iii) Lessor has duly performed and complied with all covenants, agreements and conditions contained herein or in any Operative Document required to be performed or complied with by it on or prior to the Closing Date.
- (s) **Lessor's Resolutions and Incumbency Certificate, Etc.** Lessee, Agent and each Participant shall have received a certificate of the Secretary or an Assistant Secretary of Lessor attaching and certifying as to (i) the resolutions of the Board of Directors duly authorizing the execution, delivery and performance by Lessor of documents and agreements of the type represented by each Operative Document to which it is or will be a party, (ii) the pertinent provisions of its by-laws and (iii) the incumbency and signature of persons authorized to execute and deliver on its behalf the Operative Documents to which it is a party.

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- (t) **Termination of Liens.** Agent, each Participant and Lessor shall have received a pay-off letter from the Successor Agent, together with duly executed UCC-3 termination statements, mortgage releases and such other instruments, in form and substance satisfactory to Agent, each Participant and Lessor, as shall be necessary to terminate and satisfy all Liens created pursuant to the Existing Financing and all other Liens except Permitted Exceptions.

Section 6.2 **Further Conditions Precedent.** The obligation of Lessor to make the Refinancing Advance on the Closing Date and the obligation of each Participant to purchase its Participation Interest in, and to make available its related portion of, such Refinancing Advance on the Closing Date are subject to satisfaction or waiver of the following conditions precedent and to satisfaction on or before the Closing Date of the conditions precedent set forth in Section 6.1 (it being understood that Lessor's obligations to make the Refinancing Advance to Lessee and each Participant's obligation to fund the purchase of its Participation Interest in the Refinancing Advance shall not be subject to the conditions precedent set forth in Section 6.1 and this Section 6.2 to the extent such conditions are actions required of Lessor or such Participant):

- (a) **Representations and Warranties.** On the Closing Date, the representations and warranties of Lessee, Lessor and each Participant contained herein and in each of the other Operative Documents shall be true and correct as though made on and as of such date, except to the extent such representations or warranties relate solely to an earlier date, in which case such representations and warranties shall have been true and correct on and as of such earlier date.
- (b) **Performance of Covenants.** On the Closing Date, the parties hereto shall have performed their respective agreements contained herein and in the other Operative Documents to be performed by them on or prior to such date.
- (c) **Title.** Title to the Property shall conform to the representations and warranties set forth in Section 8.4(c).
- (d) **No Default.** There shall not have occurred and be continuing any Potential Lease Default, Accelerated Purchase Event or Lease Event of Default under any of the Operative Documents, and no Potential Lease Default, Accelerated Purchase Event or Lease Event of Default under any of the Operative Documents will have occurred after the making of the Refinancing Advance.

## SECTION 7

### SECURITY

#### Section 7.1 **Lessee Obligations.**

- (a) **Property.** To the extent that the transaction evidenced by the Lease and the Operative Documents is treated as a loan by the Participants (through Lessor) to Lessee secured by the Property, with Lessee as owner of the Property pursuant to Section V hereof, the Lessee Obligations shall be secured by the Property as provided in the Lease.

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- (b) **Other Collateral.** In addition to a security interest in the Property, the Lessee Obligations shall be secured initially either by (i) a Cash Collateral Agreement in the form of **Exhibit M**, duly executed and delivered by Lessee and Cash Collateral delivered to Agent or its assignee pursuant to the Cash Collateral Agreement, or (ii) a Letter of Credit in the form of **Exhibit N** (or such other form as Agent may approve) issued in favor of Agent or Lessor (collectively, the "Collateral"). The Collateral shall on the closing date be in an amount equal to the Lease Balance and at no time shall be less than the Lease Balance. Lessee shall select the initial Collateral by notice to Agent not less than three (3) Business Days before the Closing Date. If Lessee delivers a Letter of Credit, Agent shall not draw upon the Letter of Credit (other than as may be requested or directed by Lessee) until the Expiration Date or the occurrence of an Accelerated Purchase Event. In any event, Lessee may not withdraw any Collateral required to be delivered pursuant to this Section 7.1(b) until the Expiration Date and satisfaction in full of all Lessee Obligations, but Lessee may require the application of any available Collateral to satisfy the Obligations on and subject to the conditions set forth in Section 3.23, and Lessee may substitute Collateral to the extent permitted by Section 7.1(c). At the time Lessee delivers any Cash Collateral to Agent pursuant to this Section 7.1(b), Lessee also shall deliver to Lessor a favorable written opinion of its counsel, in form and substance reasonably satisfactory to Lessor and Agent but subject to customary qualifications and assumptions, to the effect that the Cash Collateral Agreement is a legal, valid and binding agreement of Lessee, enforceable in accordance with its terms, and that Lessor has a perfected security interest in the Cash Collateral.



- (c) **Substitution of Collateral.** If Lessee has delivered a Cash Collateral Agreement and Cash Collateral at the Closing Date or has during the Term (subject to the provisions of this Section 7.1(c)) has substituted a Cash Collateral Agreement and Cash Collateral for a Letter of Credit, Lessee may at any time thereafter during the Term so long as no Potential Lease Default exists under any of the Operative Documents substitute a new Letter of Credit in place of such Cash Collateral Agreement and Cash Collateral on ten (10) Business Days prior written notice to Lessor and Agent. If at the Closing Date or at any time during the Term Lessee has delivered a Letter of Credit to Lessor in satisfaction of Lessee's obligations under this Section 7.1, not later than twenty (20) Business Days before expiration of such Letter of Credit Lessee shall deliver to Lessor a replacement Letter of Credit. Notwithstanding the immediately preceding sentence, if at the Closing Date or at any time during the Term Lessee has delivered a Letter of Credit to Lessor in satisfaction of Lessee's obligations under this Section 7.1, Lessee may replace such Letter of Credit with Cash Collateral under and pursuant to a Cash Collateral Agreement delivered to Agent not later than one hundred twenty (120) days before expiration of such Letter of Credit; however, during such one hundred twenty (120) day period, Agent will have the benefit of both the Cash Collateral and the Letter of Credit to be replaced, and if bankruptcy or other legal proceedings are instigated or continued by or against Lessee during such period, leaving Agent unsure whether the pledge of the Cash Collateral will be effective to secure Lessee's Obligations, then Agent may draw upon such Letter of Credit before it expires. Any failure of Lessee to deliver either (i) a replacement Letter of Credit at least twenty (20) Business Days prior to the expiration of an existing Letter of Credit or (ii) Cash Collateral pledged pursuant to such a Cash Collateral Agreement at least one hundred twenty (120) days prior to the expiration of an existing Letter of Credit will constitute a Lease Event of Default, whereupon Agent or Lessor may immediately draw upon the existing Letter of Credit.

Section 7.2 **Lessor Obligations to Participants.** The obligations of Lessor to the Participants under the Operative Documents shall be secured by the Mortgage and the Assignment of Lease.

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## SECTION 8

### REPRESENTATIONS

Section 8.1 **Representations of Lessor.** Lessor represents and warrants to each of the other parties hereto as follows:

- (a) **Due Organization, Etc.** It is a corporation duly organized, validly existing and in good standing under the laws of the State of Ohio and has the corporate power and authority to enter into and perform its obligations under each of the Operative Documents to which it is or will be a party and each other agreement, instrument and document to be executed and delivered by it in connection with or as contemplated by each such Operative Document to which it is or will be a party.
- (b) **Authorization; No Conflict.** The execution, delivery and performance of each Operative Document to which it is or will be a party has been duly authorized by all necessary action on its part and neither the execution and delivery thereof, nor the consummation of the transactions contemplated thereby, nor compliance by it with any of the terms and provisions thereof (i) does or will require any approval or consent of any trustee or holders of any of its indebtedness or obligations, (ii) does or will contravene any current United States, Colorado or California law, governmental rule or regulation, (iii) does or will contravene or result in any breach of or constitute any default under, or result in the creation of any Lien upon any of its property under, its articles of incorporation or by-laws, or any indenture, mortgage, deed of trust, conditional sales contract, credit agreement or other agreement or instrument to which it is a party or by which it or its properties may be bound or affected or (iv) does or will require any Governmental Action by any Governmental Authority, except such as have been obtained on Lessee's or Lessor's behalf.
- (c) **Enforceability, Etc.** Each Operative Document to which Lessor is or will be a party has been duly executed and delivered by Lessor and each such Operative Document to which Lessor is a party constitutes, or upon execution and delivery will constitute, a legal, valid and binding obligation enforceable against Lessor in accordance with the terms thereof, except as the same may be limited by insolvency, bankruptcy, reorganization or other laws relating to or affecting creditors' rights or by general equitable principles.
- (d) **Litigation.** There is no action or proceeding pending or, to its knowledge, threatened to which it is a party, before any Governmental Authority that, if adversely determined, would materially and adversely affect its ability to perform its obligations under the Operative Documents to which it is a party, would have a material adverse effect on the financial condition of Lessor or would question the validity or enforceability of any of the Operative Documents to which it is or will become a party.

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- (e) **Assignment.** It has not assigned or transferred any of its right, title or interest in or under the Lease except to Agent, for the benefit of the Participants, in accordance with this Participation Agreement and the other Operative Documents.
- (f) **Defaults.** No Potential Lease Default or Lease Event of Default under the Operative Documents attributable to it has occurred and is continuing.

- (g) **Use of Proceeds.** The proceeds of the purchase of the Participation Interests shall be applied by Lessor solely in accordance with the provisions of the Operative Documents.
- (h) **Securities Act.** Neither Lessor nor any Person authorized by Lessor to act on its behalf has offered or sold any interest in the Lease, or in any similar security relating to the Property, or in any security the offering of which for the purposes of the Securities Act would be deemed to be part of the same offering as the offering of the aforementioned securities to, or solicited any offer to acquire any of the same from, any Person other than Agent and the Participants, and neither Lessor nor any Person authorized by Lessor to act on its behalf will take any action which would subject the issuance or sale of any interest in the Lease or the Property to the provisions of Section 5 of the Securities Act or require the qualification of any Operative Document under the Trust Indenture Act of 1939, as amended.
- (i) **Chief Place of Business.** Lessor's chief place of business, chief executive office and office where the documents, accounts and records relating to the transactions contemplated by this Participation Agreement and each other Operative Document are kept are located at 66 Pearl Street, Albany, New York 12207.
- (j) **Federal Reserve Regulations.** Lessor is not engaged principally in, and does not have as one of its important activities, the business of extending credit for the purpose of purchasing or carrying any margin stock (within the meaning of Regulation U of the Board), and no part of the proceeds of the purchase of the Participation Interests will be used by it to purchase or carry any margin stock or to extend credit to others for the purpose of purchasing or carrying any such margin stock or for any purpose that violates, or is inconsistent with, the provisions of Regulation T, U, or X of the Board.
- (k) **Investment Company Act.** Lessor is not an "investment company" or a company controlled by an "investment company" within the meaning of the Investment Company Act.
- (l) **No Plan Assets.** Lessor is not acquiring its interests in the Property with the assets of any "employee benefit plan" (as defined in Section 3(3) of ERISA) which is subject to Title I of ERISA, or "plan" (as defined in Section 4975(e)(1) of the Code).
- (m) **Equity Source.** The source of its 3.5% minimum equity investment in the Tranche C Participation Interest is full recourse debt, the obligee of which is KeyBank National Association, the ultimate parent of Lessor; (ii) Lessor will not obtain residual insurance or any other residual guarantee to ensure recovery of its equity investment; and (iii) Lessor will bear the loss attributable to any decline in the fair value of the residual interest (to the extent, if any, such loss is not recovered from payments required by the terms of the Lease) and has, and is expected to continue to have during the term of the Lease, other significant assets, in addition to and of a value that exceeds its equity investment, that are at risk.

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Section 8.2 **Representations of the Participants.** Each Participant represents and warrants to Lessor, each of the other Participants and Lessee as follows:

- (a) **No Plan Assets.** Such Participant is not and will not be funding its purchase of a Participation Interest hereunder, and is not performing its obligations under the Operative Documents, with the assets of an "employee benefit plan" (as defined in Section 3(3) of ERISA) which is subject to Title I of ERISA, or "plan" (as defined in Section 4975(e)(1) of the Code). The advancing of any amount with respect to its Participation Interest on any Funding Date shall constitute an affirmation by the subject Participant of the preceding representation and warranty.
- (b) **Due Organization, Etc.** It is either (i) a duly organized and validly existing corporation in good standing under the laws of the state of its incorporation, or (ii) a national banking association duly organized and validly existing under the laws of the United States or (iii) a banking corporation duly organized and validly existing under the laws of the jurisdiction of its organization, and, in each case, has the corporate power and authority to execute, deliver and carry out the terms and provisions of the Operative Documents to which it is a party.
- (c) **Authorization; No Conflict.** The execution, delivery and performance of each Operative Document to which it is or will be a party has been duly authorized by all necessary action on its part and neither the execution and delivery thereof, nor the consummation of the transactions contemplated thereby, nor compliance by it with any of the terms and provisions thereof (i) does or will require any approval or consent of any trustee or holders of any of its indebtedness or obligations, (ii) does or will contravene any current law, governmental rule or regulation of the United States or the state or country of its organization, (iii) does or will contravene or result in any breach of or constitute any default under, or result in the creation of any Lien upon any of its property under, its certificate of incorporation or bylaws, articles of association or other organizational documents or any indenture, mortgage, deed of trust, conditional sales contract, credit agreement or other agreement or instrument to which it is a party or by which it or its properties may be bound or affected or (iv) does or will require any Governmental Action by any Governmental Authority.
- (d) **Enforceability, Etc.** Each Operative Document to which it is a party has been, or on or before the Closing Date or applicable Funding Date or Land Interest Acquisition Date will be, duly executed and delivered by it and each such Operative Document to which it is a party constitutes, or upon execution and delivery will constitute, a legal, valid and binding obligation enforceable against it in accordance with the terms thereof, except as the same may be limited by insolvency, bankruptcy, reorganization or other laws relating to or affecting creditors' rights or by general equitable principles.

- (e) **Litigation.** There is no action or proceeding pending or, to its knowledge, threatened to which it is or will be a party before any Governmental Authority that is reasonably likely to be adversely determined and, if adversely determined, would materially and adversely affect its ability to perform its obligations under the Operative Documents to which it is a party.

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Section 8.3 **Representations of Lessee.** Lessee represents and warrants to each of the other parties hereto that:

- (a) **Corporate Status.** Lessee (i) is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and (ii) has duly qualified and is authorized to do business and has obtained a certificate of authority to transact business as a foreign corporation in the States of California and Colorado and in each other jurisdiction where the failure to so qualify is reasonably likely to be Material.
- (b) **Corporate Power and Authority.** Lessee has corporate power and authority to execute, deliver and carry out the terms and provisions of the Operative Documents to which it is or will be a party and has taken all necessary corporate action to authorize the execution, delivery and performance of the Operative Documents to which it is or will be a party and has or will have duly executed and delivered each Operative Document required to be executed and delivered by it and, assuming the due authorization, execution and delivery thereof on the part of each other party thereto, each such Operative Document constitutes or will constitute a legal, valid and binding obligation enforceable against it in accordance with its terms, except as the same may be limited by insolvency, bankruptcy, reorganization or other laws relating to or affecting the enforcement of creditors' rights or by general equitable principles.
- (c) **No Violation.** Neither the execution, delivery and performance by Lessee of the Operative Documents to which it is or will be a party nor compliance with the terms and provisions thereof, nor the consummation by Lessee of the transactions contemplated therein (i) will result in a violation by Lessee of any applicable provision of any law, statute, rule, regulation, order, writ, injunction or decree of any court or governmental instrumentality having jurisdiction over Lessee or the Property that would (x) adversely affect the validity or enforceability of the Operative Documents to which Lessee is a party, or the title to, or value or condition of, the Property, or (y) have a Material Adverse Effect on the consolidated financial position, business or consolidated results of operations of Lessee, or (z) have an adverse effect on the ability of Lessee to perform its obligations under the Operative Documents, (ii) will conflict with or result in any breach under, or (other than pursuant to the Operative Documents) result in the creation or imposition of (or the obligation to create or impose) any Lien upon any of the property or assets of Lessee pursuant to the terms of, any indenture, loan agreement or other agreement for borrowed money to which Lessee is a party or by which it or any of its property or assets is bound or to which it may be subject (other than Permitted Liens), or (iii) will violate any provision of the certificate or articles of incorporation or bylaws of Lessee.
- (d) **Litigation.** There are no actions, suits or proceedings pending or, to the knowledge of Lessee, threatened (i) that are reasonably likely to have a Material Adverse Effect or (ii) that question the validity of the Operative Documents or the rights or remedies of Lessor, Agent or the Participants with respect to Lessee or the Property under the Operative Documents.

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- (e) **Governmental Approvals.** No Governmental Action by any Governmental Authority having jurisdiction over Lessee or the Property is required to authorize or is required in connection with (i) the execution, delivery and performance by Lessee of any Operative Document or (ii) the legality, validity, binding effect or enforceability against Lessee of any Operative Document, except for the filing or recording of the Operative Documents hereof with the appropriate Governmental Authorities.
- (f) **Investment Company Act.** Lessee is not an "investment company" or a company "controlled" by an "investment company," within the meaning of the Investment Company Act.
- (g) **Public Utility Holding Company Act.** Lessee is not a "holding company, or a "subsidiary company," or an "affiliate" of a "holding company," or of a "subsidiary company" of a "holding company," within the meaning of the Public Utility Holding Company Act of 1935, as amended.
- (h) **Accuracy of Information Furnished.** None of the Operative Documents and none of the other certificates, statements or information furnished to Lessor, Agent or any Participant by or on behalf of Lessee or any of its Subsidiaries in connection with the Operative Documents or the transactions contemplated thereby (taken together with all such Operative Documents, certificates, statements or information) contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading (it being understood by Lessor, Agent or any Participant that the projections and forecasts provided by Lessee are not to be viewed as facts and that actual results during the period or periods covered by such projections and forecasts may differ from the projected or forecasted results).
- (i) **Taxes.** All United States federal income tax returns and all other Material tax returns which are required to have been filed have been or will be prepared in accordance with applicable law and filed by or on behalf of Lessee by the respective due dates, including extensions, and all taxes due with respect to Lessee pursuant to such returns or pursuant to any assessment received by Lessee have been or will be paid. The charges, accruals and reserves on the books of Lessee in respect of taxes or other governmental charges are, in the opinion of Lessee, adequate.

- (j) **Compliance with ERISA.** Each member of the ERISA Group has fulfilled its obligations under the minimum funding standards of ERISA and the Code with respect to each Plan and is in compliance in all Material respects with the presently applicable provisions of ERISA and the Code with respect to each Plan. No member of the ERISA Group has (i) sought a waiver of the minimum funding standard under Section 412 of the Code in respect of any Plan, (ii) failed to make any contribution or payment to any Plan or Multiemployer Plan or in respect of any Benefit Arrangement, or made any amendment to any Plan or Benefit Arrangement, which has resulted or could result in the imposition of a Lien or the posting of a bond or other security under ERISA or the Code or (iii) incurred any liability under Title IV of ERISA other than a liability to the PBGC for premiums under Section 4007 of ERISA.

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- (k) **Environmental and Other Regulations.** Except as set forth in **Schedule IV** attached hereto, Lessee and the Property are in compliance with all Environmental Laws relating to pollution and environmental control or employee safety in the jurisdiction in which the Property is located and in all other domestic jurisdictions, other than, with respect to such other jurisdictions, those Environmental Laws the non-compliance with which would not have a Material Adverse Effect.
- (l) **Offer of Securities, Etc.** Neither Lessee nor any Person authorized to act on their behalf has, directly or indirectly, offered any interest in the Property or the Lease or any other interest similar thereto (the sale or offer of which would be integrated with the sale or offer of such interest in the Property or the Lease), for sale to, or solicited any offer to acquire any of the same from, any Person other than the Participants, Lessor and other "accredited investors" (as defined in Regulation D of the Securities and Exchange Commission).
- (m) **Financial Statements.** The audited Financial Statements of Lessee and its consolidated Subsidiaries as of March 31, 2002, and the related consolidated statements of income, shareholder's equity and cash flows for the fiscal year then ended, reported on by Ernst & Young, LLP, and the unaudited Financial Statements for the quarter ended September 30, 2002 copies of which have been delivered to each of Lessor, the Participants and Agent, present fairly in all material respects, in conformity with generally accepted accounting principles, the financial position of Lessee as of such date and its results of operations and cash flows for such fiscal year. Since the date of the audited Financial Statements, there has been no event or circumstance which has a Material Adverse Effect.
- (n) **No Violation or Default.** Neither Lessee nor any of Lessee's Subsidiaries is in violation of or in default with respect to (i) any Requirement of Law applicable to such Person or (ii) any Contractual Obligation of such Person, where, in each case, such violation or default is reasonably likely to have a Material Adverse Effect. Without limiting the generality of the foregoing, neither Lessee nor any of Lessee's Subsidiaries (A) is in violation of any Environmental Laws, (B) to the best of Lessee's knowledge, has any liability or potential liability under any Environmental Laws or (C) has received written notice or other written communication of an investigation or is under investigation by any Governmental Authority having jurisdiction over Lessee or any of Lessee's Subsidiaries having authority to enforce Environmental Laws, where, in each case, such violation, liability or investigation could reasonably be expected to have a Material Adverse Effect, nor, to the best of Lessee's knowledge, have any Hazardous Materials been released or disposed of on any of the properties owned by Lessee or Lessee's Subsidiaries which, either individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect. No Lease Event of Default or Potential Lease Default has occurred and is continuing.
- (o) **Title: Possession Under Leases.** Lessee and Lessee's Subsidiaries (i) own and have good title (without regard to minor defects of title), or leasehold interests in, all their other respective properties and assets which are material to the business of Lessee and its Subsidiaries taken as a whole as reflected in the most recent Financial Statements delivered to Agent (except those assets and properties disposed of since the date of such Financial Statements in compliance with this Participation Agreement) and (ii) own and have good title (without regard to minor defects of title) to, or leasehold interests in, all respective properties and assets acquired by Lessee and Lessee's Subsidiaries since such date which are material to the business of Lessee and its Subsidiaries taken as a whole (except those assets and properties disposed of in compliance with this Participation Agreement). Such assets and properties are subject to no Lien, except for Permitted Liens.

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- (p) **Patent and Other Rights.** Lessee and Lessee's Subsidiaries own or license under validly existing agreements (or could obtain such ownership, possession or license on terms not materially adverse to Lessee and its Subsidiaries, taken as a whole, and under circumstances that could not reasonably be expected to have a Material Adverse Effect), and have the full right to license without the consent of any other Person, all patents, licenses, trademarks, trade names, trade secrets, service marks, copyrights and all rights with respect thereto, which are material to conduct the businesses of Lessee and its Subsidiaries (taken as a whole) as now conducted.
- (q) **Solvency, Etc.** Lessee and each of its Material Subsidiaries is Solvent and, after the execution and delivery of the Operative Documents and the consummation of the transactions contemplated thereby, will be Solvent.
- (r) **Catastrophic Events.** Neither Lessee nor any of Lessee's Subsidiaries and none of their properties is affected by any fire, explosion, strike, lockout or other labor dispute, earthquake, embargo or other casualty that is reasonably likely to have a Material Adverse Effect. As of the Closing Date, there are no disputes presently subject to grievance procedure, arbitration or litigation under any of the collective bargaining agreements, employment contracts or employee welfare or incentive plans to which Lessee or any of Lessee's Subsidiaries is a party, and there are no strikes, lockouts, work stoppages or slowdowns, or, to the best knowledge of Lessee, jurisdictional disputes or organizing activities occurring or threatened which alone or in the aggregate are reasonably likely to have a Material Adverse Effect.

- (s) **Disclosure.** No statement, information, report, representation, or warranty made by the Lessee in any Operative Document or furnished to the Agent, the Lessor or any Participant in connection with any Operative Document contains any untrue statement of a material fact or, when viewed together with the Lessee's periodic reports filed under the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder, omits to state any material fact necessary to make the statements herein or therein not misleading.

Section 8.4 **Representations of Lessee With Respect to the Property on the Closing Date.** Lessee hereby represents and warrants as follows:

- (a) **Property.** The Property consists of the Land Interest, and the Improvements and Equipment thereon and all Appurtenant Rights thereto. Such Property is located in the State of Colorado. The use of the Property by Lessee and its agents, assignees, employees, invitees, lessees, licensees, contractors and tenants complies in all material respects with all Requirements of Law (including, without limitation, Title III of the Americans with Disabilities Act, all zoning and land use laws and Environmental Laws) and Insurance Requirements, except for such Requirements of Law as Lessee shall be contesting in good faith by appropriate proceedings. The Improvements on such Property do not encroach in any manner onto any adjoining land (except as permitted by express written easements or as insured by appropriate title insurance) and the Property complies in all Material respects with all applicable Requirements of Law (including, without limitation, Title III of the Americans with Disabilities Act, all applicable Environmental Laws and building, planning, zoning and fire codes). The Improvements including, without limitation, structural members, the plumbing, heating, air conditioning and electrical systems thereof, and all water, sewer, electric, gas, telephone and drainage facilities are, in all material respects, in first class working condition and fit for use as administration, manufacturing design and warehouse facilities, and all other utilities required to adequately service the Improvements for their intended use are available and "tapped on" and hooked up pursuant to adequate permits (including any that may be required under applicable Environmental Laws). There is no action, suit or proceeding (including any proceeding in condemnation or eminent domain or under any Environmental Law) pending or, to the best of Lessee's knowledge, threatened with respect to Lessee, its Affiliates or such Property which adversely affects the title to, or the use, operation or value of, the Property. As of the Closing Date, no fire or other casualty with respect to the Property shall have occurred. The Property has available all material services of public facilities and other utilities necessary for use and operation of such facility and the other Improvements for their primary intended purposes, including, without limitation, adequate water, gas and electrical supply, storm and sanitary sewerage facilities, telephone, other required public utilities and means of access to such facility from publicly dedicated streets and public highways for pedestrians and motor vehicles. All utilities serving such Property are located in, and vehicular access to the Improvements on such Property is provided by, either public rights-of-way abutting such Property or Appurtenant Rights. All material licenses, approvals, authorizations, consents, permits (including, without limitation, building, demolition and environmental permits, licenses, approvals, authorizations and consents), easements and rights-of-way, including proof and dedication, required for the use, treatment, storage, transport, disposal or disposition of any Hazardous Substance on, at, under or from such Property have either been obtained from the appropriate Governmental Authorities having jurisdiction or from private parties, as the case may be, or will be obtained from the appropriate Governmental Authorities having jurisdiction or from private parties, as the case may be, prior to commencing any such construction or use and operation, as applicable and will in each case be maintained by Lessee during the periods for which they are required by Applicable Law or such Governmental Authorities.

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- (b) **Title.** Lessor has fee simple title in the Land Interest and any Improvements and has the right to grant the Mortgage on the Property.
- (c) **Insurance.** Lessee has obtained insurance coverage covering the Property which meets the requirements of Article XIV of the Lease, and such coverage is in full force and effect.
- (d) **Lease.** On the Closing Date:
- (i) Lessee has a valid leasehold interest in the Property, subject only to the Permitted Exceptions;
- (ii) Lessee's obligation to pay Rent is an independent covenant and no right of deduction or offset will exist with respect to any Rent or other sums payable under the Lease; and
- (iii) no Rent under the Lease has been prepaid and Lessee will have no right to prepay the Rent, except as specifically set forth in the Lease.

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- (e) **Protection of Interests.** (i) On the Closing Date, the Assignment of Lease and Consent to Assignment and the Mortgage are each in a form sufficient, and have been recorded in all recording offices necessary, to grant perfected first priority liens on the Property to Agent or Lessor, as the case may be, (ii) Agent Financing Statements are each in a form sufficient, and have been filed in all filing offices necessary, to create a valid and perfected first priority security interest in Lessor's interest in all Equipment, if any, to be located on the Property and the Improvements; and (iii) Lessor Financing Statements are each in a form sufficient, and have been filed in all filing offices necessary, to perfect Lessor's interest under the Lease to the extent the Lease is a security agreement.

- (f) **Flood Hazard Areas.** No portion of the Property is located in an area identified as a special flood hazard area by the Federal Emergency Management Agency or other applicable agency, or if any portion of the Property is located in an area identified as a special flood hazard area by the Federal Emergency Management Agency or other applicable agency, then flood insurance has been obtained for the Property or such portion thereof in accordance with Section 14.2(b) of the Lease and in accordance with the National Flood Insurance Act of 1968, as amended.
- (g) **Conditions Precedent.** All conditions precedent contained in this Participation Agreement and in the other Operative Documents relating to the refinancing of the Property by Lessor have been satisfied in full or waived.

## SECTION 9

### PAYMENT OF CERTAIN EXPENSES

Lessee agrees, for the benefit of Lessor, Agent and the Participants, that:

#### Section 9.1 **Transaction Expenses.**

- (a) Lessee shall pay, or cause to be paid, from time to time all Transaction Expenses in respect of the transactions consummated on the Closing Date, it being understood and agreed that neither Agent, Lessor nor any Participant shall be required to advance any Transaction Expenses in connection with the closing.
- (b) Lessee shall pay or cause to be paid (i) all Transaction Expenses of Lessor, (ii) the Administrative Fee, (iii) all Transaction Expenses reasonably incurred by Lessee, Agent or Lessor in entering into any future amendments or supplements with respect to any of the Operative Documents, whether or not such amendments or supplements are ultimately entered into, or giving or withholding of waivers or consents hereto or thereto, in each case (except after the occurrence of a Lease Event of Default) which have been requested by or approved by Lessee, (iv) all Transaction Expenses incurred by Lessor, Lessee or Agent in connection with any purchase of the Property by Lessee or other Person pursuant to Articles XVI, XVII, XX or XXII of the Lease, and (v) all Transaction Expenses incurred by any of the other parties hereto in respect of enforcement of any of their rights or remedies against Lessee in respect of the Operative Documents.

Section 9.2 **Brokers' Fees and Stamp Taxes.** Lessee shall pay or cause to be paid any brokers' fees and any and all stamp, transfer and other similar taxes, fees and excises, if any, including any interest and penalties, which are payable in connection with the transactions contemplated by this Participation Agreement and the other Operative Documents.

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## SECTION 10

### OTHER COVENANTS AND AGREEMENTS

Section 10.1 **Affirmative Covenants of Lessee.** So long as this Participation Agreement is in effect, Lessee shall, and shall (except in the case of Lessee's reporting covenants set forth in Sections 10.1(a), 10.1(b)(i) and 10.1(b)(ii)) cause each Subsidiary, to:

- (a) **Financial Statements.** Deliver to Agent and each Participant, in form and detail satisfactory to Agent and the Required Participants:

(i) as soon as available, but in any event within (A) ninety (90) days after the end of each fiscal year of Lessee, or, (B) if Lessee has been granted an extension by the Securities and Exchange Commission permitting the late filing by Lessee of any annual report on form 10-K, the earlier of (x) 120 days after the end of each fiscal year of Lessee or (y) the last day of any such extension, a consolidated balance sheet of Lessee and its Subsidiaries as at the end of such fiscal year, and the related consolidated statements of income and cash flows for such fiscal year, setting forth in each case in comparative form the figures for the previous fiscal year, all in reasonable detail, audited and accompanied by a report and opinion of an independent certified public accountant of nationally recognized standing, which report and opinion shall be prepared in accordance with GAAP and shall not be subject to any qualifications or exceptions as to the scope of the audit nor to any qualifications and exceptions not reasonably acceptable to the Required Participants;

(ii) as soon as available, but in any event within (A) forty-five (45) days after the end of each of the first three fiscal quarters of each fiscal year of Lessee, or, (B) if Lessee has been granted an extension by the Securities and Exchange Commission permitting the late filing by Lessee of any quarterly report on form 10-Q, the earlier of (x) sixty (60) days after the end of each of the first three fiscal quarters of each fiscal year of Lessee or (y) the last day of any such extension, a consolidated balance sheet of Lessee and its Subsidiaries as at the end of such fiscal quarter, and the related consolidated statements of income and cash flows for such fiscal quarter and for the portion of Lessee's fiscal year then ended, setting forth in each case in comparative form the figures for the corresponding fiscal quarter of the previous fiscal year and the corresponding portion of the previous fiscal year, all in reasonable detail and certified by a Responsible Officer of Lessee as fairly presenting the financial condition, results of operations and cash flows of Lessee and its Subsidiaries in accordance with GAAP, subject only to normal year-end audit adjustments and the absence of footnotes; and

(iii) Reports required to be delivered pursuant to clauses (i) and (ii) of this Section 10.1(a) shall be deemed to have been delivered on the date on which Lessee posts such reports on Lessee's website on the Internet at the website address listed on Schedule III hereof or when such report is posted on the Securities and Exchange Commission's website at [www.sec.gov](http://www.sec.gov).; provided that (A) Lessee shall deliver paper copies of the reports referred to in such clauses (i) and (ii) of this Section 10.1(a) to Agent or any Participant who requests Lessee to deliver such paper copies until written request to cease delivering paper copies is given by Agent or such Participant, (B) Lessee shall notify Agent and the Participants of the posting of any such new material, and (C) in every instance Lessee shall provide paper copies of the Compliance Certificates required by clause (i) of Section 10.1(b) to Agent and each Participant. Except for the Compliance Certificates referred to in such clause (i) of Section 10.1(b), Agent shall have no obligation to request the delivery or to maintain copies of the reports referred to in clauses (i) and (ii) of this Section 10.1(a), and in any event shall have no responsibility to monitor compliance by Lessee with any such request for delivery, and each Participant shall be solely responsible for requesting delivery to it or maintaining its copies of such reports.

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(b) **Certificates, Notices and Other Information.** Deliver to Agent and each Participant, in form and detail satisfactory to Agent and the Required Participants:

(i) concurrently with the delivery of the Financial Statements referred to in clauses (i) and (ii) of Section 10.1(a), a duly completed Compliance Certificate signed by a Responsible Officer of Lessee;

(ii) monthly on or before the tenth Business Day of each calendar month, certified copies of reports or account statements signed by a Responsible Officer of Lessee detailing (i) the total amount of unrestricted cash (and cash equivalents) held by Lessee and its Subsidiaries on a consolidated basis as of the last day of the immediately preceding calendar month. ("Consolidated Cash Balance"), and (ii) the portion(s) of such Consolidated Cash Balance deposited in domestic accounts subject to any deposit account control agreement agreements;

(iii) promptly after the same are available, copies of each annual report, proxy or financial statement or other report or communication sent to the stockholders of Lessee, and copies of all annual, regular, periodic and special reports and registration statements which Lessee may file or be required to file with the Securities and Exchange Commission under Sections 13 or 15(d) of the Securities Exchange Act of 1934, and not otherwise required to be delivered to Agent pursuant hereto;

(iv) promptly after the occurrence thereof, notice of any Potential Lease Default or Lease Event of Default;

(v) notice of any change in accounting policies or financial reporting practices by Lessee or any Subsidiary that is material to Lessee or to Lessee and its Subsidiaries on a consolidated basis;

(vi) promptly after the commencement thereof, notice of any litigation, investigation or proceeding affecting Lessee where the reasonably expected damages to Lessee exceed the Threshold Amount, or in which injunctive relief or similar relief is sought, which relief, if granted, has a Material Adverse Effect;

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(vii) promptly after the occurrence thereof, notice of any Reportable Event with respect to any Plan or the intent to terminate any Plan, or the institution of proceedings or the taking or expected taking of any other action to terminate any Plan or withdraw from any Plan;

(viii) promptly after the occurrence thereof, notice of any Material Adverse Effect; and

(ix) promptly, such other data and information as from time to time may be reasonably requested by Agent, or, through Agent or any Participant. Notwithstanding any provision of this Participation Agreement to the contrary, so long as no Potential Lease Default or Lease Event of Default shall have occurred and be continuing, neither Lessee nor any of its Subsidiaries shall be required to disclose, permit the inspection, examination, photocopying or making extracts of, or discuss, any document, information or other matter that (A) constitutes non-financial trade secrets or non-financial proprietary information, or (B) the disclosure of which to any Participant, or their designated representative, is then prohibited by law or any agreement binding on Lessee or any of its Subsidiaries that was not entered into by Lessee or any such Subsidiary for the purpose of concealing information from the Participants.

Each notice pursuant to this Section shall be accompanied by a statement of a Responsible Officer of Lessee setting forth details of the occurrence referred to therein and stating what action Lessee has taken and proposes to take with respect thereto. The annual reports, proxies, financial statements or other communications required by Section 10.1(b)(iii) above shall be deemed to have been delivered on the date on which Lessee posts such reports on Lessee's website on the Internet at the website address listed on Schedule 10.02 hereof or when such report is posted on the Securities and Exchange Commission's website at [www.sec.gov](http://www.sec.gov); provided that (y) Lessee shall deliver paper copies of the reports referred to in Section 10.1(b)(iii) to Administrative Agent or any Lender who requests Lessee to deliver such paper copies until written request to cease delivering paper copies is given by Administrative Agent or such Lender, and (z) Lessee shall notify Administrative Agent and Lenders of the posting of any such new material. Administrative Agent shall have no obligation to request the delivery or to maintain copies of the reports and communications referred to in Section 10.1(b)(iii), and in any event shall have no responsibility to monitor compliance by Lessee with any such request for delivery, and each Lender shall be solely responsible for requesting delivery to it or maintaining its copies of such reports and communications.

- (c) **Payment of Taxes.** Pay and discharge when due all material taxes, assessments, and governmental charges, except for any such tax, assessment, charge, or levy which is an Ordinary Course Lien under subsection (b) of the definition of such term and except as otherwise provided in Section 13 hereof or Article XIII of the Lease.
- (d) **Preservation of Existence.** Preserve and maintain its existence, licenses, permits, rights, franchises and privileges necessary or desirable in the normal conduct of its business, except (i) as permitted by Section 10.2(c), or (ii) where failure to do so cannot reasonably be expected to have a Material Adverse Effect.

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- (e) **Maintenance of Properties.** Maintain, preserve and protect all of its material properties and equipment necessary in the operation of its business in good order and condition, subject to wear and tear in the ordinary course of business, and not permit any waste of its properties, except where failure to do so would not reasonably be expected to have a Material Adverse Effect.
- (f) **Maintenance of Insurance.** Maintain liability and casualty insurance with responsible insurance companies satisfactory to Agent in such amounts and against such risks as is customary for similarly situated businesses.
- (g) **Compliance with Requirements of Law.**
- (i) Comply with all Requirements of Law, noncompliance with which would not reasonably to be expected to have a Material Adverse Effect; and
- (ii) conduct its operations and keep and maintain its property in material compliance with all Environmental Laws.
- (h) **Inspection Rights.** At any time during regular business hours and as often as reasonably requested upon reasonable notice, permit Agent or any Participant, or any employee, agent or representative thereof, to examine, audit and make copies and abstracts from Lessee's records and books of account and to visit and inspect its properties and to discuss its affairs, finances and accounts with any of its officers and key employees, and, upon request, furnish promptly to Agent or any Participant true copies of all financial information and internal management reports made available to their senior management. Notwithstanding any provision of this Agreement to the contrary, so long as no Potential Lease Default or Lease Event of Default shall have occurred and be continuing, neither Lessee nor any of its Subsidiaries shall be required to disclose, permit the inspection, examination, photocopying or making extracts of, or discuss, any document, information or other matter that (i) constitutes non-financial trade secrets or non-financial proprietary information, or (ii) the disclosure of which to the Lessor, Agent or any Participant, or their designated representative, is then prohibited by law or any agreement binding on Lessee or any of its Subsidiaries that was not entered into by Lessee or any such Subsidiary for the purpose of concealing information from the Lessor, Agent or any Participant. Lessee shall, however, furnish to Agent such information concerning Lessee's intellectual property (including, without limitation, application and registration numbers for any filings in connection with such intellectual property) as is reasonably necessary to permit Agent (on behalf of itself and the other Participants) to perfect a security interest in such intellectual property.
- (i) **Keeping of Records and Books of Account.** Keep adequate records and books of account reflecting all financial transactions in conformity with GAAP, consistently applied, and in material conformity with all applicable requirements of any Governmental Authority having regulatory jurisdiction over Lessee or any applicable Subsidiary.



- (j) **Compliance with ERISA.** Cause, and cause each of its ERISA Affiliates to: (i) maintain each Plan in compliance in all material respects with the applicable provisions of ERISA, the Code and other federal or state law; (ii) cause each Plan which is qualified under Section 401(a) of the Code to maintain such qualification; and (iii) make all required contributions to any Plan subject to Section 412 of the Code.

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- (k) **Compliance With Agreements.** Promptly and fully comply with all Contractual Obligations to which any one or more of them is a party, except for any such Contractual Obligations (i) the nonperformance of which would not cause a Potential Lease Default or Lease Event of Default, (ii) then being contested by any of them in good faith by appropriate proceedings, or (iii) if the failure to comply therewith could not reasonably be expected to have a Material Adverse Effect.
- (l) **ALTA Survey.** Not later than January 15, 2003, Lessee shall have delivered to Agent for the benefit of Lessor and the Participants an ALTA/ACSM (1992)(Urban) Survey of the Property, including Table A numbers 1, 2, 3, 4, 6, 8, 9, 10 and 11, certified to Lessor, the Participants and the title company and otherwise in form reasonably acceptable to the Participants, together with endorsements to the title insurance policies delivered pursuant to Section 6.1(e) hereof removing any survey exceptions, adding endorsements that the real property shown on such Survey is identical to the Property and such other endorsements as Lessor, Agent and the Participants may reasonably require.

Section 10.2 **Negative Covenants of Lessee.** So long as this Participation Agreement is in effect, Lessee shall not, and shall not permit any of its Subsidiaries to, directly or indirectly:

- (a) **Indebtedness.** Create, incur, assume or suffer to exist any Indebtedness, except for the following ("Permitted Indebtedness"):
- (i) The obligations of Lessee under the Operative Documents and the Loan Documents;
  - (ii) Indebtedness outstanding on the date hereof and listed on **Schedule 10.2** and any refinancings, refundings, renewals or extensions thereof, provided that the amount of such Indebtedness is not increased at the time of such refinancing, refunding, renewal or extension except by an amount equal to the premium or other amount paid, and fees and expenses incurred, in connection with such refinancing and by an amount equal to any utilized commitments thereunder, and (ii) the material terms of any such refinanced, refunded, renewed or extended Indebtedness shall be no less favorable to Lessee than the terms of such Indebtedness immediately prior to such refinancing, refunding, renewal or extension;
  - (iii) Ordinary Course Indebtedness;
  - (iv) Indebtedness of Lessee under the Convertible Subordinated Debentures;
  - (v) Indebtedness of Lessee under any letter of credit facility other than a Letter of Credit (a "**Permitted LC Agreement**"); provided that (A) the sum at any time of the aggregate face amount of all letters of credit issued and outstanding under all Permitted LC Agreements, plus the aggregate amount of all unremedied drawings under such letters of credit, does not exceed \$10,000,000, and (B) the Indebtedness of Lessee under any Permitted LC Agreement is at all times either unsecured or secured by Liens permitted pursuant to Section 10.2(b).

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(vi) Indebtedness of Lessee and its Subsidiaries under loans and Capital Leases incurred by Lessee or any of its Subsidiaries to finance the acquisition by such Person of real property, improvements, fixtures, equipment or other fixed assets (together with attachments, ascensions, additions, "soft costs" and proceeds thereof), provided that in each case, (A) such Indebtedness is incurred by such Person at the time of, or not later than six (6) months after, the acquisition by such Person of the property so financed, and (B) such Indebtedness does not exceed the purchase price of the property so financed;

(vii) Indebtedness of Lessee and any of its Subsidiaries under Synthetic Lease Obligations;

(viii) Indebtedness of Lessee and its Subsidiaries under initial or successive refinancings, refundings, renewals or extensions of any Indebtedness permitted by clauses (v), (vi) and (vii) above, provided that the amount of such Indebtedness is not increased at the time of such refinancing, refunding, renewal or extension except by an amount equal to the premium or other amount paid, and fees and expenses incurred, in connection with such refinancing, and (ii) the material terms of any such refinanced, refunded, renewed or extended indebtedness shall be no less favorable to Lessee than the terms of such Indebtedness immediately prior to such refinancing, refunding, renewal, or extension;

(ix) Indebtedness of Lessee to any of Lessee's Subsidiaries, Indebtedness of any of Lessee's Subsidiaries to Lessee or Indebtedness of any of Lessee's Subsidiaries to any of Lessee's other Subsidiaries;

(x) Subordinated Indebtedness of Lessee to any Person, provided that (A) such Indebtedness contains subordination provisions no less favorable to Agent and the Participants than those set forth in **Exhibit O** or as otherwise approved by the Required Participants and (B) the aggregate principal amount of all Subordinated Debt of Lessee outstanding (including the Convertible Subordinated Debentures) does not exceed \$350,000,000 at any time, and

(xi) Other Indebtedness not included in (i) through (xi) above and not exceeding, in the aggregate at any time, ten percent (10%) of the total consolidated assets of Lessee and its Subsidiaries determined as of the end of the most recent fiscal quarter.

(b) **Liens.** Incur, assume or suffer to exist, any Lien upon any of its property, assets or revenues, whether now owned or hereafter acquired, except for the following ("Permitted Liens"):

(i) Liens in favor of any of Agent or any Participant securing the obligations of Lessee under the Operative Documents;

(ii) Liens existing on the date hereof and listed on **Schedule 10.2** and any renewals or extensions thereof, provided that the property covered thereby is not increased and any renewal or extension of the obligations secured or benefited thereby is permitted by Section 10.2(a);

- (iii) Ordinary Course Liens;
- (iv) Liens securing Investments which constitute Permitted Investments under Section 10.1(p);
- (v) Liens on cash or cash equivalents securing reimbursement obligations of Lessee under letters of credit (other than any Letters of Credit) in an aggregate amount of all such cash and cash equivalents not to exceed \$10,000,000;
- (vi) Liens on the property or assets of any corporation which becomes a Subsidiary of Lessee after the date of this Participation Agreement, provided that (A) such Liens exist at the time such corporation became a Subsidiary, and (B) such Liens were not created in contemplation of such acquisition by Lessee;
- (vii) Rights of vendors or lessors under conditional sale agreements, Capital Leases or other title retention agreements, provided that in each case, (A) such rights secure or otherwise relate to Permitted Indebtedness, (B) such rights do not extend to any property other than property acquired with the proceeds of such Permitted Indebtedness (together with accessions, additions, replacements and proceeds thereof), and (z) such rights do not secure any Indebtedness other than Permitted Indebtedness;
- (viii) Liens securing Indebtedness and any related obligations of Lessee or any of its Subsidiaries which constitutes Permitted Indebtedness under clause (vi) of Section 10.2(a) (or refinancings of such Indebtedness under clause (viii) of Section 10.2(a)), provided that such Liens cover only those assets subject to Synthetic Lease Obligations (together with accessions, additions, replacements and proceeds thereof);
- (ix) Liens incurred in connection with leases, subleases, licenses and sublicenses granted to Persons not interfering in any material respect with the business of Lessee and its Subsidiaries and any interest or title of a lessee or licensee under any such leases, subleases, licenses or sublicenses;
- (x) Liens in favor of the Lenders in connection with the letter of credit cash collateral account established in accordance with the Loan Documents;
- (xi) Liens arising in connection with judgments not constituting a Lease Event of Default; and
- (xii) Liens not otherwise permitted hereunder on the property or assets of Lessee and any of its Subsidiaries securing (A) borrowed money Indebtedness or (B) all obligations of Lessee arising other than in connection with any securitization which are evidenced by bonds, debentures, notes or other similar instruments, provided that, in each case, the aggregate principal amount of all Indebtedness secured by such Liens does not exceed at any time ten percent (10%) of the Consolidated Tangible Net Worth of Lessee and its Subsidiaries determined as of the end of the fiscal quarter immediately preceding the date of determination;

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- (c) **Fundamental Changes.** Merge or consolidate with or into any Person or liquidate, wind-up or dissolve itself, or permit or suffer any liquidation or dissolution or sell all or substantially all of its assets, except that:
    - (i) any Subsidiary may merge with (A) Lessee, provided that Lessee shall be the continuing or surviving corporation, (B) any one or more Subsidiaries, and (C) any joint venture, partnership or other Person, so long as such joint venture, partnership and other Person will, as a result of making such merger and all other contemporaneous related transactions, become a Subsidiary;
    - (ii) any Subsidiary may sell all or substantially all of its assets (upon voluntary liquidation or otherwise), to Lessee or to another Subsidiary;
    - (iii) Lessee may merge into or consolidate with any other Person, provided that (A) Lessee is the surviving corporation, and (B) immediately after giving effect to such merger or consolidation, no Potential Lease Default or Lease Event of Default shall have occurred and be continuing; and
    - (iv) any Subsidiary may merge or consolidate with or into any other Person or sell all or substantially all of its assets to the extent such transaction is a Disposition otherwise permitted under Section 10.2(d) or an Investment otherwise permitted under Section 10.2(e) and immediately after giving effect to such merger or consolidation, no Potential Lease Default or Lease Event of Default shall have occurred and be continuing.
  - (d) **Dispositions.** Make any Dispositions, except:
    - (i) Ordinary Course Dispositions;
    - (ii) Dispositions permitted by Section 10.2(c);
    - (iii) Dispositions permitted by the Lease; and
    - (iv) Dispositions not otherwise permitted hereunder provided that such Dispositions do not exceed in the aggregate 10% of the Consolidated Tangible Net Worth for the fiscal quarter ending December 31, 2002 as determined in the financial statements delivered in accordance with Section 10.1(a).
  - (e) **Investments.** Make any Investments, except for the following ("Permitted Investments"):

- (i) Investments existing on September 30, 2002;
- (ii) Ordinary Course Investments;
- (iii) Investments permitted by Section 10.2(a) or Section 10.2(c);

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- (iv) Investments arising from rights received by Lessee and its Subsidiaries upon the required payment of any permitted contingent obligations of Lessee and its Subsidiaries;
- (v) Investments in the nature of Acquisitions, provided that the aggregate amount of such Acquisitions in any period of four consecutive fiscal quarters does not exceed ten percent (10%) of Consolidated Tangible Net Worth as determined as of the fiscal quarter immediately preceding the date of determination;
- (vi) Investments of Lessee and its Subsidiaries in Swap Contracts, provided that all such arrangements are entered into in connection with bona fide hedging operations and not for speculation;
- (vii) Investments not otherwise permitted hereunder, provided that the aggregate amount of such other Investments made after September 30, 2002 (less any return on any such Investments) does not exceed ten percent (10%) of Consolidated Tangible Net Worth as determined as of the fiscal quarter immediately preceding the date of determination.

(f) **Restricted Payments.** Make any Restricted Payments, except as follows:

- (i) Lessee may pay dividends or other distributions payable solely in shares of capital stock of Lessee or any Subsidiary or payable by any Subsidiary to Lessee or another Subsidiary;
- (ii) Lessee may distribute rights pursuant to a shareholder rights plan or redeem such rights, provided that such redemption is in accordance with the terms of such shareholder rights plan;
- (iii) Lessee may make Restricted Payments in connection with or pursuant to any of its Employee Benefits Plans or in connection with the employment, termination or compensation of its employees, officers or directors;
- (iv) Lessee may make Restricted Payments with the Net Security Proceeds received from a substantially concurrent issuance of Equity Securities or capital stock or with its Equity Securities or capital stock or Lessee may convert any Equity Securities in accordance with their terms into other Equity Securities, provided, however, that the cash amount of any such Restricted Payment shall be limited to the cash portion of the Net Proceeds received from the concurrent issuance of Equity Securities or capital stock;
- (v) Lessee may purchase Equity Securities pursuant to one or more stock repurchase programs, provided that (A) no Potential Lease Default or Lease Event of Default shall have occurred and be continuing, (B) after giving effect to any such repurchases Lessee shall be in compliance with Section 10.2(k), and (C) when combined with the amount of all dividends, purchases or redemptions made under Section 10.2(f)(vi), the total of all such purchases of Equity Securities shall not exceed the sum of \$5,000,000 in the aggregate over the life of this Agreement; and
- (vi) Lessee may declare or pay any dividends in respect of its Equity Securities or purchase or redeem shares of its Equity Securities or make distributions to shareholders not otherwise permitted hereunder, provided that (i) the aggregate amount paid or distributed in any period of four consecutive quarters (excluding any amounts covered by clause (ii) above) does not exceed five percent (5%) of Consolidated Tangible Net Worth as determined as of the fiscal quarter immediately preceding the date of determination; and (ii) when combined with the amount of all purchases of Equity Securities made under Section 10.2(f)(v), the total of all such dividends, purchases or redemptions shall not exceed the sum of \$5,000,000 in the aggregate over the life of this Agreement.

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- (g) **ERISA.** At any time engage in a transaction which could be subject to Sections 4069 or 4212(c) of ERISA, or permit any Pension Plan to (i) engage in any non-exempt "prohibited transaction" (as defined in Section 4975 of the Code); (ii) fail to comply with ERISA or any other applicable Requirements of Law; or (iii) incur any material "accumulated funding deficiency" (as defined in Section 302 of ERISA), which, with respect to each event listed above, has a Material Adverse Effect.
- (h) **Change in Nature of Business.** Engage, either directly or indirectly through Affiliates, in any line of business other than the digital storage business, any other business incidental or reasonably related thereto, or any businesses that are, as determined by the Board of Directors of Lessee, appropriate extensions thereof.
- (i) **Transactions with Affiliates.** Enter into any transaction of any kind with any Affiliate (other than transactions among Lessee or any of its Subsidiaries and any Subsidiary) of Lessee other than arm's-length transactions with Affiliates that are otherwise permitted hereunder.

(j) **Certain Indebtedness Payments, Etc.** Neither Lessee nor any of its Subsidiaries shall pay, prepay, redeem, purchase, defease or otherwise satisfy in any manner prior to the scheduled payment thereof any Subordinated Debt except as otherwise permitted under this Section 10.2(j); amend, modify or otherwise change the terms of any document, instrument or agreement evidencing Subordinated Debt such that such amendment, modification or change would (i) cause the outstanding aggregate principal amount of all such Subordinated Debt so amended, modified or changed to be increased as a consequence of such amendment, modification or change, (ii) cause the subordination provisions applicable to such Subordinated Debt to be less favorable to Agent and the Participants than those set forth on **Exhibit O**, (iii) increase the interest rate applicable thereto, or (iv) accelerate the scheduled payment thereof. Lessee shall not cause or permit any of its obligations, except the obligations constituting Senior Indebtedness to constitute "Designated Senior Indebtedness" under the Indenture governing the Convertible Subordinated Debentures (it being understood that the obligations of Lessee under the Operative Documents shall at all times constitute "Designated Senior Indebtedness" thereunder). Notwithstanding the foregoing, Lessee may conduct an exchange offer (whether public, private or on a 3(a)(9) basis) of all or part of the Lessee's Convertible Subordinated Debentures for one or more of the following: (a) new securities ("New Securities") that are subordinated in right of payment to the obligations of Lessee under the Operative Documents to the same extent as the existing Convertible Subordinated Debentures; provided that (w) the aggregate annual interest obligation of Lessee under the New Securities shall be equal to or less than the aggregate annual interest obligation under the existing Convertible Subordinated Debentures, (x) the maturity date of the New Securities shall not be earlier than the maturity date of the existing Convertible Subordinated Debentures, (y) the total principal amount of the obligations represented by Lessee's Subordinated Debt shall not be increased by means of any exchange of New Securities for all or part of the Lessee's Convertible Subordinated Debentures and (z) the New Securities shall not permit any amortization of the principal amount of the obligations represented thereby prior to the maturity of the existing Convertible Subordinated Debentures; or (b) new securities issued by Maxtor ("**Maxtor Securities**"). No exchange or series of exchanges of New Securities or Maxtor Securities for all or any part of Lessee's Convertible Subordinated Debentures pursuant to this Section 10.2(j) shall be deemed to permit any reduction in the amount of Maxtor's reimbursement obligations under the Maxtor Reimbursement Agreement except on a dollar-for-dollar basis to the extent that the obligations represented by Lessee's Subordinated Debt are reduced by means of such exchange or series of exchanges. Lessee may (A) convert, or honor a conversion request with respect to, any such Subordinated Debt into Equity Securities of Lessee in accordance with the terms thereof, (B) pay cash to holders of such Subordinated Debt in connection with such a conversion but solely to the extent representing the value of any fractional shares; and (C) make other payments, repayments, redemptions, purchases, defeasance or other satisfaction of Subordinated Debt not to exceed \$5,000,000 in the aggregate.

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(k) **Financial Covenants.**

(i) **Consolidated Tangible Net Worth.** Permit Consolidated Tangible Net Worth on the last day of any fiscal quarter commencing with the fiscal quarter ended December 31, 2002, to be less than \$190,000,000.

(ii) **Minimum Quick Ratio.** Permit the Quick Ratio determined as of the last day of any fiscal quarter of Lessee (commencing with the quarter ending December 31, 2002) to be less than 1.00:1.00.

(iii) **Adjusted Leverage Ratio.** Permit the Adjusted Leverage Ratio, determined as of the last day of any fiscal quarter of Lessee, commencing with the fiscal quarter ending June 30, 2003 (measured on a rolling four quarter basis for the four fiscal quarters ending on such dates), to be greater than the following: (i) for the fiscal quarters ending June 30, 2003 and September 30, 2003, 2.50:1.00; and (ii) for the fiscal quarters ending December 31, 2003 and all fiscal quarters thereafter, 2.00:1.00.

(iv) **Minimum Consolidated EBITDA.** Permit Consolidated EBITDA, determined as of the last day of any fiscal quarter of Lessee commencing with the fiscal quarter ending December 31, 2002, to be less than the following: (i) for the fiscal quarter ending December 31, 2002, \$1,000,000; (ii) for the fiscal quarter ending March 31, 2003, \$18,000,000; (iii) for the fiscal quarter ending June 30, 2003, \$14,000,000; (iv) for the fiscal quarter ending September 30, 2003, \$11,000,000; (v) for the fiscal quarter ending December 31, 2003, \$12,500,000; and (vi) for the fiscal quarter ending March 31, 2004, \$13,000,000.

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(v) **Maximum Senior Indebtedness.** Permit Lessee's Senior Indebtedness to exceed at any time the sum of \$125,000,000 from the Closing Date through March 31, 2003.

(vi) **Maximum Capital Expenditures.** Permit Lessee's capital expenditures (as determined pursuant to GAAP) to exceed \$10,000,000 for each fiscal quarter of Lessee or \$30,000,000 for each fiscal year of Lessee.

(viii) **Minimum Unrestricted Cash.** Permit Lessee's Consolidated Cash Balance (as defined in Section 10.1(b)(ii)) at any time to fall below \$100,000,000. During any period in which the Consolidated Cash Balance is less than \$200,000,000, Lessee shall maintain a minimum Consolidated Cash Balance of \$100,000,000 deposited in domestic accounts subject to a deposit account control agreement satisfactory to Agent. During any period in which the Consolidated Cash Balance is equal to or greater than \$200,000,000, Lessee shall maintain a minimum Consolidated Cash Balance of \$50,000,000 deposited in domestic accounts subject to such deposit account control agreement. The Consolidated Cash Balance covenants set forth in this Section 10.2(k)(vii) shall be tested monthly in accordance with the reports to be delivered to Lessor, Agent and each Participant pursuant to Section 10.1(b)(ii) of this Agreement.

- (l) **Accounting Changes.** Change (i) its fiscal year (currently April 1 to March 31), or (ii) its accounting practices except as permitted by GAAP.
- (m) **No Impairment of Deposits.** Lessee shall not, nor shall it permit any of its Subsidiaries to, directly or indirectly, enter into or become bound by any agreement, instrument, indenture or other obligation which could directly or indirectly restrict, prohibit or require the consent of any Person to the making by Lessee of any deposit of Cash Collateral or the realization thereon or utilization thereof (or of any earnings thereon or of any other Collateral) by Lessor, Agent or any of the Participants.
- (n) **Tax Losses.** Alone or together with one or more of its Subsidiaries or Affiliates, incur a Tax Loss the uninsured or unreimbursed portion of which (individually, or together with all other prior Tax Losses) exceeds the Threshold Amount, where (i) an "uninsured" Tax Loss means a Tax Loss which is not the subject of a bona fide insurance policy or contract with an insurer or syndicate of insurers of national repute or as to which such insurer or insurers have disputed or disclaimed contractual liability for such Tax Loss or otherwise breached the terms of such policy or contract, and (ii) an "unreimbursed" Tax Loss means a Tax Loss not reimbursed by Maxtor in accordance with the terms of the Maxtor Reimbursement Agreement. **[subject to review]**

Section 10.3 **Cooperation with Lessee.** Lessor, the Participants and Agent shall, to the extent reasonably requested by Lessee (but without assuming additional liabilities, duties or other obligations on account thereof), at Lessee's expense, cooperate with Lessee in connection with its covenants contained herein including, without limitation, at any time and from time to time, upon the request of Lessee, to promptly and duly execute and deliver any and all such further instruments, documents and financing statements (and continuation statements related thereto) as Lessee may reasonably request in order to perform such covenants.

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Section 10.4 **Covenants of Lessor.** Lessor hereby agrees that so long as this Participation Agreement is in effect:

- (a) **Discharge of Liens.** Lessor will not create or permit to exist at any time, and will, at its own cost and expense, promptly take such action as may be necessary duly to discharge, or to cause to be discharged, all Lessor Liens on the Property attributable to it; provided, however, that Lessor shall not be required to so discharge any such Lessor Lien while the same is being contested in good faith by appropriate proceedings diligently prosecuted so long as such proceedings shall not involve any material danger of impairment of the Liens of the Lease or the Security Documents or of the sale, forfeiture or loss of, and shall not interfere with the use or disposition of, the Property or title thereto or any interest therein or the payment of Rent.
- (b) **Change of Chief Place of Business.** Lessor shall give prompt notice to Lessee and Agent if Lessor's chief place of business or chief executive office, or the office where the records concerning the accounts or contract rights relating to the Property are kept, shall cease to be located at 66 South Pearl Street, Albany, New York 12207, or if it shall change its name, identity or corporate structure.

## SECTION 11

### PARTICIPATIONS

Section 11.1 **Amendments; Actions on Default.**

- (a) Lessor shall have the right to forebear from exercising rights against Lessee to the extent Lessor shall determine in good faith that such forbearance is appropriate and is permitted by Section 15.5 and Sections 11.1, 11.2 and 11.3. Upon the direction of the Required Participants, Lessor shall execute any waiver, modification or amendment of the Lease requested by Lessee; provided, that: (i) the waiver, modification or amendment is not prohibited by the forgoing provisions of this Participation Agreement, (ii) the waiver, modification or amendment does not (A) increase the amount Lessor may be required to pay to Lessee or anyone else, or (B) reduce or postpone (and cannot reasonably be expected to reduce or postpone) any payments that Lessor would, but for such modification or amendment, be expected to receive, or (C) release Lessor's interest in all or a substantial part of the Property; and (iii) Lessor is not excused from executing the waiver, modification or amendment by Section 11.3
- (b) Lessor will, with reasonable promptness, provide each Participant with copies of all default notices it sends or receives under the Lease and notify each Participant of any Lease Event of Default under the Lease of which it is aware and of any other matters which, in Lessor's reasonable judgment, are likely to materially affect the payments each Participant will be required to make or be entitled to receive under this Participation Agreement, but Lessor will not in any event be liable to any Participant for Lessor's failure to do so unless such failure constitutes gross negligence or willful misconduct on the part of Lessor.

- (c) Before taking possession of the Property or exercising foreclosure or offset rights against the Property or filing any lawsuit against Lessee because of any breach by Lessee of the Operative Documents or if requested in writing by any Participant at any time when a Lease Event of Default has occurred and is continuing, Lessor shall promptly call a meeting with each Participant and Agent to discuss what, if anything, Lessor should do. Such meeting shall be scheduled during regular business hours in the offices of Agent, or another appropriate location in San Francisco, California, not earlier than five (5) and not later than twenty (20) Business Days after Lessor's receipt of the written request from a Participant. If the Required Participants shall direct Lessor in writing to (a) send any default notices required before a Potential Lease Default can become a Lease Event of Default, or (b) bring a lawsuit against Lessee to enforce the Operative Documents when a Lease Event of Default has occurred and is continuing, then Lessor shall send the notice or bring the suit, and Lessor shall prosecute any such suit with reasonable diligence using reputable counsel. However, if Agent is not a member of the Required Participants voting pursuant to this subsection 11.1(d) in favor of the giving of any such notice or the bringing of any such suit, then Lessor may require that it first receive the written agreement (in form reasonably acceptable to Lessor) of the members of the Required Participants so voting to indemnify Agent and Lessor from and against all costs, liabilities and claims that may be incurred by or asserted against Lessor because of the action the Required Participants direct Agent or Lessor to take. In no event shall any Participant instigate any suit or other action directly against Lessee with respect to the Operative Documents or the Property, even if such Participant would, but for this Participation Agreement, be entitled to do so as a third party beneficiary or otherwise under the Operative Documents.

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- (d) In the event Lessee or its designee fails to purchase the Property after any exercise of its Purchase Option or Expiration Date Purchase Obligation or following the occurrence and continuance of a Lease Event of Default, Lessor shall, if the Required Participants shall agree in writing, bring suit against Lessee to enforce the Operative Documents in such form as shall be recommended by reputable counsel, and thereafter Lessor shall prosecute the suit with reasonable diligence in accordance with the advice of reputable counsel. If Lessor acquires the interests of Lessee in any of the Property as a result of such suit or otherwise, Lessor shall thereafter proceed with reasonable diligence to sell the Property in a commercially reasonable manner to one or more bona fide third party purchasers and shall in any event endeavor to consummate the sale of the entire Property (through a single sale of the entire Property or a series of sales of parts) within five (5) years following the date Lessor recovers possession of the Property at the best price or prices Lessor believes are reasonably attainable within such time. Further, after the Designated Payment Date and prior to Lessor's sale of the entire Property, Lessor shall retain a property management company experienced in the area where the Property is located to manage the operation of the Property and pursue the leasing of any completed Improvements which are part of the Property. Lessor shall not retain an Affiliate of Lessor to act as the property manager except under a bona fide, arms-length management contract containing commercially reasonable terms. Further, after the Designated Payment Date and until Lessor sells the Property, Lessor shall (i) endeavor in good faith to maintain, or shall obtain the agreement of one or more of such tenants to maintain, the Property in good order and repair, (ii) procure and maintain casualty insurance against risks customarily insured against by owners of comparable properties, in amounts sufficient to eliminate the effects of coinsurance, (iii) keep and allow each Participant to review accurate books and records covering the operation of the Property, and (iv) pay prior to delinquency all taxes and assessments lawfully levied against the Property.
- (e) Notwithstanding the foregoing, Defaulting Participants shall have no voting or consent rights under this Section 11.1 and no rights to require Lessor to call a meeting pursuant to Section 11.1(d) until they cease to be Defaulting Participants. During any period that any Defaulting Participants have no voting rights under this Section 11.1, only the Commitment Percentages of the other Participants that still have voting rights will be considered for purposes of determining the Required Participants.

Section 11.2 **General.** Subject to the limitations set forth in Section 11.1 and Section 14:

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- (a) Lessor shall have the exclusive right to take any action and to exercise any available powers, rights and remedies to enforce the obligations of Lessee under the Operative Documents, or to refrain from taking any such action or exercising any such power, right or remedy.
- (b) Lessor shall be entitled to (i) give any consent, waiver or approval requested by Lessee with respect to any construction or other approval contemplated in the Lease or (ii) waive or consent to any adverse title claims affecting the Property, provided that, in either case, such action will not have a material adverse effect on Lessee's obligations or ability to make the payments required under the Operative Documents, Lessor's rights and remedies under the Operative Documents or any Participant's rights hereunder.

Section 11.3 **Conflicts.** Notwithstanding anything to the contrary herein contained, Lessor shall be entitled, even over the objection of each Participant or the Required Participants, (i) to take any action required of Lessor by, or to refrain from taking any action prohibited by, the Operative Documents or any law, rule or regulation to which Lessor is subject (provided, that this Section shall not be construed to authorize Lessor to take any action required by a modification of the Operative Documents prohibited by Section 11.1), and (ii) after notice to the Participants, to bring and prosecute a suit against Lessee in the form recommended by and in accordance with advice of reputable counsel at any time when a breach of the Operative Documents by Lessee shall have put Lessor (or any of its officers or employees) at risk of criminal prosecution or significant liability to third parties or at any time after Lessee or its designee fails to purchase the Property on the Designated Payment Date. Nothing herein contained shall be construed to require Lessor to agree to modify the Operative Documents or to take any action or refrain from taking any action in any manner that could increase Lessor's liability to Lessee or others, that could reduce or postpone payments to which Lessor is entitled thereunder, or that could reduce the scope and coverage of the indemnities provided for Lessor's benefit therein.

Section 11.4 **Refusal to Give Consents or Fund.** If any Participant declines to consent to any amendment, modification, waiver, release or consent for which such Participant's consent is requested or required by reason of this Participation Agreement, or if any Participant fails to pay any amount owed by it hereunder, Lessor shall have the right, but not the obligation and without limiting any other remedy of Lessor, to terminate such Participant's rights to receive any further payments under Section 3 of this Participation Agreement (other than payments required because of Lessor's collection of any Rent applied by Lessor as reimbursement for a Defaulted Amount or interest on a Defaulted Amount) by paying such Participant a termination fee equal to the total of:

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(i) all amounts actually advanced by such Participant to Lessor under Section 3.3 hereof before the termination; excluding, however, any such amounts that were repaid to such Participant before the termination by actual payments made to such Participant by Lessor of, or Lessor's offset against, sums representing:

(A) Such Participant's Commitment Percentage times any payments of Rent received by Lessor under the Lease; plus

(B) Such Participant's Commitment Percentage times any sales proceeds received by Lessor under the Lease; and

(ii) Such Participant's Commitment Percentage, times:

(A) the then accrued but unpaid Basic Rent due under the Lease; plus

(B) interest on past due amounts described in the preceding clause (A) computed at the Federal Funds Rate; plus

(C) interest on any amounts (other than interest itself) past due from Lessee or its designees under the Operative Documents, computed at the Federal Funds Rate.

Such Participant's rights to receive payments equal to such Participant's Commitment Percentage of any Rent applied by Lessor as reimbursement for a Defaulted Amount or interest on a Defaulted Amount shall not be impaired or affected by any termination contemplated in this Section 11.4; accordingly, Lessor shall not, as a condition to such a termination, be required to reimburse such Participant for any payments such Participant has made in connection with Defaulted Amounts.

Section 11.5 **Required Repayments.** Each Participant shall repay to Lessor, upon written request or demand by Lessor (i) any sums paid by Lessor to such Participant under this Participation Agreement from, or that were computed by reference to, any Rent or other amounts which Lessor shall be required to return or pay over to another party, whether pursuant to any bankruptcy or insolvency law or proceeding or otherwise and (ii) any interest or other amount that Lessor is also required to pay to another party with respect to such sums. Such repayment by any Participant shall not constitute a release of such Participant's right to receive such Participant's Commitment Percentage times the amount of any such Rent or any such other amount (or any interest thereon) that Lessor may later recover.



Section 11.6 **Indemnification.** Each Participant agrees to indemnify and defend Lessor (to the extent not reimbursed by Lessee within ten (10) days after demand) from and against such Participant's Commitment Percentage of any and all liabilities, obligations, claims, expenses or disbursements (including reasonable fees of attorneys, accountants, experts and advisors) of any kind or nature whatsoever (in this Section 11.6 collectively called "Covered Liabilities") which to any extent (in whole or in part) may be imposed on, incurred by or asserted against Lessor growing out of, resulting from or in any other way associated with the Property or the Operative Documents (including the enforcement thereof, whether exercised upon Lessor's own initiative or upon the direction of the Required Participants) and the transactions and events at any time associated therewith or contemplated therein. The foregoing indemnification shall apply whether or not such Covered Liabilities are in any way or to any extent caused, in whole or in part, by any negligent act or omission of any kind by Lessor; provided, only that no Participant shall be obligated under this Section 11.6 to indemnify Lessor (i) for Covered Liabilities incurred in connection with any transfer or assignment by Lessor of its right to receive Rent or its rights and interests in and to the Property, the Operative Documents or this Participation Agreement to its Affiliates or (ii) for that portion or percentage, if any, of any of the Covered Liabilities which is proximately caused by: (A) Lessor's own gross negligence or willful misconduct; (B) any representation made by Lessor in the Operative Documents that is false in any material respect and that Lessor knew was false at the time of Lessor's execution of the Operative Documents; or (C) Lessor Liens not claimed by, through or under any of the Participants. After each Participant has paid its Percentage of any Covered Liabilities, each Participant shall be entitled to payment from Lessor of an amount equal to the Adjusted Percentage (as defined below) of any payments subsequently received by Lessor as Excess Reimbursement (as defined below) for such Covered Liabilities. As used in this Section "Adjusted Percentage" shall equal (i) such Participant's Commitment Percentage, divided by (ii) the sum of the Commitment Percentages of all Participants who have paid Lessor their respective shares of the Covered Liabilities at issue. As used in this Section, the term "Excess Reimbursement" shall mean, for the Covered Liabilities at issue, amounts reimbursed or paid by Lessee to or on behalf of Lessor on account of such Covered Liabilities in excess of (i) such Covered Liabilities, times (ii) the Commitment Percentages of any Participants that have not paid Lessor their respective Percentages of such Covered Liabilities.

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Section 11.7 **Required Supplemental Payments.** In the event that Lessee fails to pay any Required Supplemental Payment when due (a "Defaulted Amount"), Lessor shall notify each Participant of such Defaulted Amount, whereupon each Participant shall pay to Lessor an amount equal to such Participant's Commitment Percentage times the Defaulted Amount; such payment from Participant to Lessor shall be due prior to 2:00 p.m., San Francisco time, on the date of such notice if such notice is given by 12:00 noon, San Francisco time, otherwise prior to 12:00 noon, San Francisco time, on the next Business Day following such notice. After payment of a Participant's Commitment Percentage times the Defaulted Amount, any payments subsequently received by Lessor from Lessee as reimbursement for such Defaulted Amount, and any interest received by Lessor from Lessee that accrued on the Defaulted Amount after the date of such Participant's payment of its Commitment Percentage times the Defaulted Amount, will constitute Supplemental Rent for purposes of computing payments due such Participant under this Participation Agreement.

Section 11.8 **Application of Payments Received From Defaulting Participant As a Cure For Payment Defaults.** If after a failure to make a payment required by Section 3.4, any Defaulting Participant cures such failure, in whole or in part, by paying to Lessor all or part of such payment and interest thereon at the Late Payment Rate, then Lessor shall apply the payments so made to Lessor, net of the costs of collecting such payments (the "Net Cure Proceeds"), or other funds available to Lessor equal to the Net Cure Proceeds, to make payments to Lessor itself equal to its Excess Investment (if any) until Lessor shall no longer have any Excess Investment, before applying the same to any other purpose.

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Section 11.9 **Order of Application.** For purposes of this Participation Agreement, Lessor shall be entitled, but not required, to apply any payments received from Lessee under the Operative Documents to satisfy (1) unpaid Required Supplemental Payments (and interest thereon) not included in Rent, if any, and (2) costs incurred by Lessor because of any sale under the Lease before applying such payments to satisfy Lessee's other obligations, regardless of how Lessee may have designated such payments.

Section 11.10 **Investments Pending Dispute Resolution; Overnight Investments.** Whenever Agent in good faith determines that it does not have all information needed to determine how payments to Participants must be made on account of any receipts by Agent of amounts paid under the Lease, or whenever Agent in good faith determines that there is any dispute among the Participants about payments which must be made on account of such receipts, Agent may choose to defer the payments to Participants which are the subject of such missing information or dispute. However, to minimize any such deferral, Agent shall attempt diligently to obtain any missing information needed to determine how payments to the Participants must be made. Also, pending any such deferral, or if Agent is otherwise required to invest funds pending distribution to the Participants, Agent shall endeavor to invest the payments at issue for the benefit of such Participants. In addition, if payments which are to be distributed to Participants are received by Agent after 12:00 noon, San Francisco time, and Agent will not distribute such payments until the next Business Day pursuant to Section 3, then Agent will endeavor to invest such payments overnight for the benefit of the Participants; provided, that Agent shall have no liability to any Participant if Lessor is unable to make such investments. Investments by Agent shall be in the overnight federal funds market pending distribution, and the interest earned on each dollar of principal so invested shall be paid to the Person entitled to receive such dollar of principal when the principal is paid to such Person.

Section 11.11 **Agent to Exercise Lessor's Rights.** Lessor has assigned its interest in the Lease to Agent, for the benefit of the Participants, pursuant to the Assignment of Lease. To the extent provided therein, the rights, remedies, duties and responsibilities of Lessor contained in this Section 11 and in the other Operative Documents with respect thereto shall be exercisable by, binding upon and inure to the benefit of Agent, for the benefit of the Participants.

Section 11.12 **Exculpatory Provisions Regarding Lessor.** Subject to the provisions of Section 11.11, each Participant hereby irrevocably authorizes Lessor to take such actions on its behalf as are expressly vested in or delegated to Lessor by the terms of this Participation Agreement and the other Operative Documents, together with such powers as are reasonably incidental thereto. The provisions of the following Sections of this Participation Agreement are hereby incorporated by reference into this Section 11.12, substituting the word "Lessor" for "Agent" therein:

- (i) Section 14.1--second sentence.
- (ii) Section 14.2--all.
- (iii) Section 14.3--all.
- (iv) Section 14.4--all.
- (v) Section 14.5--first sentence.
- (vi) Section 14.6--last sentence.

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## SECTION 12

### TRANSFERS OF PARTICIPANTS' INTERESTS

Section 12.1 **Restrictions on and Effect of Transfer by Participants.** No Participant may (without the prior written consent of Agent and Lessee (not to be unreasonably withheld)) assign, convey or otherwise transfer (including pursuant to a participation) all or any portion of its right, title or interest in, to or under its Participation Interest or any of the Operative Documents or the Property, provided that (x) any Participant may pledge its interest without the consent of Agent or Lessee to any Federal Reserve Bank, (y) without the prior written consent of Agent, any Participant may transfer all or any portion of its interest to any Affiliate of such Participant or to any other existing Participant and (z) Lessor may not transfer its Tranche C Participation Interest in the absence of a Lease Event of Default; provided; further, that in the case of any transfer (other than to such Affiliate) each of the following conditions and any other applicable conditions of the other Operative Documents are satisfied:

- (a) **Required Notice and Effective Date.** Any Participant desiring to effect a transfer of its interest shall give written notice of each such proposed transfer to Lessee, Agent and each other Participant at least five (5) Business Days prior to such proposed transfer, setting forth the name of such proposed transferee, the percentage or interest to be retained by such Participant, if any, and the date on which such transfer is proposed to become effective. All reasonable out-of-pocket costs (including, without limitation, legal expenses) incurred by Lessor, Agent or any Participant in connection with any such disposition by a Participant under this Section 12.1 shall be borne by such transferring Participant. In the event of a transfer under this Section 12.1, any expenses incurred by the transferee in connection with its review of the Operative Documents and its investigation of the transactions contemplated thereby shall be borne by such transferee or the relevant Participant, as they may determine, but shall not be considered costs and expenses which Lessee is obligated to pay or reimburse under Section 9. Any such proposed transfer shall become effective upon the later of (i) the date proposed in the transfer notice referred to above and (ii) the date on which all conditions to such transfer set forth in this Section 12.1 shall have been satisfied.
- (b) **Assumption of Obligations.** Any transferee pursuant to this Section 12.1 shall execute and deliver to Agent and Lessee an Assignment and Acceptance in substantially the form attached as **Exhibit H** ("Assignment and Acceptance"), duly executed by such transferee and the transferring Participant, and a letter in substantially the form of the Participant's Letter attached hereto as **Exhibit I** ("Participant's Letter"), and thereupon the obligations of the transferring Participant under the Operative Documents shall be proportionately released and reduced to the extent of such transfer. Upon any such transfer as above provided, the transferee shall be deemed to be bound by all obligations (whether or not yet accrued) under, and to have become a party to, all Operative Documents to which its transferor was a party, shall be deemed the pertinent "Participant" for all purposes of the Operative Documents and shall be deemed to have made that portion of the payments pursuant to this Participation Agreement previously made or deemed to have been made by the transferor represented by the interest being conveyed; and each reference herein and in the other Operative Documents to the pertinent "Participant" shall thereafter be deemed a reference to the transferee, to the extent of such transfer, for all purposes. Upon any such transfer, Agent shall deliver to each Participant, Lessor and Lessee a new **Schedule I** and **Schedule II** to this Participation Agreement, revised to reflect the relevant information for such new Participant and the Commitment of such new Participant (and the revised Commitment of the transferor Participant if it shall not have transferred its entire interest).

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- (c) **Employee Benefit Plans.** No Participant may make any such assignment, conveyance or transfer to or in connection with any arrangement or understanding in any way involving any employee benefit plan (or its related trust), as defined in Section 3(3) of ERISA, or with the assets of any such plan (or its related trust), as defined in Section 4975(e)(1) of the Code.

- (d) **Representations.** Notwithstanding anything to the contrary set forth above, no Participant may assign, convey or transfer its interest to any Person, unless such Person shall have delivered to Agent and Lessee a certificate confirming the accuracy of the representations and warranties set forth in Section 8 with respect to such Person (other than as such representation or warranty relates to the execution and delivery of Operative Documents) and representing that such Person has, independently and without reliance upon Agent, any other Participant or, except to the extent of Lessee's representations made under the Operative Documents when made, Lessee, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into this transaction, the Property and Lessee and made its own decision to enter into this transaction.
- (e) **Amounts; Agent's Fee.** Any transfer of a Tranche A or B Participation Interest shall be in a principal amount which is equal to or greater than \$5,000,000 or, if permitted to be transferred under Section 12.1, a Tranche C Participation Interest. Each transferring Participant shall pay to Agent a transfer fee of \$3,500.
- (f) **Applicable Law.** Such transfer shall comply with Applicable Law and shall not require registration under any securities law applicable thereto.
- (g) **Effect.** From and after any transfer of its Participation Interest the transferring Participant shall be released, to the extent assumed by the transferee, from its liability and obligations hereunder and under the other Operative Documents to which such transferor is a party in respect of obligations to be performed on or after the date of such transfer. Upon any transfer by a Participant as above provided, any such transferee shall be deemed a "Participant" for all purposes of such documents and each reference herein to a Participant shall thereafter be deemed a reference to such transferee for all purposes to the extent of such transfer, except as the context may otherwise require. Notwithstanding any transfer as provided in this Section 12.1, the transferor shall be entitled to all benefits accrued and all rights vested prior to such transfer, including, without limitation, rights to indemnification under this Participation Agreement or any other Operative Document.

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## Section 12.2 Covenants and Agreements of Participants.

- (a) **Participations.** Each Participant covenants and agrees that it will not grant Participations in its Participation Interest to any Person (a "Sub-Participant") unless such participation complies with Applicable Law and does not require registration under any securities law applicable thereto and such Sub-Participant (i) is a bank or other financial institution and (ii) represents and warrants, in writing, to such Participant for the benefit of the Participants, Lessor and Lessee that (A) no part of the funds used by it to acquire an interest in any Participation Interest constitutes assets of any "employee benefit plan" (as defined in Section 3(3) of ERISA) which is subject to Title I of ERISA, or "plan" (as defined in Section 4975(e)(1) of the Code) and (B) such Sub-Participant is acquiring its interest for investment purposes without a view to the distribution thereof. Any such Person shall require any transferee of its interest in its Participation Interest to make the representations and warranties set forth in the preceding sentence, in writing, to such Person for its benefit and the benefit of the Participants, Lessor and Lessee. In the event of any such sale by a Participant of a participating interest in its Participation Interest to a Sub-Participant, such Participant's obligations under this Participation Agreement and under the other Operative Documents shall remain unchanged, such Participant shall remain solely responsible for the performance thereof, such Participant shall remain the holder of its Participation Interest, for all purposes under this Participation Agreement and under the other Operative Documents, and Lessor, Agent and, except as set forth in Section 12.2(b), Lessee shall continue to deal solely and directly with such Participant in connection with such Participant's rights and obligations under this Participation Agreement and under the other Operative Documents.
- (b) **Transferee Indemnities.** Each Sub-Participant shall be entitled to the benefits of Sections 13.5, 13.6, and 13.7 and 13.10 with respect to its participation in the Participation Interests outstanding from time to time; provided that no Sub-Participant shall be entitled to receive any greater amount pursuant to such Sections than the transferor Participant would have been entitled to receive in respect of the amount of the participation transferred by such transferor Participant to such Sub-Participant had no such transfer or participation occurred.

Section 12.3 **Future Participants.** Each Participant shall be deemed to be bound by and, upon compliance with the requirements of this Section 12, will be entitled to all of the benefits of the provisions of, this Participation Agreement.

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## SECTION 13

### INDEMNIFICATION

Section 13.1 **General Indemnification.** Lessee agrees, whether or not any of the transactions contemplated hereby shall be consummated, to assume liability for, and to indemnify, protect, defend, save and keep harmless each Indemnitee, on an After Tax Basis, from and against, any and all Claims that may be imposed on, incurred by or asserted against such Indemnitee (whether because of action or omission by such Indemnitee or otherwise), whether or not such Indemnitee shall also be indemnified as to any such Claim by any other Person and whether or not such Claim arises or accrues prior to the Closing Date or after the Expiration Date, in any way relating to or arising out of:

- (a) any of the Operative Documents or any of the transactions contemplated thereby or any violation thereof, and any amendment, modification or waiver in respect thereof;
- (b) the Property, the Lease or any part thereof or interest therein;
- (c) the purchase, design, construction, preparation, installation, inspection, delivery, non-delivery, acceptance, rejection, ownership, management, possession, operation, rental, lease, sublease, repossession, maintenance, repair, alteration, modification, addition or substitution, storage, transfer of title, redelivery, use, financing, refinancing, disposition, operation, condition, sale (including, without limitation, any sale pursuant to Sections 16.2, 16.3, 16.4, 17.2(c), 17.2(e) or 17.4 of the Lease or any sale pursuant to Articles XX or XXII of the Lease, return or other disposition of all or any part or any interest in the Property or the imposition of any Lien (or incurring of any liability to refund or pay over any amount as a result of any Lien) thereon, including, without limitation: (1) Claims or penalties arising from any violation of federal, state or local law, rule, regulation or order or in tort (strict liability or otherwise), (2) latent or other defects, whether or not discoverable, (3) any Claim based upon a violation or alleged violation of the terms of any restriction, easement, condition or covenant or other matter affecting title to the Property, (4) the making of any Modifications in violation of any standards imposed by any insurance policies required to be maintained by Lessee pursuant to the Lease which are in effect at any time with respect to the Property or any part thereof, (5) any Claim for patent, trademark or copyright infringement, and (6) Claims arising from any public improvements with respect to the Property resulting in any charge or special assessments being levied against the Property or any plans to widen, modify or realign any street or highway adjacent to the Property;
- (d) the offer, issuance or sale of the Participation Interests, provided that (i) Lessor shall not be entitled to indemnification under this clause (d) if it shall have been determined by a court of competent jurisdiction to have breached its representation set forth in Section 8.1(h), (ii) no Participant shall be entitled to indemnification under this clause (d) if it shall have been determined by a court of competent jurisdiction to have breached its representation set forth in Section 8.2(f) and (iii) neither Lessor nor any Participant shall be entitled to indemnification under this clause (d) with respect to any Claim which a court of competent jurisdiction determines to have arisen out of the gross negligence or willful misconduct of Lessor, Agent or any Participant or its agents, employees or contractors (other than Lessee) or any misrepresentation of a material fact made by Lessor, Agent or such Participant, unless the misrepresentation was made in reliance upon and in conformity with information furnished to Lessor or such Participant, as applicable, by Lessee or its agents, employees or contractors;
- (e) the breach by Lessee of any covenant, representation or warranty made by it or deemed made by it in any Operative Document or any certificate required to be delivered by any Operative Document;

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- (f) the retaining or employment of any broker, finder or financial advisor by Lessee to act on its behalf in connection with this Participation Agreement, or the incurring of any fees or commissions to which Lessor might be subjected by virtue of entering into the transactions contemplated by this Participation Agreement;
  - (g) the existence of any Lien on or with respect to the Property, the Improvements, the Equipment, any Basic Rent or Supplemental Rent, title thereto, or any interest therein including any Liens which arise out of the possession, use, occupancy, construction, repair or rebuilding of the Property or by reason of labor or materials furnished or claimed to have been furnished to Lessee, the Existing Owner, Lessor or any of their contractors or agents or by reason of the financing of the Property or any personalty or equipment purchased or leased by Lessee or Improvements or Modifications constructed by Lessee, except Lessor Liens and Liens in favor of Agent or Lessor;
  - (h) the transactions contemplated by Lessee hereby or by any other Operative Document, in respect of the application of Parts 4 and 5 of Subtitle B of Title I of ERISA and any prohibited transaction described in Section 4975(c) of the Code (other than any Claim resulting from a breach of representation or warranty of Lessor or any Participant); or
  - (i) the Existing Financing, any documentation relating thereto, the Existing Participants, the Existing Owner, or any matters arising therefrom or related thereto; provided, however, Lessee shall not be required to indemnify (x) Lessor for any Claim to the extent arising from any misrepresentation by Lessor under Section 8.1(e) or (l) or from the failure by Lessor to comply with Section 10.4(a), or (y) any Indemnitee under this Section 13.1 for any of the following:

- (i) any Claim to the extent resulting from the willful misconduct or gross negligence of such Indemnitee or its agents, employees or contractors (other than Lessee and its agents, employers or contractors) (it being understood that Lessee shall be required to indemnify an Indemnitee even if the ordinary (but not gross) negligence of such Indemnitee caused or contributed to such Claim),
- (ii) any Claim resulting from Lessor Liens which Lessor is responsible for discharging under the Operative Documents,
- (iii) any Claim to the extent attributable to acts or events occurring after the expiration of the Term or the termination of Lessee's right to possess and control the Property (but not any claim to the extent attributable to acts or events occurring prior to or during the Term or occurring at any time that Lessee is in actual possession or control of the Property),
- (iv) any Imposition or other claims for Taxes, and
- (v) any Claims of the type(s) described in Sections 13.2 (only with respect to claims in respect of a decline in the Fair Market Sales Value of the Property as a result of an event described in Section 13.2(b) and Lessee's exercise of the Remarketing Option), 13.6, 13.7, 13.8 and 13.10. It is expressly understood and agreed that the indemnity provided for herein shall survive the expiration or termination of and shall be separate and independent from any remedy under the Lease or any other Operative Document. Without limiting the express rights of any Indemnitee under this Section 13.1, this Section 13.1 shall be construed as an indemnity only and not a guaranty of residual value of the Property or as a guaranty of the Participation Interests.

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Section 13.2 **End of Term Indemnity.**

- (a) If Lessee elects the Remarketing Option and there would, after giving effect to the proposed remarketing transactions, be a Shortfall Amount, then prior to the Maturity Date and as a condition to Lessee's right to complete the remarketing of the Property pursuant to Section 22.1 of the Lease, Lessee shall cause to be delivered to Lessor at least thirty (30) days prior to the earlier of the Expiration Date or the last day of the Remarketing Period, at Lessee's sole cost and expense, a report from an appraiser selected by Lessor and reasonably satisfactory to Agent and the Required Participants in form and substance satisfactory to Lessor, Agent and the Required Participants (the "End of the Term Report") which shall state the appraiser's conclusions as to the reason for any decline in the Fair Market Sales Value of the Property from that stated in the Appraisal by CB Richard Ellis, Inc. Valuation and Advisory Services dated March 15, 2002 and delivered to the Agent and Lessor prior to the Closing Date.
- (b) Prior to the Expiration Date, Lessee shall pay to Lessor an amount (not to exceed the Shortfall Amount) equal to the portion of the Shortfall Amount that the End of the Term Report demonstrates was the result of a decline in the Fair Market Sales Value of the Property due to:
  - (i) extraordinary wear and tear, excessive usage, failure to maintain, to repair, to restore, to rebuild or to replace, failure to comply with the Lease and all applicable laws, failure to use, workmanship, method of installation or removal or maintenance, repair, rebuilding or replacement (excepting in each case ordinary wear and tear);
  - (ii) any Modification made to, or any rebuilding of, the Property or any part thereof by Lessee or any sublessee; or
  - (iii) the existence of any Hazardous Activity, Hazardous Substance or Environmental Violations; or any restoration or rebuilding carried out by Lessee or any sublessee; or
  - (iv) any condemnation of any portion of the Property pursuant to Article XV of the Lease; or
  - (v) any use of the Property or any part thereof by Lessee or any sublessee other than as permitted by the Operative Documents; or
  - (vi) any grant, release, dedication, transfer, annexation or amendment made pursuant to Section 12.2 of the Lease; or
  - (vii) the failure of Lessor to have good and marketable fee title to the Property free and clear of all Liens (including Permitted Liens and Permitted Exceptions) and exceptions to title, except (A) such Liens or exceptions to title that existed on the Closing Date and were disclosed in the policy of title insurance delivered pursuant to Section 6.1; (B) Lessor Liens; and (C) to the extent any such liability arising as a result of a title defect is offset by the proceeds of title insurance.

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Section 13.3 **Environmental Indemnity.** Without limitation of the other provisions of this Section 13, Lessee hereby agrees to indemnify, hold harmless and defend each Indemnitee from and against any and all claims (including without limitation third party claims for personal injury or real or personal property damage), losses (including but not limited to any loss of value of the Property), damages, liabilities, fines, penalties, charges, administrative and judicial proceedings (including informal proceedings) and orders, judgments, remedial action, requirements, enforcement actions of any kind, and all reasonable and documented costs and expenses incurred in connection therewith (including but not limited to reasonable and documented attorneys' and/or paralegals' fees and expenses), including, but not limited to, all costs incurred in connection with any investigation or monitoring of site conditions or any clean-up, remedial, removal or restoration work by any federal, state or local government agency, which such Indemnitee becomes subject to because of its involvement with the Property, the transactions contemplated by the Operative Documents or any other matter referred to in paragraphs (a) through (i) of Section 13.1 arising in whole or in part, out of:

- (a) the presence on or under the Property of any Hazardous Substances, or any Releases or discharges of any Hazardous Substances on, under, from or onto the Property;
- (b) any activity, including, without limitation, construction, carried on or undertaken on or off the Property, and whether by Lessee, Lessor, the Existing Owner or any predecessor in title or any employees, agents, contractors or subcontractors of Lessee, Lessor (if such activity was undertaken with the consent or at the direction of Lessee), the Existing Owner or any predecessor in title, or any other Persons (including such Indemnitee), in connection with the handling, treatment, removal, storage, decontamination, cleanup, transport or disposal of any Hazardous Substances that at any time are located or present on or under or that at any time migrate, flow, percolate, diffuse or in any way move onto or under the Property;
- (c) loss of or damage to any property or the environment (including, without limitation, cleanup costs, response costs, remediation and removal costs, cost of corrective action, costs of financial assurance, fines and penalties and natural resource damages), or death or injury to any Person, and all expenses associated with the protection of wildlife, aquatic species, vegetation, flora and fauna, and any mitigative action required by or under Environmental Laws;
- (d) any claim concerning lack of compliance with Environmental Laws, or any act or omission causing an environmental condition that requires remediation or would allow any Governmental Authority to record a Lien on the land records;
- (e) any residual contamination on or under the Property, or affecting any natural resources, or any contamination of any property or natural resources arising in connection with the generation, use, handling, storage, transport or disposal of any such Hazardous Substances, and irrespective of whether any of such activities were or will be undertaken in accordance with applicable Environmental Laws; or

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- (f) any material inaccuracies, misrepresentations, misstatements, and omissions and any conflicting information contained in or omitted from the Environmental Audit; provided, however, Lessee shall not be required to indemnify any Indemnitee under this Section 13.3 for (1) any Claim to the extent resulting from the willful misconduct or gross negligence of such Indemnitee or its agents, employees and contractors (other than Lessee and its agents, employees and contractors) (it being understood that Lessee shall be required to indemnify an Indemnitee even if the ordinary (but not gross) negligence of such Indemnitee caused or contributed to such Claim), (2) subject to the provisions Section 15.2 of the Lease, any Claim to the extent attributable to acts or events occurring after the expiration of the Term or the termination of Lessee's right to possess and control the Property (but not any claim to the extent attributable to acts or events occurring prior to or during the Term or occurring at any time that Lessee is in actual possession or control of the Property), (3) any Imposition or other claims for Taxes of the type(s) described in Section 13.5 or (4) any Claims of the type(s) described in Sections 13.2 (only with respect to claims in respect of a decline in the Fair Market Sales Value of the Property and Lessee's exercise of the Remarketing Option), 13.6, 13.7, 13.8 and 13.10. It is expressly understood and agreed that the indemnity provided for herein shall survive the expiration or termination of and shall be separate and independent from any remedy under the Lease or any other Operative Document.

Section 13.4 **Proceedings in Respect of Claims.**

- (a) With respect to any amount that Lessee is requested by an Indemnitee to pay by reason of Section 13.1 or 13.3, such Indemnitee shall, if so requested by Lessee and prior to any payment, submit such additional information to Lessee as Lessee may reasonably request and which is in the possession of such Indemnitee to substantiate properly the requested payment.
- (b) In case any action, suit or proceeding shall be brought against any Indemnitee, such Indemnitee shall notify Lessee of the commencement thereof, and Lessee shall be entitled, at its expense, to participate in, and, to the extent that Lessee desires to, assume and control the defense thereof; provided, however, that Lessee shall have acknowledged in writing its obligation to fully indemnify such Indemnitee in respect of such action, suit or proceeding, and Lessee shall keep such Indemnitee fully apprised of the status of such action, suit or proceeding and shall provide such Indemnitee with all information with respect to such action, suit or proceeding as such Indemnitee shall reasonably request, and provided further, that Lessee shall not be entitled to assume and control the defense of any such action, suit or proceeding if and to the extent that, (A) in the reasonable opinion of such Indemnitee, (x) such action, suit or proceeding involves any possibility of imposition of criminal liability or any risk of material civil liability on such Indemnitee or will involve a material risk of the sale, forfeiture or loss of, or the creation of any Lien (other than a Permitted Exception) on the Property or any part thereof unless, in the case of civil liability or Lien, Lessee shall have posted a bond or other security satisfactory to the relevant Indemnitee in respect to such risk or (y) the control of such action, suit or proceeding would involve an actual or potential conflict of interest, (B) such proceeding involves Claims not fully indemnified by Lessee which Lessee and the Indemnitee have been unable to sever from the indemnified claim(s), or (C) a Lease Event of Default under the Lease has occurred and is continuing. The Indemnitee may participate in a reasonable manner at its own expense and with its own counsel in any proceeding conducted by Lessee in accordance with the foregoing. Lessee shall not enter into any settlement or other compromise with respect to any Claim which is entitled to be indemnified under Section 13.1 or 13.3 without the prior written consent of the Indemnitee which consent shall not be unreasonably withheld in the case of a money settlement not involving an admission of liability of such Indemnitee.

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- (c) Each Indemnitee shall at the expense of Lessee cooperate with and supply Lessee with such information and documents reasonably requested by Lessee as are necessary or advisable for Lessee to participate in any action, suit or proceeding to the extent permitted by Section 13.1 or 13.3. Unless a Lease Event of Default under the Lease shall have occurred and be continuing, no Indemnitee shall enter into any settlement or other compromise with respect to any Claim which is entitled to be indemnified under Section 13.1 or 13.3 without the prior written consent of Lessee, which consent shall not be unreasonably withheld, unless such Indemnitee waives its right to be indemnified under Section 13.1 or 13.3 with respect to such Claim.
- (d) Upon payment in full of any Claim by Lessee pursuant to Section 13.1 or 13.3 to or on behalf of an Indemnitee, Lessee, without any further action, shall be subrogated to any and all claims that such Indemnitee may have relating thereto (other than claims in respect of insurance policies maintained by such Indemnitee at its own expense), and such Indemnitee shall execute such instruments of assignment and conveyance, evidence of claims and payment and such other documents, instruments and agreements as may be necessary to preserve any such claims and otherwise cooperate with Lessee and give such further assurances as are necessary or advisable to enable Lessee vigorously to pursue such claims.
- (e) Any amount payable to an Indemnitee pursuant to Section 13.1 or 13.3 shall be paid to such Indemnitee promptly upon receipt of a written demand therefor from such Indemnitee, accompanied by a written statement describing in reasonable detail the basis for such indemnity and the computation of the amount so payable and, if requested by Lessee, such determination shall be verified by a nationally recognized independent accounting firm mutually acceptable to Lessee and the Indemnitee at the expense of Lessee.

Section 13.5 **General Impositions Indemnity.**

- (a) **Indemnification.** Lessee shall pay and assume liability for, and does hereby agree to indemnify, protect and defend the Property and all Indemnitees, and hold them harmless against, all Impositions on an After Tax Basis.
- (b) **Payments.**
  - (i) Subject to the terms of Section 13.5(f), Lessee shall pay or cause to be paid all Impositions directly to the taxing authorities where feasible and otherwise to the Indemnitee, as appropriate, and Lessee shall at its own expense, upon such Indemnitee's reasonable request, furnish to such Indemnitee copies of official receipts or other satisfactory proof evidencing such payment.
  - (ii) In the case of Impositions for which no contest is conducted pursuant to Section 13.5(f) and which Lessee pays directly to the taxing authorities, Lessee shall pay such Impositions prior to the latest time permitted by the relevant taxing authority for timely payment. In the case of Impositions for which Lessee reimburses an Indemnitee, Lessee shall do so within twenty (20) days after receipt by Lessee of demand by such Indemnitee describing in reasonable detail the nature of the Imposition and the basis for the demand (including the computation of the amount payable), but in no event shall Lessee be required to pay such reimbursement prior to ten (10) days before the latest time permitted by the relevant taxing authority for timely payment. In the case of Impositions for which a contest is conducted pursuant to Section 13.5(f), Lessee shall pay such Impositions or reimburse such Indemnitee for such Impositions, to the extent not previously paid or reimbursed pursuant to subsection (a), prior to the latest time permitted by the relevant taxing authority for timely payment after conclusion of all contests under Section 13.5(f).

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(iii) At Lessee's request, the amount of any indemnification payment by Lessee pursuant to subsection (a) shall be verified and certified by an independent public accounting firm mutually acceptable to Lessee and the Indemnitee. The fees and expenses of such independent public accounting firm shall be paid by Lessee unless such verification shall result in an adjustment in Lessee's favor of five percent (5%) or more of the payment as computed by the Indemnitee, in which case such fee shall be paid by the Indemnitee.

- (c) **Reports and Returns.** Lessee shall be responsible for preparing and filing any real and personal property or ad valorem tax returns in respect of the Property. In case any other report or tax return shall be required to be made with respect to any obligations of Lessee under or arising out of subsection (a) and of which Lessee has knowledge or should have knowledge, Lessee, at its sole cost and expense, shall notify the relevant Indemnitee of such requirement and (except if such Indemnitee notifies Lessee that such Indemnitee intends to file such report or return) (A) to the extent required or permitted by and consistent with Applicable Law, make and file in its own name such return, statement or report; and (B) in the case of any other such return, statement or report required to be made in the name of such Indemnitee, advise such Indemnitee of such fact and prepare such return, statement or report for filing by such Indemnitee or, where such return, statement or report shall be required to reflect items in addition to any obligations of Lessee under or arising out of subsection (a), provide such Indemnitee at Lessee's expense with information sufficient to permit such return, statement or report to be properly made with respect to any obligations of Lessee under or arising out of subsection (a). Such Indemnitee shall, upon Lessee's request and at Lessee's expense, provide any data maintained by such Indemnitee (and not otherwise available to or within the control of Lessee) with respect to the Property which Lessee may reasonably require to prepare any required tax returns or reports. Each Indemnitee agrees to use its best efforts to send to Lessee a copy of any written request or other notice that the Indemnitee receives with respect to any reports or returns required to be filed with respect to the Property or the transactions contemplated by the Operative Documents, it being understood that no Indemnitee shall have any liability for failure to provide such copies.

- (d) **Income Inclusions.** If as a result of the payment or reimbursement by Lessee of any expenses of Lessor or the payment of any Transaction Expenses incurred in connection with the transactions contemplated by the Operative Documents, Lessor or any Participant shall suffer a net increase in any federal, state or local income tax liability, Lessee shall indemnify such Persons (without duplication of any indemnification required by subsection (a)) on an After Tax Basis for the amount of such increase. The calculation of any such net increase shall take into account any current or future tax savings realized or reasonably expected to be realized by such person in respect thereof, as well as any interest, penalties and additions to tax payable by Lessor, or any Participant or such Affiliate, in respect thereof.

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- (e) **Withholding Taxes.** As between Lessee on one hand, and Lessor or Agent and any Participant on the other hand, Lessee shall be responsible for, and, subject to the provisions of Sections 13.5(g) and (h), Lessee shall indemnify and hold harmless Lessor, Agent and the Participants (without duplication of any indemnification required by subsection (a)) on an After Tax Basis against, any obligation for United States or foreign withholding taxes imposed in respect of payments with respect to the Participation Interests or with respect to Rent payments under the Lease or payments of the Asset Termination Value or Purchase Option Price (and, if Lessor, Agent or any Participant receives a demand for such payment from any taxing authority, Lessee shall discharge such demand on behalf of Lessor, Agent or such Participant). Notwithstanding the foregoing provisions of this Section 13.5(e) or any other provision of any Operative Document to the contrary, Lessee shall not be responsible for and shall not be required to indemnify or otherwise hold harmless any Person from or against any withholding tax imposed as a collection device for, or in substitution or lieu of, an income, franchise or similar tax to the extent such income, franchise or similar tax would not otherwise be subject to indemnification pursuant to this Section 13.5 (a "Qualified Withholding Tax"). As used herein, Qualified Withholding Taxes include, without limitation, any withholding taxes arising under Section 871, 881, 1441 or 1442 of the Code and any similar taxes arising under state, local or foreign law as well as any withholding tax imposed as a collection device for, or in substitution or lieu of the Imposition that qualifies as an "income tax" within the meaning of United States Treasury Regulation Section 1.901-2.

- (f) **Contests of Impositions.**

(i) If a written claim is made against any Indemnitee or if any proceeding shall be commenced against such Indemnitee (including a written notice of such proceeding), for any Impositions, such Indemnitee shall promptly notify Lessee in writing and shall not take action with respect to such claim or proceeding without the consent of Lessee for thirty (30) days after the receipt of such notice by Lessee; provided, however, that, in the case of any such claim or proceeding, if action shall be required by law or regulation to be taken prior to the end of such 30-day period, such Indemnitee shall, in such notice to Lessee, inform Lessee of such shorter period, and no action shall be taken with respect to such claim or proceeding without the consent of Lessee before two (2) days before the end of such shorter period; provided, further, that the failure of such Indemnitee to give the notices referred to in this sentence shall not diminish Lessee's obligation hereunder except to the extent such failure precludes Lessee from contesting all or part of such claim.

(ii) If, within thirty (30) days of receipt of such notice from the Indemnitee (or such shorter period as the Indemnitee has notified Lessee is required by law or regulation for the Indemnitee to commence such contest), Lessee shall request in writing that such Indemnitee contest such Imposition, the Indemnitee shall, at the expense of Lessee, in good faith conduct and control such contest (including, without limitation, by pursuit of appeals) relating to the validity, applicability or amount of such Impositions (provided, however, that (A) if such contest involves a tax other than a tax on net income and can be pursued independently from any other proceeding involving an unindemnified tax liability of such Indemnitee, the Indemnitee, at Lessee's request, shall allow Lessee to conduct and control such contest and (B) in the case of any contest, the Indemnitee may request Lessee to conduct and control such contest) by, in the sole discretion of the Person conducting and controlling such contest, (1) resisting payment thereof, (2) not paying the same except under protest, if protest is necessary and proper, (3) if the payment be made, using reasonable efforts to obtain a refund thereof in appropriate administrative and judicial proceedings, or (4) taking such other action as is reasonably requested by Lessee from time to time.

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(iii) The party controlling any contest shall consult in good faith with the non-controlling party and shall keep the non-controlling party reasonably informed as to the conduct of such contest; provided, that all decisions ultimately shall be made in the sole discretion of the controlling party except that no decision shall be made to concede an indemnified issue without the prior consent of Lessee (which consent shall not be unreasonably withheld). The parties agree that an Indemnitee may at any time decline to take further action with respect to the contest of any Imposition and may settle such contest if such Indemnitee shall waive its rights to any indemnity from Lessee that otherwise would be payable in respect of such claim (and any future claim by any taxing authority, the contest of which is precluded by reason of such resolution of such claim) and shall pay to Lessee any amount previously paid or advanced by Lessee pursuant to this Section 13.5 by way of indemnification or advance for the payment of an Imposition other than expenses of such contest.

(iv) Notwithstanding the foregoing provisions of this Section 13.5, an Indemnitee shall not be required to take any action and Lessee shall not be permitted to contest any Impositions in its own name or that of the Indemnitee unless (A) Lessee shall have agreed such Imposition is subject to indemnity hereunder and shall pay to such Indemnitee on demand and on an After Tax Basis all reasonable costs, losses and expenses that such Indemnitee actually incurs in connection with contesting such Impositions, including, without limitation, all reasonable legal, accounting and investigatory fees and disbursements, (B) in the case of a claim that must be pursued in the name of an Indemnitee (or an Affiliate thereof), the amount of the potential indemnity (taking into account all similar or logically related claims that have been or could be raised in any audit involving such Indemnitee for which Lessee may be liable to pay an indemnity under this Section 13.5) exceeds \$10,000, (C) the Indemnitee shall have reasonably determined that the action to be taken will not result in any material danger of sale, forfeiture or loss of the Property, or any part thereof or interest therein, will not interfere with the payment of Rent, and will not result in risk of criminal liability, (D) if such contest shall involve the payment of the Imposition prior to the contest, Lessee shall provide to the Indemnitee an interest-free advance in an amount equal to the Imposition that the Indemnitee is required to pay (with no additional net after-tax cost to such Indemnitee), (E) in the case of a claim that must be pursued in the name of an Indemnitee (or an Affiliate thereof), Lessee shall have provided to such Indemnitee an opinion of independent tax counsel selected by the Indemnitee and reasonably satisfactory to Lessee stating that a reasonable basis exists to contest such claim (or, in the case of an appeal of an adverse judicial determination, an opinion of such counsel to the effect that there is substantial authority for the position asserted in such appeal) and (F) no Lease Event of Default hereunder shall have occurred and be continuing. In no event shall an Indemnitee be required to appeal an adverse judicial determination to the United States Supreme Court. In addition, an Indemnitee shall not be required to contest any claim in its name (or that of an Affiliate) if the subject matter thereof shall be of a continuing nature and shall have previously been decided adversely by a court of competent jurisdiction pursuant to a contest completed in accordance with the provisions of this Section 13.5, unless there shall have been a change in law (or interpretation thereof) and the Indemnitee shall have received, at Lessee's expense, an opinion of independent tax counsel selected by the Indemnitee and reasonably acceptable to Lessee stating that as a result of such change in law (or interpretation thereof), it is more likely than not that the Indemnitee will prevail in such contest.

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(g) **Documentation of Withholding Status.** Each Participant (or any successor thereto or transferee thereof) that is organized under the laws of a jurisdiction outside of the United States of America and each Lessor that is organized under the laws of a jurisdiction outside of the United States of America shall:

(i) on or before the date it becomes a party to any Operative Document, deliver to Lessee any certificates, documents, or other evidence that shall be required by the Code or Treasury Regulations issued pursuant thereto to establish its exemption from United States Federal withholding requirements, including (A) two valid, duly completed, original copies of Internal Revenue Service Form W-8BEN or Form W-8ECI or successor applicable form, properly and duly executed, certifying in each case that such party is entitled to receive payments pursuant to the Operative Documents without deduction or withholding of United States Federal income taxes, or (B) a valid, duly completed, original copy of Internal Revenue Service Form W-8 or Form W-9 or applicable successor form, properly and duly executed, certifying that such party is entitled to an exemption from United States of America backup withholding tax; and

(ii) so long as it shall be legally entitled to do so, on or before the date that any such form described above expires or becomes obsolete, or after the occurrence of any event requiring a change in the most recent such form previously delivered to Lessee, deliver to Lessee two further valid, duly completed, original copies of any such form or certification, properly and duly executed.

(h) **Limitation on Tax Indemnification.** Lessee shall not be required to indemnify any Indemnitee, or to pay any increased amounts to any Indemnitee or tax authority with respect to any Impositions pursuant to this Section 13.5 to the extent that (i) such Imposition is attributable to such Indemnitee's failure to comply with the provisions of Section 13.5(g); or (ii) to the extent such Imposition constitutes or is collected by means of a Qualified Withholding Tax.

(i) **Tax Savings.** In the event an Indemnitee receives a refund (or similar tax savings) in respect of any Imposition paid or reimbursed by Lessee which was not considered in calculating the After Tax Basis with respect to such payment or reimbursement by Lessee, such Indemnitee shall within thirty (30) days thereafter remit the amount of such refund (or tax savings) to Lessee, provided that the amount so remitted shall not exceed the lesser of: (i) the amount received by such Indemnitee as a refund (or tax savings) net of all reasonable costs and expenses incurred by such Indemnitee in connection with obtaining and paying such amount; and (ii) (a) the amount of all prior payments by Lessee to such Indemnitee with respect to Impositions, plus any refunded interest, less (b) the amount of all prior payments by the Indemnitee to Lessee under this Section 13.5(i).

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Section 13.6 **Funding Losses.** If any repayment of any Advance is made on any day other than the last day of an Interest Period applicable thereto, Lessee shall reimburse each Participant within fifteen (15) days after demand for any Funding Losses provided that such Participant shall have delivered to Lessee a certificate as to the amount of such loss or expense, which certificate shall be conclusive in the absence of manifest error, and provided further that such loss payable to any Participant shall in no event exceed the interest or Yield on the Advances which would have been payable to such Participant for the balance of such Interest Period or other period, less the amount actually earned by such Participant on such Advances. Such Participant will, at the request of Lessee, furnish such additional information concerning the determination of such loss as Lessee may reasonably request.

Section 13.7 **Regulation D Compensation.** For so long as any Participant is required by a Change of Law to increase its existing reserve percentage above that applicable under existing law as of the Effective Date against "Eurocurrency Liabilities" (or any other category of liabilities which include deposits by reference to which the Offshore Rate is determined or any category of extensions of credit or other assets which includes loans by a non-United States office of such Participant to United States residents), and, as a result, the cost to such Participant (or its Funding Office) of purchasing or maintaining its Participation Interest is increased, then such Participant may require Lessee to pay, contemporaneously with each payment of interest or Yield, an additional amount on the Participation Interest of such Participant computed at a rate per annum up to but not exceeding the excess of (i) (A) the applicable Offshore Rate divided by (B) one minus the Eurocurrency Reserve Requirements and (ii) the applicable Offshore Rate. Any Participant wishing to require payment of such additional amount (x) shall so notify Lessee and Agent, in which case such additional interest on its Participation Interest shall be payable to such Participant by Lessee at the place indicated in such notice with respect to each Interest Period commencing at least three (3) Business Days after the giving of such notice and (y) shall furnish to Lessee at least five (5) Business Days prior to each date on which interest is payable on the Advance an officer's certificate setting forth the amount to which such Participant is then entitled under this Section (which shall be consistent with such Participant's good faith estimate of the level at which the related reserves are maintained by it). Each such certificate shall be accompanied by such information as Lessee may reasonably request as to the computation set forth therein.

Section 13.8 **Basis for Determining Interest Rate Inadequate or Unfair.** If on or prior to the first day of any Interest Period either:

- (a) deposits in dollars (in the applicable amounts) are not being offered to Agent in the relevant market for such Interest Period or any Participants shall advise Agent that the Effective Rate will not adequately and fairly reflect the cost to such Participant of funding or maintaining its Participation Interest in the Lease Balance for such Interest Period; or
- (b) any Participant determines that, and advises Agent that, by reason of the adoption, on or after the date of this Participation Agreement, of any applicable law, rule or regulation, or any change therein, or any change in the interpretation or administration thereof by any Governmental Authority, central bank or comparable agency charged with the interpretation or administration thereof, or compliance by any Participant (or its Funding Office) with any request or directive (whether or not having the force of law) of any such authority, central bank or governmental agency, it is restricted, directly or indirectly, in the amount it may hold of (i) a category of liabilities that includes deposits by reference to which, or on the basis of which, the Effective Rate is directly or indirectly determined, or (ii) the category of assets which includes its Participation Interest; then

Agent shall forthwith give notice thereof to Lessee and the Participants, whereupon until Agent notifies Lessee that the circumstances giving rise to such suspension no longer exist, each outstanding Advance shall begin to bear interest on the last day of the then current Interest Period applicable thereto at a rate per annum equal to the sum of (i) the Participants' average cost of funds (expressed as a per annum rate) employed to fund or maintain their Participation Interests, as calculated by Agent on the basis of notices of such costs provided to Agent and Lessee by the Participants, plus (ii) the Applicable Margins used to calculate interest and Yield when the Effective Rate equals the Offshore Rate.

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Section 13.9 **Illegality.** If, on or after the date of this Participation Agreement, the adoption of any applicable law, rule or regulation, or any change therein, or any change in the interpretation or administration thereof by any Governmental Authority, central bank or comparable agency charged with the interpretation or administration thereof, or compliance by any Participant (or its Funding Office) with any request or directive (whether or not having the force of law) of any such authority, central bank or comparable agency (a "Charge of Law"), shall make it unlawful or impossible for any Participant (or its Funding Office) to purchase, maintain or fund its Participation Interest and such Participant shall so notify Agent, Agent shall forthwith give notice thereof to the other Participants and Lessee, whereupon until such Participant notifies Lessee and Agent that the circumstances giving rise to such suspension no longer exist, such Participant will have the right to accelerate the obligations of Lessee under Articles 19, 20 and 22 of the Lease by directing and requiring Lessor to deliver an Early Termination Notice as provided in Section 16.3 of the Lease. However, before giving any such direction to Lessor, such Participant shall, if practicable, with the consent of Lessee (which consent shall not unreasonably be withheld), designate a different Funding Office if such designation will avoid the need for giving such notice and will not, in the judgment of such Participant, be otherwise disadvantageous to such Participant. If such notice is given, Lessee may request a reasonable explanation by such Participant of the factors underlying such notice, and Lessee may exercise its Purchase Option under Section 20.1 of the Lease upon not less than ten (10) days' written notice to Lessor, Agent and the Participants.

Section 13.10 **Increased Cost and Reduced Return.**

- (a) In the event that the adoption of any applicable law, rule or regulation, or any change therein or in the interpretation or application thereof by any Governmental Authority, central bank or comparable agency charged with the interpretation or administration thereof or compliance by any Participant with any request or directive after the date hereof (whether or not having the force of law) of any such authority, central bank or comparable agency, after the Effective Date:

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- (i) does or shall subject such Participant to any additional tax of any kind whatsoever with respect to the Operative Documents or such Participant's Participation Interest, or change the basis or the applicable rate of taxation of payments to such Participant in respect of its Participation Interest or any other amount payable hereunder (except for the imposition of or change in (x) any tax on or measured by the overall net income of such Participant including, without limitation, any tax that qualifies as an "income tax" within the meaning of United States Treasury Regulation Section 1.901-2 and which is not an Imposition or (y) any Qualified Withholding Tax);
- (ii) does or shall impose, modify or hold applicable any reserve, special deposit, insurance assessment, compulsory loan or similar requirement against assets held by, or deposits or other liabilities in or for the account of, advances or loans by, or other credit extended by, or any other acquisition of funds by, any office of such Participant which are not otherwise included in determination of the Effective Rate ; or
- (iii) does or shall impose on such Participant any other condition; and
- (iv) the result of any of the foregoing described in clauses (i), (ii) or (iii) of this Section 13.10(a) is to increase the cost to such Participant of purchasing or maintaining its Participation Interest or to reduce any amount receivable hereunder with respect thereto, then in any such case, Lessee shall promptly pay such Participant, upon its demand, any additional amounts necessary to compensate such Participant for such increased cost or reduced amount receivable which such Participant deems to be material as determined by such Participant; provided, however, that Lessee shall not be obligated to pay any Participant for any such increased costs or reduced amounts incurred more than sixty (60) days prior to the date of such Participant's demand for payment if such demand was made more than sixty (60) days after the latest of (A) the date such Participant received actual notice of such increased cost or reduced amount, or (B) the effective date of such change or the date such change occurred or was enacted.
- (b) If any Participant shall have determined that the adoption of any applicable law, rule or regulation, after the date hereof, regarding capital adequacy, or any change therein, or any change in the interpretation or administration thereof by any Governmental Authority, central bank or comparable agency charged with the interpretation or administration thereof, or any request or directive regarding capital adequacy (whether or not having the force of law) of any such authority, central bank or comparable agency has or would have the effect of reducing the rate of return on capital of such Participant (or any entity directly or indirectly controlling such Participant) as a consequence of such Participant's Participation Interest to a level below that which such Participant (or any entity directly or indirectly controlling such Participant) could have achieved but for such adoption, change, request or directive (taking into consideration its policies with respect to capital adequacy) by an amount deemed by such Participant to be material, then from time to time, within fifteen (15) days after demand by such Participant (with a copy to Agent), Lessee shall pay to such Participant such additional amount or amounts as will compensate such Participant (or its parent) for such reduction.
- (c) Each Participant will promptly notify Lessee and Agent of any event of which it has knowledge, occurring after the date hereof, which will entitle such Participant to compensation or to accelerate the termination of the Lease pursuant to this Section and will, if practicable, with the consent of Lessee (which consent shall not unreasonably be withheld), designate a different Funding Office or take any other reasonable action if such designation or action will avoid the need for, or reduce the amount of, such compensation or eliminate the need for such acceleration and will not, in the judgment of such Participant, be otherwise disadvantageous to such Participant. A certificate of any Participant claiming compensation under this Section and setting forth in reasonable detail its computation of the additional amount or amounts to be paid to it hereunder shall be conclusive in the absence of manifest error. In determining such amount, such Participant may use any reasonable averaging and attribution methods. This Section shall survive the termination of this Participation Agreement and payment of the outstanding Advances and Participation Interests.

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Section 13.11 **Substitution of Participant.** If (i) any Participant claims a right to accelerate the Expiration Date pursuant to this Section 13, or (ii) any Participant has demanded compensation or given notice of its intention to demand compensation under Sections 13.1, 13.2, 13.5 or 13.10, Lessee shall have the right, with the assistance of Agent, to seek one or more mutually satisfactory substitute banks or financial institutions (which may be one or more of the Participants) to replace such Participant under the Operative Documents.

Section 13.12 **Indemnity Payments in Addition to Residual Value Guarantee Amount.** Lessee acknowledges and agrees that its obligations to make indemnity payments under this Section 13 are separate from, in addition to, and do not reduce, its obligation to pay the Residual Value Guarantee Amount under the Lease; provided, that except as otherwise set forth in Section 13.2 hereof, the Shortfall Amount payable by Lessee in connection with the Remarketing Option under the Lease shall not be increased under this Section 13.

## SECTION 14

### AGENT

Section 14.1 **Appointment.** Each Participant hereby irrevocably designates and appoints Agent as Agent of such Participant under this Participation Agreement and the other Operative Documents, and each Participant irrevocably authorizes Agent, in such capacity, to take such action on its behalf under the provisions of this Participation Agreement and the other Operative Documents and to exercise such powers and perform such duties as are expressly delegated to Agent by the terms of this Participation Agreement and the other Operative Documents, together with such other powers as are reasonably incidental thereto. Notwithstanding any provision to the contrary elsewhere in this Participation Agreement, Agent shall not have any duties or responsibilities, except those expressly set forth herein, or any fiduciary relationship with any Participant or any other party to the Operative Documents, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Participation Agreement or any other Operative Document or otherwise exist against Agent.

Section 14.2 **Delegation of Duties.** Agent may execute any of its duties under this Participation Agreement and the other Operative Documents by or through agents or attorneys-in-fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. Agent shall not be responsible for the negligence or misconduct of any agents or attorneys-in-fact selected by it with reasonable care.

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Section 14.3 **Exculpatory Provisions.** Neither Agent nor any of its officers, directors, employees, agents, attorneys-in-fact or Affiliates shall be (a) liable for any action lawfully taken or omitted to be taken by it or such Person under or in connection with this Participation Agreement or any other Operative Document (except for its or such Person's own gross negligence or willful misconduct) or (b) responsible in any manner to any of the Participants or any other party to the Operative Documents for any recitals, statements, representations or warranties made by Lessor or Lessee or any officer thereof contained in this Participation Agreement or any other Operative Document or in any certificate, report, statement or other document referred to or provided for in, or received by Agent under or in connection with, this Participation Agreement or any other Operative Document or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Participation Agreement or any other Operative Document or for any failure of Lessor or Lessee to perform its obligations hereunder or thereunder. Agent shall not be under any obligation to any Participant or any other party to the Operative Documents to ascertain or to inquire as to the observance or performance of any of the agreements contained in, or conditions of, this Participation Agreement or any other Operative Document, or to inspect the properties, books or records of Lessor or Lessee.

Section 14.4 **Reliance by Agent.** Agent shall be entitled to rely, and shall be fully protected in relying, upon any writing, resolution, notice, consent, certificate, affidavit, letter, telecopy, telex or teletype message, statement, order or other document or conversation believed by it to be genuine and correct and to have been signed, sent or made by the proper Person or Persons and upon advice and statements of legal counsel (including, without limitation, counsel to Lessor or Lessee), independent accountants and other experts selected by Agent. Agent shall be fully justified in failing or refusing to take any action under this Participation Agreement or any other Operative Document unless it shall first receive such advice or concurrence of the Required Participants as it deems appropriate or it shall first be indemnified to its satisfaction by the Participants against any and all liability and expense which may be incurred by it by reason of taking or continuing to take any such action. Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Participation Agreement and the other Operative Documents in accordance with a request of the Required Participants, and such request and any action taken or failure to act pursuant thereto shall be binding upon all the Participants.

Section 14.5 **Notice of Default.** Agent shall not be deemed to have knowledge or notice of the occurrence of any Potential Lease Default or Lease Event of Default unless Agent has received notice from a Participant, Lessor or Lessee describing such Potential Lease Default or Lease Event of Default and stating that such notice is a "notice of default." In the event that Agent receives such a notice, Agent shall give notice thereof to the other parties hereto. Subject to the provisions of Section 11 and Section 15.5 hereof, Agent shall take such action with respect to such Potential Lease Default or Lease Event of Default as shall be reasonably directed by the Required Participants; provided that unless and until Agent shall have received such directions, Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to such Potential Lease Default or Lease Event of Default as it shall deem advisable in the best interests of the Participants.

Section 14.6 **Non-Reliance on Agent and Other Participants.** Each Participant expressly acknowledges that neither Agent nor any of its officers, directors, employees, agents, attorneys-in-fact or Affiliates has made any representations or warranties to it and that no act by Agent hereinafter taken, including any review of the affairs of Lessor or Lessee, shall be deemed to constitute any representation or warranty by Agent to any Participant. Each Participant represents to Agent that it has, independently and without reliance upon Agent or any other Participant, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, operations, property, financial and other condition and creditworthiness of Lessor, Lessee and the Property and made its own decision to purchase its Participation Interest hereunder and enter into this Participation Agreement. Each Participant also represents that it will, independently and without reliance upon Agent, Lessor or any other Participant, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under this Participation Agreement and the other Operative Documents, and to make such investigation as it deems necessary to inform itself as to the business, operations, property, financial and other condition and creditworthiness of Lessor and Lessee. Except for notices, reports and other documents expressly required to be furnished to the Participants by Agent hereunder, Agent shall not have any duty or responsibility to provide any Participant with any credit or other information concerning the business, operations, property, condition (financial or otherwise), prospects or creditworthiness of Lessor or Lessee which may come into the possession of Agent or any of its officers, directors, employees, agents, attorneys-in-fact or Affiliates.

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Section 14.7 **Indemnification.** The Participants agree to indemnify Agent in its capacity as such (to the extent not reimbursed by Lessee and without limiting the obligation of Lessee to do so), ratably according to their respective Commitment Percentages in effect on the date on which indemnification is sought under this Section 14.7 (or, if indemnification is sought after the date upon which the Commitments shall have terminated and the Participation Interests shall have been paid in full, ratably in accordance with their Commitment Percentages immediately prior to such date), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind whatsoever which may at any time (including, without limitation, at any time following the payment of the Participation Interests) be imposed on, incurred by or asserted against Agent in any way relating to or arising out of, the Commitments, this Participation Agreement, the Property, any of the other Operative Documents or any documents contemplated by or referred to herein or therein or the transactions contemplated hereby or thereby or any action taken or omitted by any of them under or in connection with any of the foregoing; provided that no Participant shall be liable for the payment of any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting solely from the gross negligence or willful misconduct of Agent. The agreements in this Section 14.7 shall survive the payment of the Participation Interests and all other amounts payable hereunder.

Section 14.8 **Agent in its Individual Capacity.** Agent and its Affiliates may make loans to, accept deposits from and generally engage in any kind of business with Lessor or Lessee as though Agent were not Agent hereunder and under the other Operative Documents. With respect to its Participation Interest purchased by it, Agent shall have the same rights and powers under this Participation Agreement and the other Operative Documents as any Participant and may exercise the same as though it were not Agent, and the terms "Participant" and "Participants" shall include Agent in its individual capacity.

Section 14.9 **Successor Agent.** Agent may resign as Agent upon twenty (20) days' notice to the Participants, Lessor or Lessee. If Agent shall resign as Agent under this Participation Agreement and the other Operative Documents, then the Required Participants shall appoint a successor agent for the Participants, which successor agent shall be a commercial bank organized under the laws of the United States of America or any State thereof or under the laws of another country which is doing business in the United States of America and having a combined capital, surplus and undivided profits of at least \$100,000,000 (and if no Potential Lease Default or Lease Event of Default exists, shall be approved by Lessee (which consent shall not be unreasonably withheld)), whereupon such successor agent shall succeed to the rights, powers and duties of Agent, and the term "Agent" shall mean such successor agent effective upon such appointment and approval, and the former Agent's rights, powers and duties as Agent shall be terminated, without any other or further act or deed on the part of such former Agent or any of the parties to this Participation Agreement. If no successor Agent has accepted appointment as Agent by the date which is twenty (20) days following a resigning Agent's notice of resignation, the resigning Agent's resignation shall nevertheless thereupon become effective and the Participants shall perform all of the duties of Agent hereunder until such time, if any, as the Required Participants appoint a successor Agent as provided above. After any retiring Agent's resignation as Agent, all of the provisions of this Section 14 shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Agent under this Participation Agreement and the other Operative Documents.

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## SECTION 15

### MISCELLANEOUS

Section 15.1 **Survival of Agreements.** The representations, warranties, covenants, indemnities and agreements of the parties provided for in the Operative Documents, and the parties' obligations under any and all thereof, shall survive the execution and delivery of this Participation Agreement, the transfer of the Property to Lessor, the construction of any Improvements, any disposition of any interest of Lessor in the Property or any Improvements, payment of the Advances and the Participation Interests and any disposition thereof and shall be and continue in effect notwithstanding any investigation made by any party and the fact that any party may waive compliance with any of the other terms, provisions or conditions of any of the Operative Documents. Except as otherwise expressly set forth herein or in other Operative Documents, the indemnities of the parties provided for in the Operative Documents shall survive the expiration or termination of any thereof.

Section 15.2 **No Broker, Etc.** Each of the parties hereto represents to the others that it has not retained or employed any broker, finder or financial adviser to act on its behalf in connection with this Participation Agreement or the transactions contemplated herein, nor has it authorized any broker, finder or financial adviser retained or employed by any other Person so to act. Any party who is in breach of this representation shall indemnify and hold the other parties harmless from and against any liability arising out of such breach of this representation.

Section 15.3 **Notices.** Unless otherwise specifically provided herein, all notices, consents, directions, approvals, instructions, requests and other communications required or permitted by the terms hereof to be given to any Person shall be given in writing and delivered (i) personally, (ii) by a nationally recognized overnight courier service, (iii) by mail (by registered or certified mail, return receipt requested, postage prepaid) or (iv) by facsimile, in each case directed to the address of such Person as indicated on Schedule III. Any such notice shall be effective upon receipt or refusal. From time to time any party may designate a new address for purposes of notice hereunder by written notice to each of the other parties hereto in accordance with this Section.

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Section 15.4 **Counterparts.** This Participation Agreement may be executed by the parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument.

Section 15.5 **Amendments.** Subject to the provisions of Section 11 hereof, no Operative Document nor any of the terms thereof may be terminated, amended, supplemented, waived or modified with respect to Lessee, Lessor, Agent or any Participant, except (a) in the case of a termination, amendment, supplement, waiver or modification to be binding on Lessee, Lessor or Agent, with the written agreement or consent of such party, and (b) in the case of a termination, amendment, supplement, waiver or modification to be binding on the Participants, with the written agreement or consent of the Required Participants; provided, however, that (x) no such termination, amendment, supplement, waiver or modification shall without written agreement or consent of each Participant:

(i) modify any of the provisions of Section 11 of this Participation Agreement or this Section 15.5, change the definition of "Required Participants" or modify or waive any provision of an Operative Agreement requiring action by the foregoing;

(ii) amend, modify, waive or supplement any of the provisions of Sections 3.10--3.21 of this Participation Agreement or the representations of such Participant in Section 8 or the covenants in Section 10 of this Participation Agreement;

(iii) reduce, modify, amend or waive any fees or indemnities in favor of any Participant, including without limitation amounts payable pursuant to Section 13 (except that any Person may consent to any reduction, modification, amendment or waiver of any indemnity or fee payable to it);

(iv) modify, postpone, reduce or forgive, in whole or in part, any payment of Rent (other than pursuant to the terms of any Operative Agreement), any payment in respect of its Participation Interest, or any payment of the Asset Termination Value, Residual Value Guarantee Amount, amounts due pursuant to Section 22.2 of the Lease, or interest or, subject to clause (iii) above, any other amount payable under the Lease or this Participation Agreement, or modify the definition or method of calculation of Rent (other than pursuant to the terms of any Operative Agreement), Participation Interest, Lease Balance, Asset Termination Value, Shortfall Amount, Residual Value Guarantee Amount, Required Supplemental Payments, Participant Balance, Tranche A Balance, Tranche B Balance, or any other definition which would affect the amounts to be advanced or which are payable under the Operative Documents; or

(v) consent to any assignment of the Lease, releasing Lessee from its obligations in respect of the payments of Rent and the Asset Termination Value or changing the absolute and unconditional character of such obligation; and (y) no other termination, amendment, supplement, waiver or modification shall, without the written agreement or consent of Lessor and the Required Participants, be made to the Lease or Section 6 of this Participation Agreement or the definition of "Lease Event of Default."

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Section 15.6 **Headings, Etc.** The Table of Contents and headings of the various Sections of this Participation Agreement are for convenience of reference only and shall not modify, define, expand or limit any of the terms or provisions hereof.

Section 15.7 **Parties In Interest.** Except as expressly provided herein, none of the provisions of this Participation Agreement are intended for the benefit of any Person except the parties hereto. Subject to the provisions of Section 25.1 of the Lease, Lessee shall not assign or transfer any of its rights or obligations under the Operative Documents without the prior written consent of Lessor, Agent and the Participants, except that Lessee may without such consent assign rights or obligations of Lessee under the Operative Documents to an Affiliate of Lessee, provided that Lessee remains primarily liable with respect to such obligations and provides its full unconditional and irrevocable guaranty of such Subsidiary's obligations under the Operative Documents, such guaranty to be in form and substance reasonably satisfactory to the Required Participants. If Lessor, Agent and the Participants consent to any such assignment or transfer to a Person not an Affiliate of Lessee, Lessee shall remain primarily liable with respect to such obligations and provide its full and unconditional guaranty of such Person's obligations under the Operative Documents, such guaranty to be in form and substance reasonably satisfactory to the Required Participants.

Section 15.8 **GOVERNING LAW.** THIS PARTICIPATION AGREEMENT SHALL IN ALL RESPECTS BE GOVERNED BY THE LAW OF THE STATE OF CALIFORNIA (EXCLUDING ANY CONFLICT-OF-LAW OR CHOICE-OF-LAW RULES WHICH MIGHT LEAD TO THE APPLICATION OF THE INTERNAL LAWS OF ANY OTHER JURISDICTION) AS TO ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE.

Section 15.9 **Severability.** Any provision of this Participation Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

Section 15.10 **Liability Limited.**

- (a) The parties hereto agree that Lessor shall have no personal liability whatsoever to Lessee, Agent or any Participant or their respective successors and assigns for any claim based on or in respect of the Lease or any of the other Operative Documents or arising in any way from the transactions contemplated hereby or thereby; provided, however, that Lessor shall be liable in its individual capacity (a) for its own willful misconduct or gross negligence (or negligence in the handling of funds), (b) for liabilities that may result from its breach of the covenant to remove Lessor Liens set forth in Section 10.3, or (c) for any Tax based on or measured by any fees, commission or compensation received by it for acting as Lessor as contemplated by the Operative Documents. It is understood and agreed that, except as provided in the preceding proviso: (i) Lessor shall have no personal liability under any of the Operative Documents; (ii) all obligations of Lessor to Lessee, Agent and the Participants are solely nonrecourse obligations and shall be enforceable solely against the interest of Lessor in the Property; and (iii) all such personal liability of Lessor is expressly waived and released as a condition of, and as consideration for, the execution and delivery of the Operative Documents by Lessor. Notwithstanding anything contained herein, the limitations on liability stated in the preceding provisions of this Section 15.10(a) shall not apply to liability of Lessor arising because of a breach of Lessor's obligation to remove Lessor Liens or because of its receiving Advances and failing to disburse Advances to Lessee in accordance with the Operative Documents, or failure to disburse proceeds from the sale of the Property in accordance with the Lease and this Participation Agreement.
- (b) No Participant shall have any obligation to any other Participant or to Lessee, Lessor or Agent with respect to transactions contemplated by the Operative Documents, except those obligations of such Participant expressly set forth in the Operative Documents or except as set forth in the instruments delivered in connection therewith, and no Participant shall be liable for performance by any other party hereto of such other party's obligations under the Operative Documents except as otherwise so set forth.

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Section 15.11 **Further Assurances.** The parties hereto shall promptly cause to be taken, executed, acknowledged or delivered, at the sole expense of Lessee, all such further acts, conveyances, documents and assurances as the other parties may from time to time reasonably request in order to carry out and effectuate the intent and purposes of this Participation Agreement, the other Operative Documents, and the transactions contemplated hereby and thereby (including, without limitation, the preparation, execution and filing of any and all Uniform Commercial Code financing statements and other filings or registrations which the parties hereto may from time to time request to be filed or effected). Lessee, at its own expense and without need of any prior request from any other party, shall take such action as may be necessary (including any action specified in the preceding sentence), or (if Lessor shall so request) as so requested, in order to maintain and protect all security interests provided for hereunder or under any other Operative Document.

Section 15.12 **Submission to Jurisdiction.** Lessee hereby submits to the nonexclusive jurisdiction of the United States District Court for the Northern District of California and of any California state court sitting in San Francisco County for purposes of all legal proceedings arising out of or relating to the Operative Documents or the transactions contemplated hereby. Lessee irrevocably waives, to the fullest extent permitted by law, any objection which it may now or hereafter have to the laying of the venue of any such proceeding brought in such a court and any claim that any such proceeding brought in such a court has been brought in an inconvenient forum.

Section 15.13 **Confidentiality.** Lessor, Agent and each Participant shall use any confidential non-public information concerning Lessee and its Subsidiaries that is furnished to Agent or such Participant by or on behalf of Lessee and its Subsidiaries in connection with the Operative Documents (collectively, "Confidential Information") solely for the purpose of evaluating and providing products and services to them and administering and enforcing the Operative Documents, and it will hold the Confidential Information in confidence. Notwithstanding the foregoing, Agent and each Participant may disclose Confidential Information (a) to their Affiliates or any of their or their Affiliates' directors, officers, employees, advisors, or representatives (collectively, the "Representatives") whom it determines need to know such information for the purposes set forth in this Section; (b) to any bank or financial institution or other entity to which such Participant has assigned or desires to assign an interest or participation in the Operative Documents or the Obligations, provided that any such foregoing recipient of such Confidential Information agrees to keep such Confidential Information confidential as specified herein; (c) to any governmental agency or regulatory body having or claiming to have authority to regulate or oversee any aspect of Agent's or such Participant's business or that of its Representatives in connection with the exercise of such authority or claimed authority; (d) to the extent necessary or appropriate to effect or preserve Agent's or such Participant's or any of their Affiliates' security (if any) for any Obligation or to enforce any right or remedy or in connection with any claims asserted by or against Agent or such Participant or any of their Representatives; and (e) pursuant to any subpoena or any similar legal process. For purposes hereof, the term "Confidential Information" shall not include information that (x) is in Agent's or a Participant's possession prior to its being provided by or on behalf of the Lessee Parties, provided that such information is not known by Agent or such Participant to be subject to another confidentiality agreement with, or other legal or contractual obligation of confidentiality to, Lessee, (y) is or becomes publicly available (other than through a breach hereof by Agent or such Participant), or (z) becomes available to Agent or such Participant on a nonconfidential basis, provided that the source of such information was not known by Agent or such Participant to be bound by a confidentiality agreement or other legal or contractual obligation of confidentiality with respect to such information.

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Section 15.14 **WAIVER OF JURY TRIAL.** EACH OF LESSEE, AGENT, LESSOR, AND EACH PARTICIPANT HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THE OPERATIVE DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY.

Section 15.15 **Usury Savings Clause.** Nothing contained in this Participation Agreement or the other Operative Documents shall be deemed to require the payment of interest or other charges by Lessee or any other Person in excess of the amount which may be may lawfully be charged under any applicable usury laws. In the event that Lessor or any other Person shall collect moneys under the Participation Agreement or any other Operative Document which are deemed to constitute interest (including, without limitation, the Basic Rent or Supplemental Rent) which would increase the effect interest rate to a rate in excess of that permitted to be charged by applicable law, all such sums deemed to constitute interest in excess of the legal rate shall, upon such determination, at the option of the Person to whom such payment was made, be returned to the Person making such payment or credited against other amounts owed by the person making such payment.

[Signature Pages Follow]

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

**SELCO SERVICE CORPORATION**, as Lessor

By: /s/Lawrence Cooper  
Name: Lawrence Cooper  
Title: Assistant Secretary  
**FLEET NATIONAL BANK**  
As a Participant

By: /s/Greg Roux  
Name: Greg Roux  
Title: Director  
**SELCO SERVICE CORPORATION**, as a Participant

By: /s/Lawrence Cooper  
Name: Lawrence Cooper  
Title: Assistant Secretary

**QUANTUM CORPORATION**, as Lessee

By: /s/Michael J. Lambert  
Name: Michael J. Lambert  
Title: Executive Vice President and CFO  
**COMERICA BANK CALIFORNIA**  
As a Participant

By: /s/Rob Ways  
Name: Rob Ways  
Title: Vice President  
**KEYBANK NATIONAL ASSOCIATION**, as a Participant

By: /s/Robert W. Boswell  
Name: Robert W. Boswell  
Title: Vice President  
**KEYBANK NATIONAL ASSOCIATION**, as Agent

By: /s/Robert W. Boswell  
Name: Robert W. Boswell  
Title: Vice President





**Credit Agreement**  
**(18-Month)**  
**among**  
**Quantum Corporation**  
**and**  
**KeyBank National Association**  
**as Administrative Agent,**  
**Sole Arranger,**  
**Sole Book Manager and**  
**Letter of Credit Issuing Lender**  
**and**  
**Fleet National Bank as Syndication Agent**  
**and**  
**Union Bank of California, N.A. as Documentation Agent**  
**and**  
**The Other Financial**  
**Institutions Parties Hereto**  
**Dated as of December 17, 2002**

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## CREDIT AGREEMENT

This CREDIT AGREEMENT ("Agreement") is entered into as of December 17, 2002, by and among QUANTUM CORPORATION, a Delaware corporation ("Borrower"), each lender from time to time party hereto (collectively, "Lenders" and individually, a "Lender"), and KEYBANK NATIONAL ASSOCIATION, as Administrative Agent and Issuing Lender.

### RECITAL

Borrower has requested that Lenders and Issuing Lender provide a revolving line of credit, and Lenders, Issuing Lender and Administrative Agent are willing to do so on the terms and conditions set forth herein.

In consideration of the mutual covenants and agreements herein contained, the parties hereto covenant and agree as follows:

## SECTION 1

# DEFINITIONS AND ACCOUNTING TERMS

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

“**Acquisition**” means any transaction or series of related transactions for the purpose of or resulting, directly or indirectly, in (a) the acquisition of all or substantially all of the assets of a Person, or of any line of business or any division of a Person, (b) the acquisition of in excess of 50% of the capital stock, partnership interests or equity of any Person, or otherwise causing any Person to become a Subsidiary, or (c) a merger or consolidation or any other combination with another Person (other than a Person that is a Subsidiary).

“**Adjusted Leverage Ratio**” means, as of any date of determination, for Borrower and its Subsidiaries on a consolidated basis, the ratio of (a) Senior Indebtedness as of such date to (b) Consolidated EBITDA for the period of the four fiscal quarters ending on, or ending most recently prior to, such date.

“**Administrative Agent**” means KeyBank National Association, in its capacity as administrative agent under any of the Loan Documents, or any successor administrative agent.

“**Administrative Agent’s Office**” means Administrative Agent’s address and, as appropriate, account as set forth on Schedule 10.02, or such other address or account as Administrative Agent hereafter may designate by written notice to Borrower and Lenders.

“**Administrative Agent-Related Persons**” means Administrative Agent (including any successor agent), together with its Affiliates (including, in the case of KeyBank in its capacity as Administrative Agent, the Arranger), and the officers, directors, employees, agents and attorneys-in-fact of such Persons and Affiliates.

1.

“**Affiliate**” means any Person directly or indirectly controlling, controlled by, or under direct or indirect common control with, another Person. A Person shall be deemed to be “controlled by” any other Person if such other Person possesses, directly or indirectly, power (a) to vote 10% or more of the securities (on a fully diluted basis) having ordinary voting power for the election of directors or managing general partners; or (b) to direct or cause the direction of the management and policies of such Person whether by contract or otherwise.

“**Agreement**” means this Credit Agreement, as amended, restated, extended, supplemented or otherwise modified in writing from time to time.

“**Applicable Amount**” means the following amounts per annum (expressed in basis points per annum), based upon the Leverage Ratio as set forth in the most recent Compliance Certificate received by Administrative Agent pursuant to Section 6.02(a), provided, however, that, until the Administrative Agent’s receipt of Borrower’s Form 10-K Annual Report filed with the Securities and Exchange Commission for the fiscal year ending March 31, 2003, such amounts shall be fixed as indicated for pricing level IV set forth below:

| Level | Leverage Ratio       | Applicable Offshore Rate Margin | Applicable Base Rate Margin | Facility Fee |
|-------|----------------------|---------------------------------|-----------------------------|--------------|
| I     | $X \leq 0.75:1.00$   | 162.50                          | 0.00                        | 25.00        |
| II    | $0.75 < X \leq 1.25$ | 187.50                          | 0.00                        | 37.50        |
| III   | $1.25 < X \leq 2.00$ | 212.50                          | 50.00                       | 50.00        |
| IV    | $2.00 < X$           | 237.50                          | 75.00                       | 62.50        |

For purposes of Borrower’s payment of interest in accordance with Section 2.07 and the facility fee specified in Section 2.08(a), each Applicable Amount calculated in accordance with the most recent Compliance Certificate shall be in effect from the date such Compliance Certificate is received by Administrative Agent to but excluding the date the next Compliance Certificate is received.

“**Applicable Payment Date**” means, (a) as to any Offshore Rate Loan, the last day of the relevant Interest Period, any date that such Loan is prepaid or converted in whole or in part and the Maturity Date; and (b) as to any other Obligations, the last Business Day of each calendar quarter and the Maturity Date; provided, further, that interest accruing at the Default Rate shall be payable from time to time upon demand of Administrative Agent.

“**Applicable Time**” means California time.

“**Arranger**” means KeyBank, in its capacity as sole arranger and sole book manager.

“**Assignment and Acceptance**” means an Assignment and Acceptance substantially in the form of Exhibit D.

“**Attorney Costs**” means and includes all reasonable attorney’s and other fees and disbursements of any law firm or other external counsel and the allocated cost of internal legal services and all disbursements of internal counsel.

2.

“**Audited Financial Statements**” means the audited consolidated balance sheet of Borrower and its Subsidiaries for the fiscal year ended March 31, 2002, and the related consolidated statements of income and cash flows for such fiscal year of Borrower.

“**Availability Limit**” means the sum of the following, all as determined in the reports delivered to Administrative Agent and each Lender in accordance with Sections 6.01(a) and (b) of this Agreement: (a) a percentage of the book value of Borrower’s inventory determined as follows: (i) from the Closing Date through the earlier of December 31, 2003 or the date of sale of any portion of the Colorado Springs Real Property Security which gives rise to a reduction of \$15,000,000 or more in the amount of the combined Commitments in accordance with Section 2.02(a) (the “**Availability Limit Reduction Date**”), 35% of the book value Borrower’s inventory, or (ii) from the calendar day next following the Availability Limit Reduction Date through the Maturity Date, 20% of the book value of Borrower’s inventory; plus (b) 80% of the book value of Borrower’s accounts receivable; plus (c) 100% of any funds maintained in the Borrower’s Supplemental Borrowing Account.

“**Base Rate**” means a fluctuating rate per annum equal to the higher of (a) the Federal Funds Rate plus 1/2 of 1% and (b) the rate of interest in effect for such day as publicly announced from time to time by KeyBank as its “prime rate.” Such prime rate is a rate set by KeyBank based upon various factors including KeyBank’s costs and desired return, general economic conditions and other factors, and is used as a reference point for pricing some loans, which may be priced at, above, or below such announced rate. Any change in such prime rate announced by KeyBank shall take effect at the opening of business on the day specified in the public announcement of such change. If KeyBank ceases to establish or publish a prime rate, the applicable Base Rate thereafter shall be instead the prime rate reported in The Wall Street Journal (or the average prime rate if a high and a low prime rate are therein reported).

“**Base Rate Loan**” means a Loan made hereunder and specified to be a Base Rate Loan in accordance with Section 2.

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

“**Borrowing**” and “**Borrow**” each mean a borrowing of Loans hereunder.

“**Borrowing Date**” means the date that a Loan is made, which shall be a Business Day.

“**Boulder Deed of Trust**” means a Leasehold Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing in commercially reasonable, recordable

form to be granted by Borrower, as Trustor, in favor of Administrative Agent, as Beneficiary (for the account of each Lender in accordance with its Pro Rata Share), encumbering Borrower's leasehold interest in the Boulder Real Property Security as security for the performance of all Obligations of Borrower.

"**Boulder Real Property Security**" means Borrower's leasehold interest in (a) certain premises consisting of approximately 43,600 square feet located at 3122 Sterling Circle, Boulder, CO pursuant to that certain Lease dated June 16, 1999 between Benchmark Tape Systems Corporation, a Delaware corporation, as Tenant, and Aweida Ventures, a Colorado General Partnership, as Landlord, as amended from time to time; and (b) certain premises consisting of approximately 95,290 square feet located at 4001 Discovery Drive, Boulder, CO pursuant to that certain Lease dated September 29, 2000 between Borrower, as Tenant, and Qwest Business Resources, Inc., a Colorado corporation, as Landlord, as amended from time to time.

3.

"**Business Day**" means each Monday, Tuesday, Wednesday, Thursday and Friday which is not a day on which banks in Albany, New York, New York, New York, San Francisco, California, Bellevue, Washington or (if interest is being determined by reference to the Offshore Rate) London, England, are generally authorized or obligated, by law or executive order, to close.

"**California Deed of Trust**" means a Leasehold Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing in commercially reasonable, recordable form to be granted by Borrower, as Trustor, in favor of Administrative Agent, as Beneficiary (for the account of each Lender in accordance with its Pro Rata Share), encumbering Borrower's leasehold interest in the California Real Property Security as security for the performance of all Obligations of Borrower.

"**California Real Property Security**" means Borrower's leasehold interest in certain premises consisting in the aggregate of approximately 206,400 square feet located at 101, 141 and 151 Innovation Drive, Irvine, CA; 2801 Kelvin Avenue, Irvine, CA; and 17071 Murphy, Irvine, CA.

"**Capital Leases**" means any and all leases under which certain obligations are required to be capitalized on the books of a lessee in accordance with GAAP.

"**Change of Control**" means the direct or indirect acquisition by any person (as such term is used in Section 13(d) and Section 14(d)(2) of the Exchange Act, but excluding any employee benefit plan of Borrower or its Subsidiaries, or any person or entity acting in its capacity as trustee, agent or other fiduciary or administrator of any such plan) or related persons constituting a group (as such term is used in Rule 13d-5 under the Exchange Act), of (a) beneficial ownership of the issued and outstanding shares of voting stock or similar equity interest of a corporation or other entity, the result of which acquisition is that such person or group possesses in excess of 40% of the combined voting power of all then-issued and outstanding voting stock of such corporation or other entity, or (b) the power to elect, appoint, or cause the election or appointment of at least a majority of the members of the board of directors of such corporation or other entity.

"**Closing Date**" means the date all the conditions precedent in Section 4.01 are satisfied or waived in accordance with Section 4.01.

"**Code**" means the Internal Revenue Code of 1986, as amended from time to time, or any successor statute thereto.

"**Colorado Springs Deed of Trust**" means that certain Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated of even date herewith and executed by Borrower, as Trustor, in favor of Administrative Agent, as Beneficiary (for the account of each Lender in accordance with its Pro Rata Share), encumbering the Colorado Springs Real Property Security as security for the performance of all Obligations of Borrower.

4.

"**Colorado Springs Real Property Security**" means the Borrower's right, title and interest in that certain real property located in Colorado Springs, Colorado and more specifically described in the Colorado Springs Deed of Trust, together with all improvements thereon or which may hereafter be constructed thereon and all appurtenances thereto. The Colorado Springs Real Property Security presently consists of two separate parcels of land: (a) "**Parcel 1**" (including improvements located at 10125 and 10205 Federal Drive, Colorado Springs, CO.); and (b) "**Parcel 2**" (including improvements located at 10285 Federal Drive, Colorado Springs, CO., and vacant land). Parcel 1 and Parcel 2 are collectively referred to herein as the "**Existing Colorado Springs Parcels**"). In accordance with the terms and conditions of the Master Lease and the Participation Agreement, Borrower may, in Selco's name but at Borrower's sole cost and expense, subdivide the Colorado Springs Real Property Security into not more than four (4) parcels (the "**Subdivided Colorado Springs Parcels**"). The Subdivided Colorado Springs Parcels shall be referred to individually herein as "**Building A**" (10125 Federal Drive), "**Building B**" (10205 Federal Drive), "**Building C**" (10285 Federal Drive) and "**Vacant Land**" (no address).

"**Commitment**" means, for each Lender, the amount set forth opposite such Lender's name on Schedule 2.01, as such amount may be reduced or adjusted from time to time in accordance with the terms of this Agreement (collectively, the "combined Commitments").

"**Compliance Certificate**" means a certificate substantially in the form of Exhibit B, properly completed and signed by a Responsible Officer of Borrower.

"**Consolidated EBITDA**" means the sum of the following, provided that the items contained in (b)-(g) below shall be added to (a) only to the extent they have been deducted in the calculation of Consolidated Net Income and, therefore, form no part of Consolidated Net Income:

(a) Consolidated Net Income, provided that (i) all gains and all losses realized by Borrower and its Subsidiaries upon the sale or other disposition (including, without limitation, pursuant to sale and leaseback transactions) of property or assets that are not sold or otherwise disposed of in the ordinary course of business, or pursuant to the sale of any capital stock of Borrower or any Subsidiary, shall be excluded from such Consolidated Net Income, (ii) net income or net loss of Borrower and its Subsidiaries combined on a "pooling of interests" basis attributable to any period prior to the date of such combination shall be excluded from such Consolidated Net Income, (iii) all items of gain or income that are properly classified as extraordinary in accordance with GAAP or are unusual or non-recurring shall be excluded from such Consolidated Net Income; and

(b) Consolidated Interest Charges; and

(c) The amount of taxes, based on or measured by income, used or included in the determination of such Consolidated Net Income; and

5.

(d) The amount of depreciation and amortization expense deducted in determining such Consolidated Net Income, including any impairment of goodwill as defined under FAS 142; and

(e) Any non-cash stock based compensation charges per GAAP; and

(f) Non-cash charges related to Borrower's sale of the Network Attached Storage business and the outsourcing of its manufacturing operations to Jabil Circuit, Inc., both net of any tax benefits or liabilities created by the same, for the quarters ending September 2002, December 2002 and March 2003; and

(g) Cash charges related to Borrower's facilities and personnel reductions, the sale of the Network Attached Storage business and the outsourcing of its manufacturing operations to Jabil Circuit, Inc., for the quarters ending September 2002 (not to exceed \$17,600,000), December 2002 (not to exceed \$20,000,000) and March 2003 (not to exceed \$5,000,000).

"**Consolidated Interest Charges**" means, for any period, for Borrower and its Subsidiaries on a consolidated basis, the sum of (a) all interest, premium payments, fees, charges and related expenses payable by Borrower and its Subsidiaries in connection with borrowed money (including capitalized interest) or in connection with the deferred purchase price of assets, in each case to the extent treated as interest in accordance with GAAP, (b) the portion of rent payable by Borrower and its Subsidiaries with respect to such period under Capital Leases that is treated as interest in accordance with GAAP and (c) the portion of rent under any Synthetic Lease Obligation that would be treated as interest in accordance

with GAAP if the Synthetic Lease Obligation were treated as a Capital Lease under GAAP.

"Consolidated Net Income" means, for any period, for Borrower and its Subsidiaries on a consolidated basis, the net income of Borrower and its Subsidiaries in accordance with GAAP.

"Consolidated Tangible Net Worth" means, as of any date of determination, for Borrower and its Subsidiaries on a consolidated basis, Shareholders' Equity of Borrower and its Subsidiaries on that date minus the Intangible Assets of Borrower and its Subsidiaries on that date.

"Continuation" and "Continue" mean, with respect to any Offshore Rate Loan, the continuation of such Offshore Rate Loan as an Offshore Rate Loan on the last day of the Interest Period for such Loan.

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

"Conversion" and "Convert" mean, with respect to any Loan, the conversion of such Loan from or into another type of Loan.

6.

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"Convertible Subordinated Debentures" means the 7% Convertible Subordinated Notes due 2004 issued by Borrower pursuant to the Indenture dated as of August 1, 1997 and the Supplemental Indenture dated as of August 1, 1997 between Borrower and LaSalle National Trust Company, N.A., as Trustee.

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

"Deeds of Trust" means the Colorado Springs Deed of Trust, the Boulder Deed of Trust, the California Deed of Trust and any trust deed granted by Borrower with respect to Material Leases in accordance with Section 7.15 hereof.

"Default" means any event that, with the giving of any notice, the passage of time, or both, would be an Event of Default.

"Default Rate" means an interest rate equal to the Base Rate plus the applicable margin specified in the definition of Applicable Amount, if any, applicable to Base Rate Loans, plus 2% per annum; provided, however, that with respect to an Offshore Rate Loan, the Default Rate shall be an interest rate equal to the interest rate otherwise applicable to such Loan, plus the applicable margin specified for Offshore Rate Loans in the definition of Applicable Amount, plus 2% per annum, in each case to the fullest extent permitted by applicable Laws.

"Deposit Account Control Agreements" means the respective Deposit Account Control Agreements to be entered into among Borrower, as Customer, Administrative Agent (for the account of each Lender in accordance with its Pro Rata Share), as Secured Party, and the following, as Depository Banks: Silicon Valley Bank, Union Bank of California, N.A., and any other depository institutions at which Borrower maintains deposit accounts from time to time.

"Designated Deposit Account" means a deposit account maintained by Borrower with KeyBank, as from time to time designated by Borrower to Administrative Agent by Requisite Notice.

"Disposition" or "Dispose" means the sale, transfer, License Disposition or other disposition (including any sale and leaseback transaction) of any property by any Person, including any sale, assignment, transfer or other disposal with or without recourse of any notes or accounts receivable or any rights and claims associated therewith.

"Dollar" and "\$" means lawful money of the United States of America.

"Eligible Assignee" means (a) a financial institution organized under the laws of the United States, or any state thereof, and having a combined capital and surplus of at least \$100,000,000; (b) a commercial bank organized under the laws of any other country which is a member of the Organization for Economic Cooperation and Development, or a political subdivision of any such country, and having a combined capital and surplus of at least \$100,000,000, provided that such bank is acting through a branch or agency located in the United States; (c) a Person that is primarily engaged in the business of commercial banking and that is (i) a Subsidiary of a Lender, (ii) a Subsidiary of a Person of which a Lender is a Subsidiary, or (iii) a Person of which a Lender is a Subsidiary; (d) another Lender; (e) any other entity which is an "accredited investor" (as defined in Regulation D under the Securities Act of 1933, as amended) which extends credit or buys loans as one of its businesses, including but not limited to, insurance companies, mutual funds and lease financing companies; or (f) other lenders or institutional investors consented to in writing in advance by Administrative Agent and Borrower. Neither Borrower nor any Affiliate of Borrower shall be an Eligible Assignee.

7.

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"Employee Benefit Plan" means any employee benefit plan within the meaning of Section 3(3) of ERISA, maintained or contributed to by Borrower or any ERISA Affiliate, other than a Multiemployer Plan.

"Environmental Laws" means all Laws relating to environmental, health, safety and land use matters applicable to any property of Borrower.

"Equity Securities" of any Person means (a) all common stock, preferred stock, participations, shares, partnership interests or other equity interests in such Person (regardless of how designated and whether or not voting or non-voting) and (b) all warrants, options and other rights to acquire any of the foregoing, other than convertible debt securities which have not been converted into common stock, preferred stock, participations, shares, partnership interests or other equity interests in any such Person.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time, or any successor Federal statute.

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

"ERISA Event" means (a) a Reportable Event with respect to a Pension Plan; (b) a withdrawal by Borrower or any ERISA Affiliate from a Pension Plan subject to Section 4063 of ERISA during a plan year in which it was a substantial employer (as defined in Section 4001(a)(2) of ERISA) or a cessation of operations that is treated as such a withdrawal under Section 4062(e) of ERISA; (c) a complete or partial withdrawal by Borrower or any ERISA Affiliate from a Multiemployer Plan or notification that a Multiemployer Plan is in reorganization; (d) the filing of a notice of intent to terminate, the treatment of a Plan amendment as a termination under Sections 4041 or 4041A of ERISA, or the commencement of proceedings by the PBGC to terminate a Pension Plan or Multiemployer Plan; (e) an event or condition which might reasonably be expected to constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan or Multiemployer Plan; or (f) the imposition of any liability under Title IV of ERISA, other than PBGC premiums due but not delinquent under Section 4007 of ERISA, upon Borrower or any ERISA Affiliate.

"Eurodollar Reserve Percentage" means, for any day during any Interest Period, the reserve percentage (expressed as a decimal, rounded upward to the next 1/100th of 1%) in effect on such day, whether or not applicable to any Lender, under regulations issued from time to time by the Board of Governors of the Federal Reserve System for determining the maximum reserve requirement (including any emergency, supplemental or other marginal reserve requirement) with respect to Eurocurrency funding (currently referred to as "Eurocurrency liabilities"). The Offshore Rate for each outstanding Offshore Rate Loan shall be adjusted automatically as of the effective date of any change in the Eurodollar Reserve Percentage. The determination of the Eurodollar Reserve Percentage and the Offshore Rate by Administrative Agent shall be conclusive in the absence of manifest error.

8.

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**"Event of Default"** means any of the events specified in Section 8.

**"Exchange Act"** means the Securities Exchange Act of 1934, as amended from time to time, or any successor federal statute.

**"Extension of Credit"** means (a) a Borrowing, Conversion or Continuation of Loans and (b) a Letter of Credit Action wherein a new Letter of Credit is issued or which has the effect of increasing the amount of, extending the maturity of, or making a material modification to an outstanding Letter of Credit or the reimbursement of drawings thereunder.

**"Federal Funds Rate"** means, for any day, the rate per annum (rounded upwards to the nearest 1/100 of 1%) equal to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers on such day, as published by the Federal Reserve Bank on the Business Day next succeeding such day; provided that (a) if such day is not a Business Day, the Federal Funds Rate for such day shall be such rate on such transactions on the next preceding Business Day as so published on the next succeeding Business Day, and (b) if no such rate is so published on such next succeeding Business Day, the Federal Funds Rate for such day shall be the average rate charged to KeyBank on such day on such transactions as determined by Administrative Agent.

**"GAAP"** means generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or such other principles as may be approved by a significant segment of the accounting profession, that are applicable to the circumstances as of the date of determination, consistently applied. If at any time any change in GAAP would affect the computation of any financial ratio or requirement set forth in any Loan Document, and either Borrower or Requisite Lenders shall so request, Administrative Agent, Lenders and Borrower shall negotiate in good faith to amend such ratio or requirement to preserve the original intent thereof in light of such change in GAAP (subject to the approval of Requisite Lenders), provided that, until so amended, (a) such ratio or requirement shall continue to be computed in accordance with GAAP prior to such change therein and (b) Borrower shall provide to Administrative Agent and Lenders financial statements and other documents required under this Agreement or as reasonably requested hereunder setting forth a reconciliation between calculations of such ratio or requirement made before and after giving effect to such change in GAAP.

**"General Security Agreement"** means that certain Security Agreement (Personal Property) dated as of the date hereof, between Borrower, as Debtor, and Administrative Agent (for the account of each Lender in accordance with its Pro Rata Share), as Lender, securing the Obligations of Borrower.

9.

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**"Governmental Authority"** means (a) any international, foreign, federal, state, county or municipal government, or political subdivision thereof, (b) any governmental or quasi-governmental agency, authority, board, bureau, commission, department, instrumentality, central bank or public body, or (c) any court, administrative tribunal or public utility.

**"Guaranty Obligation"** means, as to any Person, any (a) guaranty by such Person of Indebtedness of, or other obligation payable or performable by, any other Person or (b) assurance, agreement, letter of responsibility, letter of awareness, undertaking or arrangement given by such Person to an obligee of any other Person with respect to the payment or performance of an obligation by, or the financial condition of, such other Person, whether direct, indirect or contingent, including any purchase or repurchase agreement covering such obligation or any collateral security therefor, any agreement to provide funds (by means of loans, capital contributions or otherwise) to such other Person, any agreement to support the solvency or level of any balance sheet item of such other Person or any "keep-well" or other arrangement of whatever nature, in each such case, given for the purpose of assuring or holding harmless such obligee against loss with respect to any obligation of such other Person; provided, however, that the term Guaranty Obligation shall not include endorsements of instruments for deposit or collection in the ordinary course of business. The amount of any Guaranty Obligation shall be deemed to be an amount equal to the stated or determinable amount of the related primary obligation, or portion thereof, covered by such Guaranty Obligation or, if not stated or determinable, the maximum reasonably anticipated liability in respect thereof as determined by the Person in good faith.

**"Hazardous Substance"** means mean any substance, material or waste, including asbestos and petroleum (including crude oil or any fraction thereof), which is or becomes designated, classified or regulated as "toxic," "hazardous," a "pollutant" or similar designation under any Laws.

**"Indebtedness"** means, as to any Person at any date of determination, all items which would, in conformity with GAAP, be classified as liabilities on a balance sheet of such Person as at such date excluding (i) trade and other accounts payable in the ordinary course of business in accordance with customary trade terms and which are not overdue for a period of more than 60 days (unless contested in good faith by Borrower or any Subsidiary), (ii) deferred taxes, and (iii) accrued interest and expenses, except to the extent capitalized, and in any event including:

(a) all obligations of such Person for borrowed money and all obligations of such Person evidenced by bonds, debentures, notes or other similar instruments;

(b) any direct or contingent obligations of such Person arising under letters of credit (including standby and commercial), banker's acceptances, bank guaranties, surety bonds and similar instruments;

(c) whether or not so included as liabilities in accordance with GAAP, net obligations under any Swap Contract in an amount equal to (i) if such Swap Contract has been closed out, the termination value thereof, or (ii) if such Swap Contract has not been closed out, the mark-to-market value thereof determined on the basis of readily available quotations provided by any recognized dealer in such Swap Contract;

10.

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(d) whether or not so included as liabilities in accordance with GAAP and whether with or without recourse, all obligations of such Person to pay the deferred purchase price of property or services, and indebtedness (excluding prepaid interest thereon) secured by a Lien on property owned or being purchased by such Person (including indebtedness arising under conditional sales or other title retention agreements);

(e) Capital Leases or Synthetic Lease Obligations, provided, however, that Synthetic Lease Obligations shall be excluded from Indebtedness to the extent they are secured by cash collateral or a Letter of Credit. The amount of Indebtedness in the case of Capital Leases shall be the amount of the capitalized lease liability appearing on Borrower's financial statements delivered in accordance with Sections 6.01(a) and (b) of this Agreement. The amount of Indebtedness in the case of Synthetic Lease Obligations shall be the sum of all outstanding principal advances and any other sums advanced and outstanding pursuant to the Synthetic Lease Obligations.

(f) all Guaranty Obligations of such Person in respect of any of the foregoing obligations of any other Person.

For all purposes of this Agreement, the Indebtedness of any Person shall include, at any such time as such partnership or joint venture is not Solvent, the Indebtedness of any partnership or joint venture in which such Person is a general partner or a joint venturer, unless such Indebtedness is expressly made non-recourse to such Person (subject to customary recourse exceptions acceptable to Requisite Lenders).

**"Indemnified Liabilities"** has the meaning set forth in Section 10.13.

**"Indemnities"** has the meaning set forth in Section 10.13.

**"Intangible Assets"** means assets that are required to be disclosed as intangible assets in accordance with GAAP on Borrower's balance sheet, including customer lists, goodwill, computer software, copyrights, trade names, trade marks, patents, unamortized deferred charges, unamortized debt discount and capitalized research and development costs.

**"Intellectual Property Security Agreement"** means that certain Intellectual Property Security Agreement of even date herewith entered into by Borrower, as Debtor, and Administrative Agent (for the account of each Lender in accordance with its Pro Rata Share), as Lender, securing the Obligations of Borrower.

**"Interest Period"** means for each Offshore Rate Loan, (i) initially, the period commencing on the date such Offshore Rate Loan is disbursed or Continued or Converted into

such Offshore Rate Loan, and (ii) thereafter, the period commencing on the last day of the preceding Interest Period, and ending, in each case, on the earlier of (x) the scheduled Maturity Date, or (y) one month thereafter; provided that:

11.

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

(B) any Interest Period which begins on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period) shall end on the last Business Day of the calendar month at the end of such Interest Period; and

(C) unless Administrative Agent otherwise consents, there may not be more than eight Interest Periods for Offshore Rate Loans in effect at any time.

“Investment” means, as to any Person, any investment by such Person, whether by means of the purchase or other acquisition of stock or other securities of any other Person or by means of a loan, creating a debt, capital contribution, guaranty or other debt or equity participation or interest in any other Person. For purposes of covenant compliance, the amount of any Investment shall be the amount actually invested, without adjustment for subsequent increases or decreases in the value of such Investment. Notwithstanding the foregoing, the term “Investment” shall not include purchases of Convertible Subordinated Debentures made in compliance with Section 7.11 of this Agreement.

“IRS” means the United States Internal Revenue Service.

“Issuing Lender” means KeyBank National Association, or any other Lender who from time to time effects a Letter of Credit Action in accordance with the terms of this Agreement.

“KeyBank” means KeyBank National Association

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

“Lender” means each lender from time to time party hereto and, as the context requires, Issuing Lender.

“Lending Office” means, as to any Lender, the office or offices of such Lender described as such on Schedule 10.02, or such other office or offices as a Lender may from time to time notify Administrative Agent.

“Letter of Credit” means any standby letter of credit issued or outstanding hereunder. A Letter of Credit may be a performance letter of credit or a financial letter of credit.

12.

“Letter of Credit Action” means the issuance, supplement, amendment, renewal, extension, modification or other action relating to a Letter of Credit hereunder.

“Letter of Credit Application” means an application for a Letter of Credit Action from time to time in use by Issuing Lender.

“Letter of Credit Cash Collateral Account” means a blocked deposit account at KeyBank with respect to which Borrower agrees to execute and deliver from time to time such documentation as Administrative Agent or Issuing Lender may reasonably request to grant to Administrative Agent and Issuing Lender a security interest therein as security for the Letter of Credit Usage.

“Letter of Credit Expiration Date” means the scheduled Maturity Date.

“Letter of Credit Sublimit” means an amount equal to \$100,000,000. The Letter of Credit Sublimit is part of, and not in addition to, the combined Commitments.

“Letter of Credit Usage” means, as at any date of determination, the aggregate undrawn face amount of outstanding Letters of Credit plus the aggregate amount of all drawings under the Letters of Credit not reimbursed by Borrower or converted into Loans.

“Leverage Ratio” means, as of any date of determination, for Borrower and its Subsidiaries on a consolidated basis, the ratio of (a) Indebtedness as of such date to (b) Consolidated EBITDA for the period of the four fiscal quarters ending on, or ending most recently prior to, such date.

“License Disposition” means, in respect of any patent, trademark, copyright, mask work, trade secret or other intellectual property right owned or held by Borrower or any of its Subsidiaries (the “IP Holder”) which is material to Borrower or any of its Subsidiaries (together, “Material IP”), (i) the granting by the IP Holder of an exclusive license across all or substantially all fields, uses or regions to any Person other than Borrower or another Subsidiary, (ii) the granting of any license by the IP Holder that conveys directly or indirectly to any Person other than Borrower or its Subsidiaries all or substantially all of the economic value of such Material IP, or (iii) the abandonment by the IP Holder of such Material IP.

“Lien” means any mortgage, pledge, hypothecation, assignment, deposit arrangement (including in the nature of, cash collateral accounts or security interests), encumbrance, lien (statutory or other), fixed or floating charge, or other security interest of any kind or nature whatsoever (including any conditional sale or other title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing, and the filing of any financing statement under the Uniform Commercial Code or comparable Laws of any jurisdiction), including the interest of a purchaser of accounts receivable.

“Loan” means any advance made by any Lender to Borrower as provided in Section 2 (collectively, the “Loans”).

“Loan Documents” means this Agreement and each Note, the Deeds of Trust, the General Security Agreement, the Stock Pledge Agreement, the Intellectual Property Security Agreement, the Deposit Account Control Agreements, the Securities Account Control Agreements, each Letter of Credit Application, each Request for Extension of Credit, each certificate, each fee letter, and each other instrument or agreement from time to time executed by Borrower or any of its Subsidiaries or any Responsible Officer and delivered in connection with this Agreement.

13.

“Master Agreement” has the meaning set forth in the definition of “Swap Contract”.

“Master Lease” means that certain Amended and Restated Master Lease, Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing dated of even date herewith between Selco Service Corporation, as Lessor, and Borrower, as Lessee.

“Material Adverse Effect” means any set of circumstances or events which (a) has any material adverse effect upon the validity or enforceability of any Loan Document, (b) is material and adverse to the financial condition, business, assets or operations of Borrower, (c) has any material adverse effect upon the value or condition of the collateral under the Deeds of Trust, the General Security Agreement, the Intellectual Property Security Agreement, the Stock Pledge Agreement, the Deposit Account Control Agreements or the Securities Account Control Agreements, or (d) materially impairs the ability of Borrower to perform the Obligations.

“Material Lease” means any lease entered into by Borrower or its Subsidiaries after the Closing Date for premises in excess of 25,000 square feet.



"Material Subsidiaries" means each Subsidiary of Borrower which has assets with a total book value greater than 10% of the consolidated total assets of Borrower and its Subsidiaries, determined as of the end of the fiscal quarter immediately preceding the date of determination.

"Maturity Date" means (a) June 1, 2004, or (b) such earlier date upon which the combined Commitments may be terminated in accordance with the terms of this Agreement.

"Maxtor" means Maxtor Corporation, a Delaware corporation.

"Maxtor Reimbursement Agreement" means that certain Reimbursement Agreement between Borrower and Maxtor dated as of April 2, 2001.

"Minimum Amount" means, with respect to each of the following actions, the minimum amount and any multiples in excess thereof set forth opposite such action:

| <u>Type of Action</u>   | <u>Minimum Amount</u> | <u>Multiples in excess thereof</u> |
|---|-----------------------|------------------------------------|
| Borrowing or prepayment of, or Conversion into, Base Rate Loans                   | \$1,000,000           | \$500,000                          |
| Borrowing, prepayment or Continuation of, or Conversion into, Offshore Rate Loans | \$1,000,000           | \$500,000                          |
| Letter of Credit Action   | \$100,000             | None                               |
| Reduction in Commitments  | \$10,000,000          | \$10,000,000                       |
| Assignments   | \$5,000,000           | None                               |

14.

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"Multiemployer Plan" means any employee benefit plan of the type described in Section 4001(a)(3) of ERISA.

"Net Proceeds" means, with respect to any sale or issuance of any Equity Security or other security by any Person (including in the case of Borrower, any sale or issuance of any Subordinated Debt), the aggregate consideration received by such Person from such sale or issuance less the actual amount of fees and commissions payable to Persons other than such Person or any Affiliate of such Person.

"Note" means a promissory note made by Borrower in favor of a Lender evidencing Loans made by such Lender, substantially in the form of Exhibit C (collectively, the "Notes").

"Obligations" means all advances to, and debts, liabilities, obligations, covenants and duties of, Borrower arising under any Loan Document, whether direct or indirect (including those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising and including interest that accrues after the commencement of any proceeding under any Debtor Relief Laws by or against Borrower or any Subsidiary or Affiliate of Borrower.

"Offshore Rate" means for any Interest Period with respect to each Offshore Rate Loan comprising part of the same Borrowing, a rate per annum determined by Administrative Agent as the offered rate for Dollar deposits in the approximate amount of the requested Offshore Rate Loan and having a maturity comparable to such Interest Period, which rate appears (i) on the British Bankers' Association internet web page (<http://www.bba.org.uk/public/libor/>), or via (ii) Reuters (BBALIBORS), Bloomberg, Moneyline Telerate (Page 3750) or any other information provider of the British Bankers' Association daily Libor rates as of 11:00 A.M., London time, on the date (an "Interest Determination Date") which is the second day on which banks are open for interbank deposits in London prior to the commencement of such Interest Period. If, on the Interest Determination Date for such Interest Period, the Administrative Agent is unable to obtain any quotation as provided above, the Offshore Rate for the relevant Interest Period shall be the rate per annum that the Administrative Agent determines in good faith to be the arithmetic mean (rounded, if necessary, to the nearest sixth decimal place) of all the per annum rates of interest at which deposits in Dollars in an amount comparable to the requested Offshore Rate Loan in Dollars in respect of which the Offshore Rate is then being determined for a period comparable to such Interest Period are offered by the Administrative Agent to prime banks in the London interbank market at approximately 11:00 A.M., London time on such Interest Determination Date. The Administrative Agent shall provide to the Borrower, upon request, details as to the manner in which the Offshore Rate is calculated, but such calculation shall be conclusive and binding absent manifest error.

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"Offshore Rate Loan" means a Loan made hereunder and specified to be a Offshore Rate Loan in accordance with Section 2.

"Ordinary Course Dispositions" means:

- (a) Dispositions of surplus equipment or damaged, obsolete or worn out property, whether now owned or hereafter acquired, in the ordinary course of business;
- (b) Dispositions in the ordinary course of business;
- (c) Dispositions of property to the extent that such property is exchanged for credit against the purchase price of similar replacement property, or the proceeds of such sale are reasonably promptly applied to the purchase price of such replacement property or where Borrower or its Subsidiary determine in good faith that the failure to replace such equipment will not be detrimental to the business of Borrower or such Subsidiary;
- (d) Dispositions of assets or property by any Subsidiary of Borrower to Borrower or another Subsidiary of Borrower;
- (e) Dispositions which constitute the making or liquidating of Permitted Investments; and
- (f) Dispositions which constitute the incurrence (but not the enforcement) of Permitted Liens;

provided, however, that, other than with respect to Dispositions of the types described in clauses (a) and (d) of this definition, no such Disposition shall be for less than the fair market value of the property being disposed of.

"Ordinary Course Indebtedness" means:

- (a) Indebtedness under the Loan Documents;
  - (b) Intercompany Guaranty Obligations of Borrower or any of its Subsidiaries guarantying Indebtedness otherwise permitted hereunder of Borrower or any Subsidiary of Borrower;
  - (c) Indebtedness arising from the honoring of a check, draft or similar instrument against insufficient funds or from the endorsement of instruments for collection in the ordinary course of Borrower's or any Subsidiary's Subsidiary's business;
  - (d) Permitted Swap Obligations;
  - (e) Indebtedness of Borrower or any of its Subsidiaries with respect to surety, appeal, indemnity, performance or other similar bonds in the ordinary course of business;
- and

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(f) Indebtedness with respect to cash deposited by customers to obtain the right to delivery of future goods or services; provided, however, that all such cash deposits are held in an account subject to a Deposit Account Control Agreement.

“Ordinary Course Investments” means Investments consisting of:

- (a) Investments in other assets properly classified as “marketable securities” or “cash” or “cash equivalents” under GAAP, and which conform to the investment policies adopted by the Board of Directors of Borrower from time to time;
- (b) advances to officers, directors and employees of Borrower and its Subsidiaries for travel, entertainment, relocation and analogous ordinary business purposes;
- (c) Investments of Borrower in any of its Subsidiaries and Investments of any Subsidiary of Borrower in Borrower or another Subsidiary of Borrower;
- (d) extensions of credit to customers or suppliers of Borrower and its Subsidiaries in the ordinary course of business and any Investments received in satisfaction or partial satisfaction thereof;
- (e) Guaranty Obligations permitted by Section 7.01.
- (f) Investments received by Borrower or any of its Subsidiaries as distributions on claims in connection with the bankruptcy or reorganization of customers or suppliers and in settlement of delinquent obligations of, and other disputes with, customers and suppliers arising in the ordinary course of business;
- (g) Investments of any Subsidiary existing at the time it becomes a Subsidiary of Borrower, provided that such Investments were not made in anticipation of such Person becoming a Subsidiary of Borrower; and
- (h) Investments consisting of loans to employees, officers and directors, the proceeds of which shall be used to purchase Equity Securities of Borrower or its Subsidiaries and other loans to employees, officers and directors.

“Ordinary Course Liens” means:

- (a) Liens pursuant to any Loan Document;
- (b) Liens for taxes not yet due or which are being contested in good faith and by appropriate proceedings, if adequate reserves with respect thereto are maintained on the books of the applicable Person in accordance with GAAP;
- (c) carriers’, warehousemen’s, mechanics’, materialmen’s, repairmen’s, landlord’s or other like Liens arising in the ordinary course of business which are not overdue for a period of more than 30 days or which are being contested in good faith and by appropriate proceedings, if adequate reserves with respect thereto are maintained on the books of the applicable Person in accordance with GAAP;

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- (d) pledges or deposits in connection with worker’s compensation, unemployment insurance and other social security legislation;
  - (e) deposits to secure the performance of bids, trade contracts (other than for borrowed money), leases, statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature incurred in the ordinary course of business;
  - (f) easements, rights-of-way, restrictions and other similar encumbrances affecting real property which, in the aggregate, are not substantial in amount, and which do not in any case materially detract from the value of the property subject thereto or materially interfere with the ordinary conduct of the business of any Person;
  - (g) attachment, judgment or other similar Liens arising in connection with litigation or other legal proceedings (and not otherwise an Event of Default hereunder) in the ordinary course of business that is currently being contested in good faith by appropriate proceedings, adequate reserves have been set aside, and no material property is subject to a material risk of loss or forfeiture;
  - (h) Liens on the property or assets of any Subsidiary of Borrower in favor of Borrower or any other Subsidiary of Borrower;
  - (i) Liens in favor of customs and revenue authorities arising as a matter of law to secure payment of customs duties and in connection with the importation of goods in the ordinary course of Borrower’s and its Subsidiaries’ businesses;
  - (j) Liens arising solely by virtue of any statutory or common law provision relating to banker’s liens, rights of set-off or similar rights and remedies as to deposit accounts or other funds maintained with a creditor depository institution; provided that (i) such deposit account is not a dedicated cash collateral account and is not subject to restrictions against access by Borrower in excess of those set forth by regulations promulgated by the Federal Reserve Board, and (ii) such deposit account is not intended by Borrower or any Subsidiary to provide collateral to the depository institution; and
  - (k) Liens on insurance proceeds in favor of insurance companies with respect to the financing of insurance premiums.

“Organization Documents” means, (a) with respect to any corporation, the certificate or articles of incorporation and the bylaws; (b) with respect to any limited liability company, the articles of formation and operating agreement; and (c) with respect to any partnership, joint venture, trust or other form of business entity, the partnership or joint venture agreement and any agreement, instrument, filing or notice with respect thereto filed in connection with its formation with the secretary of state or other department in the state of its formation, in each case as amended from time to time.

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“Outstanding Obligations” means, as of any date, and giving effect to making any Extensions of Credit requested on such date and all payments, repayments and prepayments made on such date, (a) when reference is made to all Lenders, the sum of (i) the aggregate outstanding principal amount of all Loans, and (ii) all Letter of Credit Usage, and (b) when reference is made to one Lender, the sum of (i) the aggregate outstanding principal amount of all Loans made by such Lender, and (ii) such Lender’s ratable risk participation in all Letter of Credit Usage.

“PBGC” means the Pension Benefit Guaranty Corporation or any successor thereto established under ERISA.

“Participation Agreement” means that certain Participation Agreement dated as of even date herewith among Borrower, as Lessee, Selco, as Lessor and a Participant, and KeyBank and the other parties listed therein as Participants (the “Participation Agreement”)

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

“Permitted Exceptions” means with respect to the Colorado Springs Real Property Security, the Boulder Real Property Security, the California Real Property Security and the property subject to any Material Lease as to which Lender is granted a security interest in accordance with Section 6.15: (a) Liens arising by operation of law, materialmen’s, mechanics’, workers’, repairmen’s, employees’, carriers’, warehousemen’s and other like Liens in connection with any improvements or arising in the ordinary course of business for amounts that either are not more than sixty (60) days past due or are being diligently contested in good faith by appropriate proceedings and that have been bonded for not less than the full amount in dispute (or as to which other security arrangements satisfactory to the Administrative Agent have been made), which bonding (or arrangements) shall comply with applicable requirements of Laws, and has effectively stayed any execution or enforcement of such Liens; (b) Liens arising out of judgments or awards with respect to which appeals or other proceedings for review are being prosecuted in good faith and for the payment of which adequate reserves have been provided as required by GAAP or other appropriate

provisions have been made, so long as such proceedings have the effect of staying the execution of such judgments or awards; (c) all encumbrances, exceptions, restrictions, easements, rights of way, servitude's, encroachments and irregularities in title, other than Liens which, in the reasonable assessment of the Administrative Agent, do not materially impair the value of the real property security or the use of the such real property security for its intended purpose; (d) a Lien consisting of a deposit or pledge made, in the ordinary course of business, in connection with, or to secure payment of, obligations under worker's compensation, unemployment insurance or similar legislation; and (e) Permitted Liens.

"Permitted Indebtedness" has the meaning specified in Section 7.01.

"Permitted Investments" has the meaning specified in Section 7.05.

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"Permitted Liens" has the meaning specified in Section 7.02.

"Permitted Swap Obligations" means all obligations (contingent or otherwise) of Borrower or any of its Subsidiaries existing or arising under Swap Contracts, provided that such obligations are (or were) entered into by such Person in the ordinary course of business for the purpose of directly mitigating risks associated with liabilities, commitments or assets held or reasonably anticipated by such Person, or changes in the value of securities issued by such Person in conjunction with a securities repurchase program not otherwise prohibited hereunder, and not for purposes of speculation or taking a "market view."

"Person" means any individual, trustee, corporation, general partnership, limited partnership, limited liability company, joint stock company, trust, unincorporated organization, bank, business association, firm, joint venture, Governmental Authority, or otherwise.

"Plan" means any employee benefit plan maintained or contributed to by Borrower or by any trade or business (whether or not incorporated) under common control with Borrower as defined in Section 4001(b) of ERISA and insured by the Pension Benefit Guaranty Corporation under Title IV of ERISA.

"Pro Rata Share" means, with respect to each Lender, the percentage of the combined Commitments set forth opposite the name of such Lender on Schedule 2.01, as such share may be adjusted as contemplated herein.

"PT" means Pacific Time.

"Quick Ratio" means, with respect to Borrower and its Subsidiaries at any time, the ratio, determined on a consolidated basis in accordance with GAAP, of: (a) the sum at such time of all (i) cash and cash equivalents of Borrower and its Subsidiaries (excluding restricted cash), and (ii) accounts receivable of Borrower and its Subsidiaries, less all reserves therefor; to (b) the current liabilities of Borrower and its Subsidiaries other than current liabilities in connection with the Convertible Subordinated Debentures.

"Reportable Event" means any of the events set forth in Section 4043(b) of ERISA or the regulations thereunder, a withdrawal from a Plan described in Section 4063 of ERISA, or a cessation of operations described in Section 4062(e) of ERISA.

"Request for Extension of Credit" means, unless otherwise specified herein, (a) with respect to a Borrowing, Conversion or Continuation of Loans, a written request substantially in the form of Exhibit A, and (b) with respect to a Letter of Credit Action, a Letter of Credit Application; in each case duly completed and signed by a Responsible Officer of Borrower and delivered by Requisite Notice.

"Requisite Lenders" means, as of any date of determination: (a) if the Commitments are then in effect, Lenders having in the aggregate more than 66 2/3% of the combined Commitments then in effect and (b) if the Commitments have then been terminated and there are Outstanding Obligations, Lenders holding Outstanding Obligations aggregating more than 66 2/3% of such Outstanding Obligations; provided, however, that the voting rights of any Lender that has failed to fund any amounts when required to do so hereunder shall be limited to the Outstanding Obligations with respect to such Lender.

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"Requisite Notice" means, unless otherwise provided herein, (a) irrevocable written notice to the intended recipient or (b) except with respect to Letter of Credit Actions (which must be in writing), irrevocable telephonic notice to the intended recipient, promptly followed by a written notice to such recipient. Such notices shall be (i) delivered to such recipient at the address or telephone number specified on Schedule 10.02 or as otherwise designated by such recipient by Requisite Notice to Administrative Agent, and (ii) if made by Borrower, given or made by a Responsible Officer of Borrower. Any written notice delivered in connection with any Loan Document shall be in the form, if any, prescribed herein or therein. Any notice sent by other than hardcopy shall be promptly confirmed by a telephone call to the recipient and, if requested by Administrative Agent, by a manually-signed hardcopy thereof.

"Requisite Time" means, with respect to any of the actions listed below, the time and date set forth below opposite such action:

| Type of Action   | Applicable Time | Date of Action   |
|--|-----------------|--|
| Delivery of Request for Extension of Credit for, or notice for:                    |                 |  |
| -Borrowing or prepayment of, or Conversion into, Base Rate Loans                   | 8:00 a.m. PT    | Same date as such Borrowing, prepayment or Conversion  |
| -Borrowing, prepayment or Continuation of, or Conversion into, Offshore Rate Loans | 9:00 a.m. PT    | 3 Business Days prior to such Borrowing, prepayment Continuation or Conversion                   |
| -Letter of Credit Action   | 10:00 a.m. PT   | 2 Business Days prior to such action (or such lesser time which is acceptable to Issuing Lender) |
| Voluntary reduction in or termination of Commitments                               | 10:00 a.m. PT   | 3 Business Days prior to such reduction or termination   |
| Payments by Lenders or Borrower to Administrative Agent                            | 11:00 a.m. PT   | On date payment is due   |

"Responsible Officer" means the president, the chief financial officer, the vice president, the treasurer or the assistant treasurer of Borrower. Any document or certificate hereunder that is signed by a Responsible Officer of Borrower shall be conclusively presumed to have been authorized by all necessary corporate, partnership and/or other action on the part of Borrower and such Responsible Officer shall be conclusively presumed to have acted on behalf of Borrower.

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"Restricted Payment" means:

(a) the declaration or payment of any dividend or distribution by Borrower or any Subsidiary, either in cash or property, on any shares of Equity Securities of any class of Borrower or any Subsidiary; and

(b) any other payment or distribution by Borrower or any Subsidiary in respect of its Equity Securities, either directly or indirectly.

"Securities Account Control Agreements" means the respective Securities Account Control Agreements in commercially reasonable form to be entered into after the Closing Date among Borrower, as customer, Administrative Agent (for the account of each Lender in accordance with its Pro Rata Share), as secured party, and the following, as account holders: Lehman Brothers, Money Market One, Merrill Lynch, Salomon Smith Barney, Blackrock Provident, Nations Trust Bank, Scudder, AMR Investments and any other account holders with whom Borrower maintains securities accounts from time to time.

"Security Documents" means the Deeds of Trust, the General Security Agreement, the Intellectual Property Security Agreement, the Stock Pledge Agreement, the Deposit

"Selco" means Selco Service Corporation, an Ohio corporation.

"Senior Indebtedness" means, with respect to any Person at any time, all Indebtedness of such Person other than Subordinated Debt.

"Shareholders' Equity" means, as of any date of determination for Borrower and its Subsidiaries on a consolidated basis, shareholders' equity as of that date determined in accordance with GAAP.

"Solvent" means, as to any Person at any time, that (i) the fair value of the property of such Person is greater than the amount of such Person's liabilities (including disputed, contingent and unliquidated liabilities) as such value is established and liabilities evaluated for purposes of Section 101(32) of the Bankruptcy Code; (ii) the present fair saleable value of the property of such Person is not less than the amount that will be required to pay the probable liability of such Person on its debts as they become absolute and matured; (iii) such Person is able to realize upon its property and pay its debts and other liabilities (including disputed, contingent and unliquidated liabilities) as they mature in the normal course of business; (iv) such Person does not intend to, and does not believe that it will, incur debts or liabilities beyond such Person's ability to pay as such debts and liabilities mature; and (v) such Person is not engaged in business or a transaction, and is not about to engage in business or a transaction, for which such Person's property would constitute unreasonably small capital.

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"Stock Pledge Agreement" means that certain Security and Pledge Agreement dated as of even date herewith between Borrower, as Debtor, and Administrative Agent (for the account of each Lender in accordance with its Pro Rata Share), as Lender, securing the Obligations of Borrower.

"Subordinated Debt" means the Convertible Subordinated Debentures and any other subordinated debt permitted by Section 7.01.

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

"Supplemental Borrowing Account" means that certain deposit account maintained or to be maintained by Borrower with Administrative Agent for the purpose of providing additional support and collateral in determining the Availability Limit.

"Swap Contract" means (a) any and all rate swap transactions, basis swaps, forward rate transactions, commodity swaps, commodity options, forward commodity contracts, equity or equity index swaps or options, bond or bond price or bond index swaps or options or forward bond or forward bond price or forward bond index transactions, interest rate options, forward foreign exchange transactions, cap transactions, floor transactions, collar transactions, currency swap transactions, cross-currency rate swap transactions, currency options, or any other similar transactions or any combination of any of the foregoing (including any options to enter into any of the foregoing), whether or not any such transaction is governed by or subject to any master agreement, and (b) any and all transactions of any kind, and the related confirmations, which are subject to the terms and conditions of, or governed by, any form of master agreement published by the International Swaps and Derivatives Association, Inc., or any other master agreement (any such master agreement, together with any related schedules, as amended, restated, extended, supplemented or otherwise modified in writing from time to time, a "Master Agreement"), including any such obligations or liabilities under any Master Agreement.

"Swap Termination Value" means, in respect of any one or more Swap Contracts, after taking into account the effect of any legally enforceable netting agreement relating to such Swap Contracts, (a) for any date on or after the date such Swap Contracts have been closed out and termination value(s) determined in accordance therewith, such termination value(s), and (b) for any date prior to the date referenced in clause (a) the amount(s) determined as the mark-to-market value(s) for such Swap Contracts, as determined based upon one or more mid-market or other readily available quotations provided by any recognized dealer in such Swap Contracts (which may include any Lender).

"Synthetic Lease Obligations" means all monetary obligations of a Person under (a) a so-called synthetic, off-balance sheet or tax retention lease, or (b) an agreement for the use or possession of property creating obligations which do not appear on the balance sheet of such Person but which, upon the insolvency or bankruptcy of such Person, would be characterized as secured debt of such Person, including, without limitation, obligations pursuant to the Participation Agreement; the Master Lease; and the other Operative Documents as defined in the Participation Agreement.

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"Tax Loss" means any and all taxes (including interest and penalties) of the Borrower or any of its Subsidiaries paid, or required to be paid, at any time as a result of the Maxtor Merger or HDD Redemption not qualifying to be treated as a tax free transaction or as part of a tax-free reorganization under the Code (or other applicable tax law), whether as a result of the IRS (or any other applicable taxing authority) making such a determination or otherwise. The "Maxtor Merger" means the merger between Insula Corporation, a Delaware corporation and formerly a wholly-owned Subsidiary of the Borrower ("Spinco"), Maxtor Corporation, a Delaware corporation ("Maxtor") and Hawaii Acquisition Corporation, as described in Borrower's Form 8-K/A filed with the Securities and Exchange Commission on or about December 14, 2000. The "HDD Redemption" means the redemption by Borrower of all or substantially all of the outstanding common stock, par value \$0.01 per share, of Hard Disk Drive Group, formerly a reportable business segment of the Borrower, pursuant to the Separation and Redemption Agreement among the Borrower, Spinco and Maxtor.

"Threshold Amount" means \$10,000,000.

"to the best knowledge of" means, when modifying a representation, warranty or other statement of any Person, that the fact or situation described therein is known by such Person (or, (i) in the case of Borrower, known by any Responsible Officer or executive officer of Borrower, or, (ii) in the case of any other Person other than a natural Person, known by any officer of such Person) making the representation, warranty or other statement, or with the exercise of reasonable due diligence under the circumstances (in accordance with the standard of what a reasonable Person in similar circumstances would have done) would have been known by such Person (or, (i) in the case of Borrower, would have been known by any Responsible Officer or executive officer of Borrower, or, (ii) in the case of any other Person other than a natural Person, would have been known by any executive officer of such Person).

"type" of Loan means (a) a Base Rate Loan and (b) an Offshore Rate Loan.

"Unfunded Pension Liability" means the excess of a Pension Plan's benefit liabilities under Section 4001(a)(16) of ERISA, over the current value of that Pension Plan's assets, determined in accordance with the assumptions used for funding the Pension Plan pursuant to Section 412 of the Code for the applicable plan year.

"Voluntary Redemption Event" means, in respect of any Indebtedness consisting of bonds, debentures, senior or subordinated notes or other debt securities, any redemption, prepayment or call for redemption or prepayment of any or all of such Indebtedness at the election of the issuer and not in connection with any breach by such issuer of any term or covenant contained in any instrument, indenture or agreement evidencing such Indebtedness.

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## 1.02 Use of Certain Terms.

(a) All terms defined in this Agreement shall have the defined meanings when used in any certificate or other document made or delivered pursuant hereto or thereto, unless otherwise defined therein.

(b) As used herein, unless the context requires otherwise, the masculine, feminine and neuter genders and the singular and plural include one another.

(c) The words "herein" and "hereunder" and words of similar import when used in any Loan Document shall refer to the Loan Documents as a whole and not to any particular provision thereof. The term "including" is by way of example and not limitation. References herein to a Section, subsection or clause shall, unless the context otherwise requires, refer to the appropriate Section, subsection or clause in this Agreement.

(d) The term "or" is disjunctive; the term "and" is conjunctive. The term "shall" is mandatory; the term "may" is permissive.

**1.03 Accounting Terms.** All accounting terms not specifically or completely defined in this Agreement shall be construed in conformity with, and all financial data required to be submitted by this Agreement shall be prepared in conformity with, GAAP applied on a consistent basis, as in effect from time to time, and applied in a manner consistent with that used in preparing the Audited Financial Statements, except as otherwise specifically prescribed herein.

**1.04 Rounding.** Any financial ratios required to be maintained by Borrower pursuant to this Agreement shall be calculated by dividing the appropriate component by the other component, carrying the result to one place more than the number of places by which such ratio is expressed in this Agreement and rounding the result up or down to the nearest number (with a round-up if there is no nearest number) to the number of places by which such ratio is expressed in this Agreement.

**1.05 Exhibits and Schedules.** All exhibits and schedules to this Agreement, either as originally existing or as the same may from time to time be supplemented, modified or amended, are incorporated herein by this reference. A matter disclosed on any Schedule shall be deemed disclosed on all Schedules.

**References to Agreements and Laws.** Unless otherwise expressly provided herein, (a) references to agreements (including the Loan Documents) and other contractual instruments shall include all amendments, restatements, extensions, supplements and other modifications thereto (unless prohibited by any Loan Document), and (b) references to any Law shall include all statutory and regulatory provisions consolidating, amending, replacing, supplementing or interpreting such Law.

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## SECTION 2 THE COMMITMENTS AND EXTENSIONS OF CREDIT

### 2.01 Loans; Maximum Amounts

(a) Subject to the terms and conditions set forth in this Agreement, each Lender severally agrees to make, Convert and Continue Loans until the Maturity Date in such amounts as Borrower may from time to time request; provided, however, that the Outstanding Obligations of each Lender shall not exceed at any time such Lender's Commitment, and the Outstanding Obligations of all Lenders shall not exceed at any time the lesser of (i) the combined Commitments; and (ii) the Availability Limit. The amount of the combined Commitments initially totals \$100,000,000. Following the date of this Agreement, the amount of the combined Commitments may be increased to a total not to exceed \$125,000,000 in the event Administrative Agent secures additional commitments from the existing Lenders or from new lenders. If at any time the combined Commitments are increased beyond \$100,000,000 in accordance with the immediately preceding sentence, the total of the combined Commitments shall be reduced (and the amount of each Lender's Commitment as set forth in Schedule 2.01 and any amendment thereof shall be reduced in accordance with such Lender's Pro Rata Share) as set forth in Section 2.02. This is a revolving credit and, subject to the foregoing and the other terms and conditions hereof, Borrower may borrow, Convert, Continue, prepay and reborrow Loans as set forth herein without premium or penalty.

(b) Loans made by each Lender shall be evidenced by one or more Notes. The date, amount and maturity of each Lender's Loans and payments and other particulars with respect thereto may be endorsed on schedule(s) attached to its Note by each Lender and/or recorded on one or more loan accounts or records maintained by such Lender in the ordinary course of business. Such Notes, loan accounts and records shall be conclusive absent manifest error of the amount of such Loans and payments thereon. Any failure to so record or any error in doing so shall not, however, limit or otherwise affect the obligation of Borrower to pay any amount owing with respect to the Loans.

**2.02 Reduction in Amount of Commitments; Required Paydown.** If the combined Commitments are increased to a total in excess of \$100,000,000 following the date of this Agreement in accordance with Section 2.01(a), the combined Commitments shall be reduced (and the amount of each Lender's Commitment as set forth in Schedule 2.01 shall be reduced in accordance with such Lender's Pro Rata Share) during the term of this Agreement as follows:

(a) The combined Commitments shall be automatically and irrevocably reduced upon the sale of any portion of the Colorado Springs Real Property Security in accordance with the following schedule for the Existing Colorado Springs Parcels and (if applicable) the Subdivided Colorado Springs Parcels, respectively; provided, however, that in no event shall the amount of the combined Commitments be reduced below \$100,000,000 pursuant to this Section:

### Existing Colorado Springs Parcels

| Existing Parcel                                 | Reduction in combined Commitments |
|---|-----------------------------------|
| Parcel 1 (10125 and 10205 Federal Drive):       | \$25,000,000                      |
| Parcel 2 (10285 Federal Drive and vacant land): | \$12,920,000                      |

### Subdivided Colorado Springs Parcels

| Subdivided Parcel              | Reduction in combined Commitments |
|--------------------------------|-----------------------------------|
| Building A 10125 Federal Drive | \$25,000,000                      |
| Building B 10205 Federal Drive | \$8,600,000                       |
| Building C 10285 Federal Drive | \$11,300,000                      |
| Vacant Land (no address)       | \$1,620,000                       |

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(b) If the combined Commitments have not previously been reduced to \$100,000,000 in accordance with the provisions of Section 2.02(a) above, the combined Commitments shall be automatically and irrevocably reduced to \$100,000,000 effective on December 31, 2003 (without regard to the sale of any portion of the Colorado Springs Real Property Security).

Borrower shall make such Loan repayments as may be necessary in order that the Outstanding Obligations shall not at any time exceed the amount of the combined Commitments as the same is reduced in accordance with this Section 2.02.

### 2.03 Borrowings, Conversions and Continuations of Loans.

(a) Borrower may irrevocably request a Borrowing, Conversion or Continuation of Loans in a Minimum Amount therefor by delivering a Request for Extension of Credit therefor by Requisite Notice to Administrative Agent not later than the Requisite Time therefor. All Borrowings, Conversions and Continuations of Loans shall constitute Base Rate Loans unless properly and timely otherwise designated as set forth in the prior sentence.

(b) Following receipt of a Request for Extension of Credit, Administrative Agent shall promptly notify each Lender of its Pro Rata Share thereof by Requisite Notice. In the

case of a Borrowing of Loans, each Lender shall make the funds for its Loan available to Administrative Agent at Administrative Agent's Office not later than the Requisite Time therefor on the Business Day specified in such Request for Extension of Credit. Upon satisfaction of the applicable conditions set forth in Section 4.02 (and, if the initial Extension of Credit hereunder, Section 4.01), all funds so received shall be made available to Borrower in Dollars. Administrative Agent shall promptly notify Borrower and Lenders of the interest rate applicable to any Loan other than a Base Rate Loan upon determination of same.

(c) Except as otherwise provided herein, an Offshore Rate Loan may be Continued or Converted only on the last day of the Interest Period for such Offshore Rate Loan. During the existence of a Default or Event of Default, no Loans may be requested as, Converted into or Continued as Offshore Rate Loans without the consent of Requisite Lenders, and Requisite Lenders may demand that any or all of the then outstanding Offshore Rate Loans be Converted immediately into Base Rate Loans.

(d) If a Loan is to be made on the same date that another Loan is due and payable, Borrower or Lenders, as the case may be, shall, unless Administrative Agent otherwise requests, make available to Administrative Agent the net amount of funds giving effect to both such Loans and the effect for purposes of this Agreement shall be the same as if separate transfers of funds had been made with respect to each such Loan.

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(e) The failure of any Lender to make any Loan on any date shall not relieve any other Lender of any obligation to make a Loan on such date, but no Lender shall be responsible for the failure of any other Lender to so make its Loan.

#### 2.04 Letters of Credit.

(a) **The Letter of Credit Sublimit.** Subject to the terms and conditions set forth in this Agreement, until the Letter of Credit Expiration Date, Issuing Lender shall take such Letter of Credit Actions as Borrower may from time to time request; provided, however, that (i) the Outstanding Obligations of each Lender shall not at any time exceed such Lender's Commitment; (ii) the Outstanding Obligations of all Lenders shall not at any time exceed the lesser of (x) the combined Commitments; and (y) the Availability Limit; and (iii) Letter of Credit Usage shall not at any time exceed the Letter of Credit Sublimit. Subject to subsection (g) below and unless consented to by Issuing Lender and Requisite Lenders, no Letter of Credit may expire more than 12 months after the date of its issuance or last renewal. No Letter of Credit shall expire after the Letter of Credit Expiration Date except that, at the option of Administrative Agent, Letters of Credit securing Borrower's obligations pursuant to workers' compensation claims may have an expiration date not to exceed six (6) months after the Letter of Credit Expiration Date provided that (A) the aggregate face amount of such Letters of Credit shall not exceed \$2,000,000; and (B) from and after the Letter of Credit Expiration Date, the Letter of Credit Usage under such Letters of Credit shall be fully secured by cash collateral in an amount equal to such Letter of Credit Usage deposited in a Letter of Credit Cash Collateral Account.

(b) **Letter of Credit Actions.** Subject to the terms and conditions set forth in this Agreement, until the Letter of Credit Expiration Date, Issuing Lender shall take such Letter of Credit Actions as Borrower may from time to time request; provided, however, that the Outstanding Obligations of each Lender shall not exceed such Lender's Commitment, and the Outstanding Obligations of all Lenders shall not exceed the combined Commitments at any time. Subject to subsection (g) below and unless consented to by Issuing Lender and Requisite Lenders, no Letter of Credit may expire more than 12 months after the date of its issuance or last renewal; provided, however, that no Letter of Credit shall expire after the Letter of Credit Expiration Date.

(c) **Requesting Letter of Credit Actions.** Borrower may irrevocably request a Letter of Credit Action in a Minimum Amount therefor by delivering a Letter of Credit Application therefor to Issuing Lender, with a copy to Administrative Agent (who shall notify Lenders), by Requisite Notice not later than the Requisite Time therefor. Each Letter of Credit Action shall be in a form acceptable to Issuing Lender in its sole discretion. Unless Administrative Agent notifies Issuing Lender that such Letter of Credit Action is not permitted hereunder, or Issuing Lender notifies Administrative Agent that it has determined that such Letter of Credit Action is contrary to any Laws or policies of Issuing Lender, Issuing Lender shall, upon satisfaction of the applicable conditions set forth in Section 4.02 with respect to any Letter of Credit Action constituting an Extension of Credit, effect such Letter of Credit Action. This Agreement shall control in the event of any conflict with any Letter of Credit Application. Upon the issuance of a Letter of Credit, each Lender shall be deemed to have purchased from Issuing Lender a risk participation therein in an amount equal to such Lender's Pro Rata Share times the amount of such Letter of Credit.

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(d) **Reimbursement of Payments Under Letters of Credit.** Borrower shall reimburse Issuing Lender through Administrative Agent for any payment that Issuing Lender makes under a Letter of Credit on or before the date of such payment; provided, however, that if the conditions precedent set forth in Section 4.02 can be satisfied, Borrower may request a Borrowing of Loans to reimburse Issuing Lender for such payment pursuant to Section 2.03, or, failing to make such request, Borrower shall be deemed to have requested a Borrowing of Base Rate Loans on such payment date pursuant to subsection (e) below.

(e) **Funding by Lenders When Issuing Lender Not Reimbursed.** Upon any drawing under a Letter of Credit, Issuing Lender shall notify Administrative Agent and Borrower. If Borrower fails to timely make the payment required pursuant to subsection (c) above, Issuing Lender shall notify Administrative Agent of such fact and the amount of such unreimbursed payment. Administrative Agent shall promptly notify each Lender of its Pro Rata Share of such amount by Requisite Notice. Each Lender shall make funds in an amount equal its Pro Rata Share of such amount available to Administrative Agent at Administrative Agent's Office not later than the Requisite Time therefor on the Business Day specified by Administrative Agent. Administrative Agent shall remit the funds so received to Issuing Lender. The obligation of each Lender to so reimburse Issuing Lender shall be absolute and unconditional and shall not be affected by the occurrence of a Default or Event of Default or any other occurrence or event. Any such reimbursement shall not relieve or otherwise impair the obligation of Borrower to reimburse Issuing Lender for the amount of any payment made by Issuing Lender under any Letter of Credit, together with interest as provided herein.

(f) **Nature of Lenders' Funding.** If the conditions precedent set forth in Section 4.02 can be satisfied (except for the giving of a Request for Extension of Credit) on any date Borrower is obligated to, but fails to, reimburse Issuing Lender for a drawing under a Letter of Credit, the funding by Lenders pursuant to the previous subsection shall be deemed to be a Borrowing of Base Rate Loans (without regard to the Minimum Amount therefor) deemed requested by Borrower. If the conditions precedent set forth in Section 4.02 cannot be satisfied on the date Borrower is obligated to, but fails to, reimburse Issuing Lender for a drawing under a Letter of Credit, the funding by Lenders pursuant to the previous subsection shall be deemed to be a funding by each Lender of its risk participation in such Letter of Credit, and each Lender making such funding shall thereupon acquire a pro rata participation, to the extent of its reimbursement, in the claim of Issuing Lender against Borrower in respect of such payment and shall share, in accordance with that pro rata participation, in any payment made by Borrower with respect to such claim. Any amounts made available by a Lender under its risk participation shall be payable by Borrower upon demand of Administrative Agent, and shall bear interest at a rate per annum equal to the Default Rate.

(g) **Special Provisions Relating to Evergreen Letters of Credit.** Upon request by Borrower, Issuing Lender in its sole and absolute discretion may issue Letters of Credit that have automatic extension or renewal provisions ("evergreen" Letters of Credit). Issuing Lender shall have the right under any such evergreen Letters of Credit to not permit any such extension or renewal at least annually within a notice period to be agreed upon at the time each such Letter of Credit is issued. Once an evergreen Letter of Credit is issued, unless Administrative Agent has notified Issuing Lender that Requisite Lenders have elected not to permit such extension or renewal, the Borrower Parties, Administrative Agent and Lenders shall be deemed to have authorized (but may not require) Issuing Lender to, in its sole and absolute discretion, permit the renewal of such evergreen Letter of Credit at any time to a date not later than the Letter of Credit Expiration Date, and, unless directed by Issuing Lender, Borrower shall not be required to request such extension or renewal. Issuing Lender may in its sole and absolute discretion elect not to permit an evergreen Letter of Credit to be extended or renewed at any time.

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(h) **Obligations Absolute.** The obligation of Borrower to pay to Issuing Lender the amount of any payment made by Issuing Lender under any Letter of Credit shall be absolute, unconditional, and irrevocable. Without limiting the foregoing, Borrower's obligation shall not be affected by any of the following circumstances:

- (i) any lack of validity or enforceability of such Letter of Credit, this Agreement, or any other agreement or instrument relating thereto;
- (ii) any amendment or waiver of or any consent to departure from such Letter of Credit, this Agreement, or any other agreement or instrument relating hereto or thereto;

(iii) the existence of any claim, setoff, defense, or other rights which Borrower may have at any time against Issuing Lender, Administrative Agent or any Lender, any beneficiary of such Letter of Credit (or any persons or entities for whom any such beneficiary may be acting) or any other Person, whether in connection with such Letter of Credit, this Agreement, or any other agreement or instrument relating thereto, or any unrelated transactions;

(iv) any demand, statement, or any other document presented under such Letter of Credit proving to be forged, fraudulent, invalid, or insufficient in any respect or any statement therein being untrue or inaccurate in any respect whatsoever so long as any such document appeared to comply with the terms of the Letter of Credit;

(v) any payment made by Issuing Lender under such Letter of Credit to any Person purporting to be a trustee in bankruptcy, debtor-in-possession, assignee for the benefit of creditors, liquidator, receiver or other representative of or successor to any beneficiary or any transferee of such Letter of Credit, including any arising in connection with any proceeding under any Debtor Relief Laws;

(vi) the existence, character, quality, quantity, condition, packing, value or delivery of any property purported to be represented by documents presented in connection with such Letter of Credit or for any difference between any such property and the character, quality, quantity, condition, or value of such property as described in such documents;

(vii) the time, place, manner, order or contents of shipments or deliveries of property as described in documents presented in connection with such Letter of Credit or the existence, nature and extent of any insurance relative thereto;

(viii) the solvency or financial responsibility of any party issuing any documents in connection with such Letter of Credit;

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(ix) any failure or delay in notice of shipments or arrival of any property;

(x) any error in the transmission of any message relating to such Letter of Credit not caused by Issuing Lender, or any delay or interruption in any such message;

(xi) any error, neglect or default of any correspondent of Issuing Lender in connection with such Letter of Credit;

(xii) any consequence arising from acts of God, wars, insurrections, civil unrest, disturbances, labor disputes, emergency conditions or other causes beyond the control of Issuing Lender;

(xiii) so long as Issuing Lender in good faith determines that the document appears to comply with the terms of the Letter of Credit, the form, accuracy, genuineness or legal effect of any contract or document referred to in any document submitted to Issuing Lender in connection with such Letter of Credit; and

(xiv) any other circumstances whatsoever where Issuing Lender has acted in good faith.

In addition, Borrower will promptly examine a copy of each Letter of Credit and amendments thereto delivered to it and, in the event of any claim of noncompliance with Borrower's instructions or other irregularity, Borrower will immediately notify Issuing Lender in writing. Borrower shall be conclusively deemed to have waived any such claim against Issuing Lender and its correspondents unless such notice is given as aforesaid.

(i) **Role of Issuing Lender.** Each Lender and Borrower agree that, in paying any drawing under a Letter of Credit, Issuing Lender shall not have any responsibility to obtain any document (other than any sight draft, certificates and documents expressly required by the Letter of Credit) or to ascertain or inquire as to the validity or accuracy of any such document or the authority of the Person executing or delivering any such document. No Administrative Agent-Related Person nor any of the respective correspondents, participants or assignees of Issuing Lender shall be liable to any Lender for any action taken or omitted in connection herewith at the request or with the approval of Lenders or Requisite Lenders, as applicable; any action taken or omitted in the absence of gross negligence or willful misconduct; or the due execution, effectiveness, validity or enforceability of any document or instrument related to any Letter of Credit. Borrower hereby assumes all risks of the acts or omissions of any beneficiary or transferee with respect to its use of any Letter of Credit; provided, however, that this assumption is not intended to, and shall not, preclude Borrower's pursuing such rights and remedies as it may have against the beneficiary or transferee at law or under any other agreement. No Administrative Agent-Related Person, nor any of the respective correspondents, participants or assignees of Issuing Lender, shall be liable or responsible for any of the matters described in subsection (g) above. In furtherance and not in limitation of the foregoing, Issuing Lender may accept documents that appear on their face to be in order, without responsibility for further investigation, regardless of any notice or information to the contrary, and Issuing Lender shall not be responsible for the validity or sufficiency of any instrument transferring or assigning or purporting to transfer or assign a Letter of Credit or the rights or benefits thereunder or proceeds thereof, in whole or in part, which may prove to be invalid or ineffective for any reason.

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(j) **Applicability of ISP98 and UCP.** Unless otherwise expressly agreed by Issuing Lender and Borrower when a Letter of Credit is issued and subject to applicable laws, performance under Letters of Credit by Issuing Lender, its correspondents, and beneficiaries will be governed by, with respect to standby Letters of Credit, the rules of the "International Standby Practices 1998" (ISP98) or such later revision as may be published by the International Chamber of Commerce (the "ICC").

(k) **Letter of Credit Fee.** On each Applicable Payment Date, Borrower shall pay to Administrative Agent in arrears, for the account of each Lender in accordance with its Pro Rata Share, a Letter of Credit fee equal to the Applicable Amount for Offshore Rate Loans on a per annum basis times the actual daily maximum amount available to be drawn under each Letter of Credit for the period since the later of the Closing Date and the previous Applicable Payment Date. If there is any change in the Applicable Amount during any quarter, the actual daily amount shall be computed and multiplied by the Applicable Amount separately for each period during such quarter that such Applicable Amount was in effect.

(l) **Fronting Fee and Documentary and Processing Charges Payable to Issuing Lender.** On each Applicable Payment Date, Borrower shall pay to Administrative Agent for the sole account of Issuing Lender a fronting fee in an amount equal to 0.150% per annum on the daily average face amount of all outstanding Letters of Credit, payable in arrears. In addition, Borrower shall pay directly to Issuing Lender, upon demand, for its sole account its customary documentary and processing charges in accordance with its standard schedule, as from time to time in effect, for any Letter of Credit Action or other occurrence relating to a Letter of Credit for which such charges are customarily made. Such fees and charges are nonrefundable.

## 2.05 Prepayments.

(a) Upon Requisite Notice to Administrative Agent not later than the Requisite Time therefor, Borrower may at any time and from time to time voluntarily prepay Loans in part in the Minimum Amount therefor or in full without premium or penalty. Administrative Agent will promptly notify each Lender thereof and of such Lender's Pro Rata Share of such prepayment. Any prepayment of an Offshore Rate Loan shall be accompanied by all accrued interest thereon, together with the amounts set forth in Section 3.05.

(b) If for any reason the Outstanding Obligations exceed the combined Commitments as in effect or as reduced because of any limitation set forth in this Agreement or otherwise, Borrower shall immediately prepay Loans in an aggregate amount equal to such excess.

**2.06 Reduction or Termination of Commitments.** Upon Requisite Notice to Administrative Agent not later than the Requisite Time therefor, Borrower may at any time and from time to time, without premium or penalty, permanently and irrevocably reduce the Commitments in a Minimum Amount therefor to an amount not less than the Outstanding Obligations at such time or terminate the Commitments. Any such reduction or termination shall be accompanied by payment of all accrued and unpaid commitment fees with respect to the portion of the Commitments being reduced or terminated. Administrative Agent shall promptly notify Lenders of any such request for reduction or termination of the Commitments. Each Lender's Commitment shall be reduced by an amount equal to such Lender's Pro Rata Share times the amount of such reduction.

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## 2.07 Principal and Interest.

- (a) Except as otherwise provided hereunder, if not sooner paid, Borrower agrees to pay the outstanding principal amount of each Loan on the Maturity Date.
- (b) Subject to subsection (c) below, and unless otherwise specified herein, Borrower shall pay interest on the unpaid principal amount of each Loan (before and after default, before and after maturity, before and after judgment, and before and after the commencement of any proceeding under any Debtor Relief Laws) from the date borrowed until paid in full (whether by acceleration or otherwise) on each Applicable Payment Date at a rate per annum equal to the interest rate determined in accordance with the definition of such type of Loan, plus the applicable margin specified in the definition in this Agreement of Applicable Amount with respect to such type of Loan.
- (c) Notwithstanding subsection (b) of this Section, while any Event of Default exists or after acceleration, Borrower shall pay interest (after as well as before entry of judgment thereon to the extent permitted by law) on the principal amount of all outstanding Obligations, at the Default Rate.

## 2.08 Fees.

- (a) **Facility Fee.** Borrower shall pay to Administrative Agent (for the account of each Lender according to its Pro Rata Share) the respective facility fee set forth in the definition in this Agreement of Applicable Amount, calculated on the full amount of the combined Commitments. The facility fee shall accrue from the Closing Date until the Maturity Date and shall be calculated and payable quarterly in arrears on each Applicable Payment Date. The facility fee shall accrue at all times, including at any time during which one or more conditions in Section 4 are not met.
- (b) **Agency and Arrangement Fees.** Borrower shall pay to Administrative Agent and Arranger an administrative agency fee and a structuring and arrangement fee, respectively, in such amounts and at such times as set forth in a separate letter agreement dated December 2, 2002 among Borrower, Administrative Agent and Arranger (the "Fee Letter"). Such fees are for the services to be performed by Administrative Agent in acting as Administrative Agent and for the services of Arranger in structuring and arranging the credit facilities under this Agreement, respectively, and are fully earned on the date paid. Such fees are solely for Administrative Agent's and Arranger's own account and are nonrefundable.
- (c) **Lenders' Upfront Fee.** On the Closing Date, Borrower shall pay to Administrative Agent for the account of each Lender an upfront fee in an amount agreed between Administrative Agent and Borrower, calculated based on each Lender's Commitment and allocated by Administrative Agent. Such upfront fees are consideration for the Commitments by each Lender under this Agreement and are fully earned on the date paid. The upfront fee paid to each Lender is solely for its own account and is nonrefundable.

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**2.09 Computation of Interest and Fees.** Computation of interest on Base Rate Loans when the Base Rate is determined by KeyBank's "prime rate" shall be calculated on the basis of a year of 365 or 366 days, as the case may be, and the actual number of days elapsed. Computation of all other types of interest and all fees shall be calculated on the basis of a year of 360 days and the actual number of days elapsed, which results in a higher yield to Lenders than a method based on a year of 365 or 366 days. Interest shall accrue on each Loan for the day on which the Loan is made, and shall not accrue on a Loan, or any portion thereof, for the day on which the Loan or such portion is paid, provided that any Loan that is repaid on the same day on which it is made shall bear interest for one day.

## 2.10 Making Payments.

- (a) Except as otherwise provided herein, all payments by Borrower or any Lender hereunder shall be made to Administrative Agent at Administrative Agent's Office not later than the Requisite Time for such type of payment. All payments received after such Requisite Time shall be deemed received on the next succeeding Business Day. All payments shall be made in immediately available funds in lawful money of the United States of America. All payments by Borrower shall be made without condition or deduction for any counterclaim, defense, recoupment or setoff.
- (b) Upon satisfaction of any applicable terms and conditions set forth herein, Administrative Agent shall promptly make any amounts received in accordance with the prior subsection available in like funds as received, as follows: (i) if payable to Borrower, by crediting the Designated Deposit Account, and (ii) if payable to any Lender, by wire transfer to such Lender at its Lending Office. In the case of amounts held by Administrative Agent that are payable to Borrower, if any applicable terms and conditions are not so satisfied, Administrative Agent shall return any funds it is holding that would otherwise be payable to Borrower to the Lenders making such funds available, without interest.
- (c) Subject to the definition of "Interest Period," if any payment to be made by Borrower shall come due on a day other than a Business Day, payment shall instead be considered due on the next succeeding Business Day, and such extension of time shall be reflected in computing interest and fees.
- (d) Unless Borrower or any Lender has notified Administrative Agent prior to the date any payment to be made by it is due, that it does not intend to remit such payment, Administrative Agent may, in its sole and absolute discretion, assume that Borrower or Lender, as the case may be, has timely remitted such payment and may, in its sole and absolute discretion and in reliance thereon, make available such payment to the Person entitled thereto. If such payment was not in fact remitted to Administrative Agent in immediately available funds, then:
- (i) if Borrower failed to make such payment, each Lender shall forthwith on demand repay to Administrative Agent the amount of such assumed payment made available to such Lender, together with interest thereon in respect of each day from and including the date such amount was made available by Administrative Agent to such Lender to the date such amount is repaid to Administrative Agent at the Federal Funds Rate; and

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(ii) if any Lender failed to make such payment, Administrative Agent shall be entitled to recover such corresponding amount on demand from such Lender. If such Lender does not pay such corresponding amount forthwith upon Administrative Agent's demand therefor, Administrative Agent promptly shall notify Borrower, and Borrower shall pay such corresponding amount to Administrative Agent. Administrative Agent also shall be entitled to recover from such Lender interest on such corresponding amount in respect of each day from the date such corresponding amount was made available by Administrative Agent to Borrower to the date such corresponding amount is recovered by Administrative Agent, (A) from such Lender at a rate per annum equal to the daily Federal Funds Rate, and (B) from Borrower, at a rate per annum equal to the interest rate applicable to such Borrowing. Nothing herein shall be deemed to relieve any Lender from its obligation to fulfill its Commitment or to prejudice any rights which Administrative Agent or Borrower may have against any Lender as a result of any default by such Lender hereunder.

(e) If Administrative Agent or any Lender is required at any time to return to Borrower, or to a trustee, receiver, liquidator, custodian, or any official under any proceeding under Debtor Relief Laws, any portion of a payments made by Borrower, each Lender shall, on demand of Administrative Agent, return its share of the amount to be returned, plus interest thereon from the date of such demand to the date such payment is made at a rate per annum equal to the daily Federal Funds Rate.

**2.11 Funding Sources.** Nothing in this Agreement shall be deemed to obligate any Lender to obtain the funds for any Loan in any particular place or manner or to constitute a representation by any Lender that it has obtained or will obtain the funds for any Loan in any particular place or manner.

**2.12 Supplemental Borrowing Account.** Borrower shall establish a Supplemental Borrowing Account with Administrative Agent, and Borrower shall deposit into said account such funds (if any) as may be required so that the Availability Limit shall at all times equal or exceed the total Outstanding Obligations under this Agreement. Administrative Agent, on behalf of itself and all other Lenders, shall have a security interest in the Supplemental Borrowing Account to secure the Outstanding Obligations under this Agreement. Borrower may withdraw funds from the Supplemental Borrowing Account only if, and to the extent that, the Availability Limit exceeds the total Outstanding Obligations under the Credit Agreement.

**2.13 Collateral.** Borrower's Obligations are secured by the Deeds of Trust, the General Security Agreement, the Intellectual Property Security Agreement, the Stock Pledge Agreement, the Deposit Account Control Agreements and the Securities Account Control Agreements.



## SECTION 3

# TAXES, YIELD PROTECTION AND ILLEGALITY

### 3.01 Taxes.

(a) Any and all payments by Borrower to or for the account of Administrative Agent or any Lender under any Loan Document shall be made free and clear of and without deduction for any and all present or future taxes, duties, levies, imposts, deductions, assessments, fees, withholdings or similar charges, and all liabilities with respect thereto, excluding, in the case of Administrative Agent and each Lender, (i) taxes imposed on or measured by its net income, (ii) franchise taxes imposed on it (in lieu of net income taxes) by the jurisdiction (or any political subdivision thereof) under the Laws of which Administrative Agent or such Lender, as the case may be, is organized or maintains a lending office; (iii) any applicable withholding tax imposed by Sections 1441 and 1442 of the Code that is withheld by Administrative Agent from a payment to any Foreign Lender (as defined in Section 10.21 of this Agreement) pursuant to Section 10.21; and (iv) any penalties, interest, costs and expenses (including Attorney Costs) imposed on Administrative Agent or any Lender arising from the assertion by any Governmental Authority that Administrative Agent did not properly withhold any tax or other amount from payments made in respect of any Foreign Lender (all such non-excluded taxes, duties, levies, imposts, deductions, assessments, fees, withholdings or similar charges, and liabilities being hereinafter referred to as "Taxes"). If Borrower shall be required by any Laws to deduct any Taxes from or in respect of any sum payable under any Loan Document to Administrative Agent or any Lender, (A) the sum payable shall be increased as necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section), Administrative Agent and such Lender receives an amount equal to the sum it would have received had no such deductions been made, (B) Borrower shall make such deductions, (C) Borrower shall pay the full amount deducted to the relevant taxation authority or other authority in accordance with applicable Laws, and (D) within 30 days after the date of such payment, Borrower shall furnish to Administrative Agent (who shall forward the same to such Lender) the original or a certified copy of a receipt evidencing payment thereof.

(b) In addition, Borrower agrees to pay any and all present or future stamp, court or documentary taxes and any other excise or property taxes or charges or similar levies which arise from any payment made under any Loan Document or from the execution, delivery, performance, enforcement or registration of, or otherwise with respect to, any Loan Document (hereinafter referred to as "Other Taxes").

(c) If Borrower shall be required by the Laws of any jurisdiction outside the United States to deduct any Taxes from or in respect of any sum payable under any Loan Document to Administrative Agent or any Lender, Borrower shall also pay to such Lender or Administrative Agent (for the account of such Lender), at the time interest is paid, such additional amount that the respective Lender specifies as necessary to preserve the after-tax yield (after factoring in United States (federal and state) taxes imposed on or measured by net income) such Lender would have received if such deductions (including deductions applicable to additional sums payable under this Section) had not been made.

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(d) Borrower agrees to indemnify, defend and hold Administrative Agent and each Lender harmless for (i) the full amount of Taxes and Other Taxes (including any Taxes or Other Taxes imposed or asserted by any jurisdiction on amounts payable under this Section) paid by Administrative Agent and such Lender; (ii) any liability (including penalties, interest and expenses) arising therefrom or with respect thereto; and (iii) amounts payable under Section 3.01(c); provided that (A) Borrower shall not be obligated to indemnify the Administrative Agent or any Lender for any penalties described in clause (ii) above to the extent the Administrative Agent or such Lender (1) had actual knowledge of the existence of the tax, interest, or expense, the non-payment of which gave rise to such penalties, and (2) failed to give the Borrower notice of such tax, interest or expense within ten Business Days after the Administrative Agent or such Lender received actual knowledge of the existence thereof; and (B) nothing contained in this subsection (d) shall be deemed to imply any obligation on the part of the Administrative Agent or any Lender to provide the Borrower with the notice of any such tax, penalty, interest or expense. Payment under this subsection (d) shall be made within 30 days after the date the Lender or the Administrative Agent makes a demand therefor.

**3.02 Illegality.** If any Lender determines that any Laws have made it unlawful, or that any Governmental Authority has asserted that it is unlawful, for any Lender or its applicable Lending Office to make, maintain or fund Offshore Rate Loans, or materially restricts the authority of such Lender to purchase or sell, or to take deposits of, Dollars in the applicable offshore Dollar market, or to determine or charge interest rates based upon the Offshore Rate, then, on notice thereof by Lender to Borrower through Administrative Agent, any obligation of such Lender to make Offshore Rate Loans shall be suspended until Lender notifies Administrative Agent and Borrower that the circumstances giving rise to such determination no longer exist. Upon receipt of such notice, Borrower shall, upon demand from such Lender (with a copy to Administrative Agent), prepay or Convert all Offshore Rate Loans of such Lender, either on the last day of the Interest Period thereof, if Lender may lawfully continue to maintain such Offshore Rate Loans to such day, or immediately, if Lender may not lawfully continue to maintain such Offshore Rate Loans. Each Lender agrees to designate a different Lending Office if such designation will avoid the need for such notice and will not, in the good faith judgment of such Lender, otherwise be materially disadvantageous to such Lender.

**3.03 Inability to Determine Rates.** If, in connection with any Request for Extension of Credit involving any Offshore Rate Loan, Administrative Agent determines that (a) Dollar deposits are not being offered to banks in the applicable offshore dollar market for the applicable amount and Interest Period of the requested Offshore Rate Loan, (b) adequate and reasonable means do not exist for determining the underlying interest rate for such Offshore Rate Loan, or (c) such underlying interest rate does not adequately and fairly reflect the cost to Lender of funding such Offshore Rate Loan, Administrative Agent will promptly notify Borrower and all Lenders. Thereafter, the obligation of all Lenders to make or maintain such Offshore Rate Loan shall be suspended until Administrative Agent revokes such notice. Upon receipt of such notice, Borrower may revoke any pending request for a Borrowing of Offshore Rate Loans or, failing that, be deemed to have converted such request into a request for a Borrowing of Base Rate Loans in the amount specified therein.

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### 3.04 Increased Cost and Reduced Return; Capital Adequacy.

(a) If any Lender determines that any Laws:

(i) impose on such Lender any Tax, duty, or other charge with respect to any Offshore Rate Loans or its obligation to make Offshore Rate Loans;

(ii) change the basis on which Taxes are imposed on any amounts payable to such Lender under this Agreement in respect of any Offshore Rate Loans;

(iii) impose or modify any reserve, special deposit, or similar requirement (other than the reserve requirement utilized in the determination of the Offshore Rate) relating to any extensions of credit or other assets of, or any deposits with or other liabilities or commitments of, such Lender (including its Commitment); or

(iv) impose on such Lender or on the offshore Dollar interbank market any other condition affecting this Agreement or any of such extensions of credit or liabilities or commitments;

and the result of any of the foregoing is to increase the cost to such Lender of making, Converting into, Continuing, or maintaining any Offshore Rate Loans or to reduce any sum received or receivable by such Lender under this Agreement with respect to any Offshore Rate Loans, then from time to time upon demand of Lender (with a copy of such demand to Administrative Agent), Borrower shall pay to such Lender such additional amounts as will compensate such Lender for such increased cost or reduction (except to the extent that such increased cost or reduction is an amount subject to Section 3.01, in which case the sum received or receivable by such Lender shall be increased in accordance with the provisions of Section 3.01).

(b) If any Lender determines that any change in or the interpretation of any Laws have the effect of reducing the rate of return on the capital of such Lender or compliance by such Lender (or its Lending Office) or any corporation controlling such Lender as a consequence of such Lender's obligations hereunder (taking into consideration its policies with

respect to capital adequacy and such Lender's desired return on capital), then from time to time upon demand of such Lender (with a copy to Administrative Agent), Borrower shall pay to such Lender such additional amounts as will compensate such Lender for such reduction; provided, however, that Borrower shall not be required to pay additional amounts to compensate any Lender for (i) any applicable withholding tax imposed by Sections 1441 and 1442 of the Code that is withheld by Administrative Agent from a payment to any Foreign Lender pursuant to Section 10.21, (ii) any reduction in connection with any penalties, interest, costs and expenses (including Attorney Costs) arising from the assertion by any Governmental Authority that Administrative Agent did not properly withhold any tax or other amount from payments made in respect of any Foreign Lender; or (iii) any change in the rate of applicable taxes imposed on or measured by net income.

**3.05 Breakfunding Costs.** Upon demand of any Lender (with a copy to Administrative Agent) from time to time, Borrower shall promptly compensate such Lender for and hold such Lender harmless from any loss, cost or expense incurred by it as a result of:

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(a) any Continuation, Conversion, payment or prepayment of any Loan other than a Base Rate Loan on a day other than the last day of the Interest Period for such Loan (whether voluntary, mandatory, automatic, by reason of acceleration, or otherwise); or

(b) any failure by Borrower (for a reason other than the failure of such Lender to make a Loan) to prepay, borrow, Continue or Convert any Loan other than a Base Rate Loan on the date or in the amount notified by Borrower;

including any loss of anticipated profits and any loss or expense arising from the liquidation or reemployment of funds obtained by it to maintain such Loan or from fees payable to terminate the deposits from which such funds were obtained. Borrower shall also pay any customary administrative fees charged by such Lender in connection with the foregoing.

**3.06 Matters Applicable to all Requests for Compensation.**

(a) The Administrative Agent or any Lender claiming compensation under this Section 3 shall deliver to Borrower a certificate setting forth in reasonable detail the additional amount or amounts to be paid to it hereunder, which shall be conclusive in the absence of clearly demonstrable error. In determining such amount, Lenders may use any reasonable averaging and attribution methods. For purposes of this Section 3, a Lender shall be deemed to have funded each Offshore Rate Loan at the Offshore Rate for such Loan by a matching deposit or other borrowing in the offshore Dollar interbank market, whether or not such Offshore Rate Loan was in fact so funded.

(b) Borrower shall not be obligated to pay any amount under this Section 3 which arose prior to the date which is 180 days preceding the date of such demand or is attributable to periods prior to the date which is 180 days preceding the date of such demand; provided, however, that in the event any Law is enacted that retroactively imposes any cost or charge upon the Administrative Agent or any Lender that would otherwise be a basis for compensation under Sections 3.01 through 3.05, the Administrative Agent or such Lender may make a demand for such compensation through and including the date which is 180 days after the date upon which such Law takes effect.

(c) Upon any Lender making a claim for compensation under Section 3.01 or 3.04, Borrower may remove and replace such Lender in accordance with Section 10.22.

**3.07 Survival.** All of Borrower's obligations under this Section 3 shall survive for a period of one year after the later of termination of the Commitments, and payment in full of all Obligations; provided, however, that the obligation of Borrower to make any payment under this Section 3 is contingent upon the receipt by Borrower of the certificate described in Section 3.06(a) within the later of (a) 180 days after the later of the repayment of all Loans, the termination of all Letters of Credit and the termination of the Commitment, or (b) in the case of any Law retroactively imposing any cost or charge upon the Administrative Agent or any Lender, 180 days after the date upon which such Law takes effect.

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**SECTION 4  
CONDITIONS PRECEDENT TO EXTENSIONS OF CREDIT**

**4.01 Conditions of Initial Extension of Credit.** The obligation of each Lender to make its initial Extension of Credit hereunder is subject to satisfaction of the following conditions precedent:

(a) Unless waived by Administrative Agent and Lenders, Administrative Agent's receipt of the following, each of which shall be originals or facsimiles (followed promptly by originals) unless otherwise specified, each properly executed by a Responsible Officer of Borrower, each dated on, or in the case of third-party certificates, recently before the Closing Date and each in form and substance satisfactory to Administrative Agent, Lenders and their legal counsel:

(i) executed counterparts of this Agreement, sufficient in number for distribution to Administrative Agent, Lenders and Borrower;

(ii) Notes executed by Borrower in favor of each Lender, each in a principal amount equal to such Lender's Commitment;

(iii) The original Colorado Springs Deed of Trust;

(iv) The original Stock Pledge Agreement;

(v) The original Intellectual Property Security Agreement;

(vi) The original General Security Agreement;

(vii) The original Deposit Account Control Agreements among Borrower, Administrative Agent (for the account of each Lender in accordance with its Pro Rata Share) and Union Bank of California, N.A. and Bank of America, respectively;

(viii) The original Fee Letter;

(ix) such certificates of resolutions or other action, incumbency certificates and/or other certificates of Responsible Officers of Borrower as Administrative Agent and any Lender may require to establish the identities of and verify the authority and capacity of each Responsible Officer thereof authorized to act as a Responsible Officer thereof;

(x) such evidence as Administrative Agent and any Lender may reasonably require to verify that Borrower is duly organized or formed, validly existing, in good standing and qualified to engage in business in Delaware, California, Colorado and Texas, including certified copies of Borrower's Organization Documents, certificates of good standing and/or qualification to engage in business, tax clearance certificates, and the like;

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(xi) a certificate signed by a Responsible Officer of Borrower certifying (A) that the representations and warranties made by Borrower herein are true and correct on and as of the Closing Date (except to the extent such representations and warranties specifically refer to an earlier date, in which case they shall be true and correct as of such earlier date), (B) that Borrower is in compliance with all the terms and provisions of the Loan Documents to which it is a party, and no Default or Event of Default shall have occurred and be continuing, and (C) that there has been no event or circumstance since the date of the Audited Financial Statements which has a Material Adverse Effect;

(xii) opinions of counsel to Borrower in form and substance satisfactory to Administrative Agent;

(xiii) written evidence that the Existing Credit Agreement and all commitments thereunder have been or concurrently herewith are being terminated;

(xiv) a certificate in form and substance satisfactory to Administrative Agent certifying that Borrower and its Subsidiaries on a consolidated basis held unrestricted cash (and cash equivalents) of \$100,000,000 or more as of the last day of the month during which the initial Extension of Credit is to be made.

(xv) such other assurances, certificates, documents, consents or opinions as Administrative Agent, Issuing Lender or Requisite Lenders reasonably may require.

(b) Chicago Title Company shall be committed to issue the following policies of title insurance upon the Closing Date: (A) an ALTA (1992) Loan Policy insuring Administrative Agent that the Lien of the of the Colorado Springs Deed of Trust is a first and primary Lien in Borrower's leasehold interest in the Colorado Springs Real Property Security, subject only to the Permitted Exceptions, and (B) an ALTA (1992) Leasehold Policy insuring leasehold title in Borrower, such policies each in an amount not less than \$50,000,000 and to be reasonably satisfactory to Administrative Agent and the Lenders, with extended coverage, access, tax parcel, variable rate, future advances, usury, comprehensive, doing business, mechanics liens and zoning endorsements and such other endorsements as and to the extent available in such jurisdiction where the Colorado Springs Real Property Security is located, if requested by Administrative Agent.

(c) Any fees required to be paid on or before the Closing Date shall have been paid.

(d) Unless waived by Administrative Agent, Borrower shall have paid all Attorney Costs of Administrative Agent to the extent invoiced prior to or on the Closing Date, plus such additional amounts of Attorney Costs as shall constitute its reasonable estimate of Attorney Costs incurred or to be incurred by it through the closing proceedings (provided that such estimate shall not thereafter preclude final settling of accounts between Borrower and Administrative Agent).

**4.02 Conditions to all Extensions of Credit.** In addition to any applicable conditions precedent set forth elsewhere in this Section 4 or in Section 2, the obligation of each Lender to honor any Request for Extension of Credit other than a Conversion or Continuation is subject to the following conditions precedent:

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(a) the representations and warranties of Borrower contained in Section 5 shall be correct on and as of the date of such Extension of Credit, except to the extent that such representations and warranties specifically refer to an earlier date;

(b) no Default or Event of Default exists, or would result from such proposed Extension of Credit;

(c) Administrative Agent shall have timely received a Request for Extension of Credit by Requisite Notice by the Requisite Time therefor; and

(d) Administrative Agent shall have received the certificate required by Section 6.02(b) of this Agreement for the calendar month immediately preceding the date of the Request for Extension of Credit (or, in the case of a Request for Extension of Credit made during the first ten Business Days of a month, Administrative Agent shall have received such certificate for the second calendar month preceding the date of the Request for Extension of Credit), and such certificate shall have certified that Borrower and its Subsidiaries on a consolidated basis held unrestricted cash (and cash equivalents) of \$100,000,000 or more as of the last day of such month.

(e) The sum of the Outstanding Obligations plus the advances requested pursuant to the Request for Extension of Credit shall not exceed the Availability Limit in accordance with the most recent financial statements delivered by Borrower pursuant to Sections 6.01(a) and (b) of this Agreement.

(f) Administrative Agent shall have received, in form and substance satisfactory to it, such other assurances, certificates, documents or consents related to the foregoing as Administrative Agent or Requisite Lenders reasonably may require.

Each Request for Extension of Credit by Borrower shall be deemed to be a representation and warranty that the conditions specified in Sections 4.02(a) and (b) have been satisfied on and as of the date of such Extension of Credit.

## SECTION 5 REPRESENTATIONS AND WARRANTIES

Borrower represents and warrants to Administrative Agent and Lenders that:

**5.01 Existence and Qualification; Power; Compliance with Laws.** Borrower is a corporation duly incorporated, validly existing and in good standing under the Laws of the state of its incorporation, has the corporate power and authority and the legal right to own, lease and operate its properties and to conduct its business as currently conducted, is duly qualified and in good standing under the Laws of Delaware, California, Colorado and Texas, and is in compliance with all Laws except to the extent that noncompliance could not be reasonably expected to have a Material Adverse Effect.

**5.02 Power; Authorization; Enforceable Obligations.** Borrower has the corporate power and authority and the legal right to make, deliver and perform each Loan Document to which it is a party and Borrower has the corporate power and authority to borrow hereunder and has taken all necessary action to authorize the borrowings on the terms and conditions of this Agreement and to authorize the execution, delivery and performance of this Agreement and the other Loan Documents to which it is a party. No consent or authorization of, filing with, or other act by or in respect of any Governmental Authority, is required in connection with the borrowings hereunder or with the execution, delivery, performance, validity or enforceability of this Agreement or any of the other Loan Documents. The Loan Documents have been duly executed and delivered by Borrower, and constitute a legal, valid and binding obligation of Borrower, enforceable against Borrower in accordance with their respective terms.

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**5.03 No Legal Bar.** The execution, delivery, and performance by Borrower of the Loan Documents to which it is a party and compliance with the provisions thereof have been duly authorized by all requisite action on the part of Borrower and do not and will not (a) violate or conflict with, or result in a breach of, or require any consent under (i) any Organization Documents of Borrower or any of its Subsidiaries, (ii) any material applicable Laws, rules, or regulations or any order, writ, injunction, or decree of any Governmental Authority or arbitrator, or (iii) any material Contractual Obligation of Borrower or any of its Subsidiaries or by which any of them or any of their property is bound or subject, (b) constitute a default under any such material agreement or instrument, or (c) result in, or require, the creation or imposition of any Lien on any of the properties of Borrower or any of its Subsidiaries (other than the Liens granted in connection herewith)..

**5.04 Financial Statements; No Material Adverse Effect.**

(a) The Audited Financial Statements (i) were prepared in accordance with GAAP consistently applied throughout the period covered thereby, except as otherwise expressly noted therein; (ii) fairly present the financial condition of Borrower and its Subsidiaries as of the date thereof and their results of operations for the period covered thereby in accordance with GAAP consistently applied throughout the period covered thereby, except as otherwise expressly noted therein; and (iii) show all material indebtedness and other liabilities, direct or contingent, of Borrower and its Subsidiaries as of the date thereof, including liabilities for taxes, material commitments and Indebtedness in accordance with GAAP consistently applied throughout the period covered thereby.

(b) Since the date of the Audited Financial Statements, there has been no event or circumstance which has a Material Adverse Effect.

**5.05 Litigation.** Except as disclosed in Schedule 5.05, no litigation, investigation or proceeding of or before an arbitrator or Governmental Authority is pending or, to the knowledge of Borrower after due and diligent investigation, threatened by or against Borrower or any of its Subsidiaries or against any of their properties or revenues which could reasonably be expected to have a Material Adverse Effect.

**5.06 No Default.** Neither Borrower nor any its Subsidiaries are in default under or with respect to any Contractual Obligation which could reasonably be expected to have a Material Adverse Effect, and no Default or Event of Default has occurred and is continuing or will result from the consummation of this Agreement or any of the other Loan Documents, or the making of the Extensions of Credit hereunder.

**5.07 Ownership of Property; Liens.** Borrower and its Subsidiaries have valid fee or leasehold interests in all real property which they use in their respective businesses, and Borrower and its respective Subsidiaries have good and marketable title to all their other property, and none of such property is subject to any Lien, except as permitted in Section 7.02.

**5.08 Taxes.** Borrower and its Subsidiaries have filed all material tax returns which are required to be filed, and have paid, or made provision for the payment of, all taxes with respect to the periods, property or transactions covered by said returns, or pursuant to any assessment received by Borrower or its respective Subsidiaries, except (a) such taxes, if any, as are being contested in good faith by appropriate proceedings and as to which adequate reserves have been established and maintained, and (b) immaterial taxes; provided, however, that in each case no material item or portion of property of Borrower or any of its Subsidiaries is in jeopardy of being seized, levied upon or forfeited.

**5.09 Margin Regulations; Investment Company Act; Public Utility Holding Company Act.**

(a) Borrower is not engaged nor will it engage, principally or as one of its important activities, in the business of extending credit for the purpose of “purchasing” or “carrying” “margin stock” within the respective meanings of each of the quoted terms under Regulation U of the Board of Governors of the Federal Reserve System as now and from time to time hereafter in effect. No part of the proceeds of any Extensions of Credit hereunder will be used for “purchasing” or “carrying” “margin stock” as so defined or for any purpose which violates, or which would be inconsistent with, the provisions of Regulations U or X of such Board of Governors.

(b) Neither Borrower nor any of its Subsidiaries (i) is a “holding company,” or a “subsidiary company” of a “holding company,” or an “affiliate” of a “holding company” or of a “subsidiary company” of a “holding company,” within the meaning of the Public Utility Holding Company Act of 1935, or (ii) is or is required to be registered as an “investment company” under the Investment Company Act of 1940.

**5.10 ERISA Compliance.**

(a) Each Plan is in compliance in all material respects with the applicable provisions of ERISA, the Code and other federal or state Laws. Each Plan that is intended to qualify under Section 401(a) of the Code has received a favorable determination letter from the IRS or an application for such a letter is currently being processed by the IRS with respect thereto and, to the best knowledge of Borrower, nothing has occurred which would prevent, or cause the loss of, such qualification. Borrower and each ERISA Affiliate have made all required contributions to each Plan subject to Section 412 of the Code, and no application for a funding waiver or an extension of any amortization period pursuant to Section 412 of the Code has been made with respect to any Plan. There has been no prohibited transaction or violation of the fiduciary responsibility rules with respect to any Plan that has or could reasonably be expected to have a Material Adverse Effect.

(b) (i) No ERISA Event has occurred or is reasonably expected to occur; (ii) no Pension Plan has any Unfunded Pension Liability; (iii) neither Borrower nor any ERISA Affiliate has incurred, or reasonably expects to incur, any liability under Title IV of ERISA with respect to any Pension Plan (other than premiums due and not delinquent under Section 4007 of ERISA); (iv) neither Borrower nor any ERISA Affiliate has incurred, or reasonably expects to incur, any liability (and no event has occurred which, with the giving of notice under Section 4219 of ERISA, would result in such liability) under Sections 4201 or 4243 of ERISA with respect to a Multiemployer Plan; and (v) neither Borrower nor any ERISA Affiliate has engaged in a transaction that could be subject to Sections 4069 or 4212(c) of ERISA.

**5.11 Intangible Assets.** Borrower and its Subsidiaries own, or possess the right to use, all trademarks, trade names, copyrights, patents, patent rights, franchises, licenses and other intangible assets that are used in the conduct of their respective businesses as now operated or could obtain such right without causing a Material Adverse Effect, and none of such items, to the best knowledge of Borrower, conflicts with the valid trademark, trade name, copyright, patent, patent right or intangible asset of any other Person to the extent that such conflict has or could reasonably be expected to have a Material Adverse Effect.

**5.12 Compliance With Laws.** Borrower and its Subsidiaries are in compliance in all material respects with all material Laws that are applicable such Person.

**5.13 Environmental Compliance.** Borrower and its Subsidiaries conduct in the ordinary course of business a review of the effect of existing Environmental Laws and claims alleging potential liability or responsibility for violation of any Environmental Law on their respective businesses, operations and properties, and as a result thereof Borrower has reasonably concluded that such Environmental Laws and claims do not, individually or in the aggregate, have a Material Adverse Effect.

**5.14 Insurance.** The properties of Borrower and its Subsidiaries are insured with financially sound and reputable insurance companies not Affiliates of Borrower, in such amounts, with such deductibles and covering such risks as are customarily carried by companies engaged in similar businesses and owning similar properties in localities where Borrower or such Subsidiary operates.

**5.15 Swap Obligations.** Neither Borrower nor any of its Subsidiaries has incurred any outstanding obligations under any Swap Contracts, other than Permitted Swap Obligations. Borrower has undertaken its own independent assessment of its consolidated assets, liabilities and commitments and has considered appropriate means of mitigating and managing risks associated with such matters and has not relied on any swap counterparty or any Affiliate of any swap counterparty in determining whether to enter into any Swap Contract.

**5.16 Disclosure.** No statement, information, report, representation, or warranty made by Borrower in any Loan Document or furnished to Administrative Agent or any Lender in connection with any Loan Document contains any untrue statement of a material fact or, when viewed together with Borrower’s periodic reports filed under the Exchange Act and the rules and regulations promulgated thereunder, omits to state any material fact necessary to make the statements herein or therein not misleading.

**SECTION 6  
AFFIRMATIVE COVENANTS.**

So long as any Obligation remains unpaid or unperformed, or any portion of the Commitments remains outstanding (or, in the case of Sections 6.12, 6.13, 6.14 and 6.15, within the time period specified therein), Borrower shall, and shall (except in the case of Borrower’s reporting covenants set forth in Sections 6.01 and 6.02(a)-(c) and Borrower’s covenants set forth in Sections 6.12, 6.13 and 6.14), cause each Subsidiary, to:

**6.01 Financial Statements.** Deliver to Administrative Agent and each Lender, in form and detail satisfactory to Administrative Agent and Requisite Lenders:

(a) as soon as available, but in any event within (i) 90 days after the end of each fiscal year of Borrower, or, (ii) if Borrower has been granted an extension by the Securities and Exchange Commission permitting the late filing by Borrower of any annual report on form 10-K, by the earlier of (x) 120 days after the end of each fiscal year of Borrower or (y) the last day of any such extension, a consolidated balance sheet of Borrower and its Subsidiaries as at the end of such fiscal year, and the related consolidated statements of income and cash flows for such fiscal year, setting forth in each case in comparative form the figures for the previous fiscal year, all in reasonable detail, audited and accompanied by a report and opinion of an independent certified public accountant of nationally recognized standing, which report and opinion shall be prepared in accordance with GAAP and shall not be subject to any qualifications or exceptions as to the scope of the audit nor to any qualifications and exceptions not reasonably acceptable to Requisite Lenders;

(b) as soon as available, but in any event within (i) 45 days after the end of each of the first three fiscal quarters of each fiscal year of Borrower, or, (ii) if Borrower has been granted an extension by the Securities and Exchange Commission permitting the late filing by Borrower of any quarterly report on form 10-Q, by the earlier of (x) 60 days after the end of each of the first three fiscal quarters of each fiscal year of Borrower or (y) the last day of any such extension, a consolidated balance sheet of Borrower and its Subsidiaries as at the end of such fiscal quarter, and the related consolidated statements of income and cash flows for such fiscal quarter and for the portion of Borrower’s fiscal year then ended, setting forth in each case in comparative form the figures for the corresponding fiscal quarter of the previous fiscal year and the corresponding portion of the previous fiscal year, all

in reasonable detail and certified by a Responsible Officer of Borrower as fairly presenting the financial condition, results of operations and cash flows of Borrower and its Subsidiaries in accordance with GAAP, subject only to normal year-end audit adjustments and the absence of footnotes; and

(c) Reports required to be delivered pursuant to clauses (a) and (b) of this Section 6.01 shall be deemed to have been delivered on the date on which Borrower posts such reports on Borrower's website on the Internet at the website address listed on Schedule 10.02 hereof or when such report is posted on the Securities and Exchange Commission's website at [www.sec.gov](http://www.sec.gov); provided that (x) Borrower shall deliver paper copies of the reports referred to in such clauses (a) and (b) of this Section 6.01 to Administrative Agent or any Lender who requests Borrower to deliver such paper copies until written request to cease delivering paper copies is given by Administrative Agent or such Lender, (y) Borrower shall notify Administrative Agent and Lenders of the posting of any such new material, and (z) in every instance Borrower shall provide paper copies of the Compliance Certificates required by clause (a) of Section 6.02 to Administrative Agent and each Lender. Except for the Compliance Certificates referred to in such clause (a) of Section 6.02, Administrative Agent shall have no obligation to request the delivery or to maintain copies of the reports referred to in clauses (a) and (b) of this Section 6.01, and in any event shall have no responsibility to monitor compliance by Borrower with any such request for delivery, and each Lender shall be solely responsible for requesting delivery to it or maintaining its copies of such reports.

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**6.02 Certificates, Notices and Other Information.** Deliver to Administrative Agent and each Lender, in form and detail satisfactory to Administrative Agent and Requisite Lenders:

(a) concurrently with the delivery of the financial statements referred to in Sections 6.01(a) and (b), a duly completed Compliance Certificate signed by a Responsible Officer of Borrower;

(b) monthly on or before the tenth Business Day of each calendar month, certified copies of reports or account statements signed by a Responsible Officer of Borrower detailing (i) the total amount of unrestricted cash (and cash equivalents) held by Borrower and its Subsidiaries on a consolidated basis as of the last day of the immediately preceding calendar month ("Consolidated Cash Balance"), and (ii) the portion(s) of such Consolidated Cash Balance deposited in domestic accounts subject to the Deposit Account Control Agreements.

(c) promptly after the same are available, copies of each annual report, proxy or financial statement or other report or communication sent to the stockholders of Borrower, and copies of all annual, regular, periodic and special reports and registration statements which Borrower may file or be required to file with the Securities and Exchange Commission under Sections 13 or 15(d) of the Exchange Act, and not otherwise required to be delivered to Administrative Agent pursuant hereto;

(d) promptly after the occurrence thereof, notice of any Default or Event of Default;

(e) notice of any change in accounting policies or financial reporting practices by Borrower or any Subsidiary that is material to Borrower or to Borrower and its Subsidiaries on a consolidated basis;

(f) promptly after the commencement thereof, notice of any litigation, investigation or proceeding affecting Borrower where the reasonably expected damages to Borrower exceed the Threshold Amount, or in which injunctive relief or similar relief is sought, which relief, if granted, has a Material Adverse Effect;

(g) promptly after the occurrence thereof, notice of any Reportable Event with respect to any Plan or the intent to terminate any Plan, or the institution of proceedings or the taking or expected taking of any other action to terminate any Plan or withdraw from any Plan;

(h) promptly after the occurrence thereof, notice of any Material Adverse Effect; and

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(i) promptly, such other data and information as from time to time may be reasonably requested by Administrative Agent, or, through Administrative Agent or any Lender. Notwithstanding any provision of this Agreement to the contrary, so long as no Default or Event of Default shall have occurred and be continuing, neither Borrower nor any of its Subsidiaries shall be required to disclose, permit the inspection, examination, photocopying or making extracts of, or discuss, any document, information or other matter that (i) constitutes non-financial trade secrets or non-financial proprietary information, or (ii) the disclosure of which to any Lender, or their designated representative, is then prohibited by law or any agreement binding on Borrower or any of its Subsidiaries that was not entered into by Borrower or any such Subsidiary for the purpose of concealing information from the Lenders.

Each notice pursuant to this Section shall be accompanied by a statement of a Responsible Officer of Borrower setting forth details of the occurrence referred to therein and stating what action Borrower has taken and proposes to take with respect thereto. The annual reports, proxies, financial statements or other communications required by Section 6.02(c) above shall be deemed to have been delivered on the date on which Borrower posts such reports on Borrower's website on the Internet at the website address listed on Schedule 10.02 hereof or when such report is posted on the Securities and Exchange Commission's website at [www.sec.gov](http://www.sec.gov); provided that (y) Borrower shall deliver paper copies of the reports referred to in Section 6.02(c) to Administrative Agent or any Lender who requests Borrower to deliver such paper copies until written request to cease delivering paper copies is given by Administrative Agent or such Lender, and (z) Borrower shall notify Administrative Agent and Lenders of the posting of any such new material. Administrative Agent shall have no obligation to request the delivery or to maintain copies of the reports and communications referred to in Section 6.02(c), and in any event shall have no responsibility to monitor compliance by Borrower with any such request for delivery, and each Lender shall be solely responsible for requesting delivery to it or maintaining its copies of such reports and communications.

**6.03 Payment of Taxes.** Pay and discharge when due all material taxes, assessments, and governmental charges, except for any such tax, assessment, charge, or levy which is an Ordinary Course Lien under subsection (b) of the definition of such term.

**6.04 Preservation of Existence.** Preserve and maintain its existence, licenses, permits, rights, franchises and privileges necessary or desirable in the normal conduct of its business, except (i) as permitted by Section 7.03, or (ii) where failure to do so would not reasonably be expected to have a Material Adverse Effect.

**6.05 Maintenance of Properties.** Maintain, preserve and protect all of its material properties and equipment necessary in the operation of its business in good order and condition, subject to wear and tear in the ordinary course of business, and not permit any waste of its properties, except where failure to do so would not reasonably be expected to have a Material Adverse Effect.

**6.06 Maintenance of Insurance.** Maintain liability and casualty insurance with responsible insurance companies satisfactory to Lender in such amounts and against such risks as is customary for similarly situated businesses.

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**6.07 Compliance With Laws.**

(a) Comply with the requirements of all applicable Laws and orders of any Governmental Authority, noncompliance with which would reasonably be expected to have a Material Adverse Effect.

(b) Conduct its operations and keep and maintain its property in material compliance with all Environmental Laws.

**6.08 Inspection Rights.** At any time during regular business hours and as often as reasonably requested upon reasonable notice, permit Administrative Agent or any Lender, or any employee, agent or representative thereof, to examine, audit and make copies and abstracts from Borrower's records and books of account and to visit and inspect its

properties and to discuss its affairs, finances and accounts with any of its officers and key employees, and, upon request, furnish promptly to Administrative Agent or any Lender true copies of all financial information and internal management reports made available to their senior management. Notwithstanding any provision of this Agreement to the contrary, so long as no Default or Event of Default shall have occurred and be continuing, neither Borrower nor any of its Subsidiaries shall be required to disclose, permit the inspection, examination, photocopying or making extracts of, or discuss, any document, information or other matter that (i) constitutes non-financial trade secrets or non-financial proprietary information, or (ii) the disclosure of which to any Lender, or their designated representative, is then prohibited by law or any agreement binding on Borrower or any of its Subsidiaries that was not entered into by Borrower or any such Subsidiary for the purpose of concealing information from the Lenders. Borrower shall, however, furnish to Administrative Agent such information concerning Borrower's intellectual property (including, without limitation, application and registration numbers for any filings in connection with such intellectual property) as is reasonably necessary to permit Administrative Agent (on behalf of itself and the other Lenders) to perfect a security interest in such intellectual property.

**6.09 Keeping of Records and Books of Account.** Keep adequate records and books of account reflecting all financial transactions in conformity with GAAP, consistently applied, and in material conformity with all applicable requirements of any Governmental Authority having regulatory jurisdiction over Borrower or any applicable Subsidiary.

**6.10 Compliance with ERISA.** Cause, and cause each of its ERISA Affiliates to: (a) maintain each Plan in compliance in all material respects with the applicable provisions of ERISA, the Code and other federal or state law; (b) cause each Plan which is qualified under Section 401(a) of the Code to maintain such qualification; and (c) make all required contributions to any Plan subject to Section 412 of the Code.

**6.11 Compliance With Agreements.** Promptly and fully comply with all Contractual Obligations to which any one or more of them is a party, except for any such Contractual Obligations (a) the nonperformance of which would not cause a Default or Event of Default, (b) then being contested by any of them in good faith by appropriate proceedings, or (c) if the failure to comply therewith could not reasonably be expected to have a Material Adverse Effect.

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**6.12 ALTA Survey.** Not later than January 15, 2003, deliver to Administrative Agent for the benefit of Lenders an ALTA/ACSM (1992)(Urban) Survey of the Colorado Real Property Security, including Table A numbers 1, 2, 3, 4, 6, 8, 9, 10 and 11, certified to Administrative Agent, the Lenders and the title company and otherwise in form reasonably acceptable to the Administrative Agent and Lenders, together with endorsements to the title insurance policies delivered pursuant to Section 4.01(b) hereof removing any survey exceptions, adding endorsements that the real property shown on such Survey is identical to the Property and such other endorsements as Administrative Agent and Lenders may reasonably require.

**6.13 Securities Account Control Agreements.** Not later than January 15, 2003, cause three (3) originals of the Securities Account Control Agreements to be delivered to Administrative Agent, fully executed on behalf of Borrower and the respective financial institutions to be parties thereto.

**6.14 Boulder Deed of Trust; California Deed of Trust.** Not later than January 15, 2003, obtain and deliver to Administrative Agent at Borrower's sole cost and expense: (a) original consents in commercially reasonable form from all landlords for the Boulder Real Property Security and the California Real Property Security permitting Borrower to enter into and deliver to Administrative Agent for recordation the Boulder Deed of Trust and the California Deed of Trust; (b) three (3) Borrower executed originals of each of the Boulder Deed of Trust and the California Deed of Trust in form for recordation in Colorado and California, respectively; and (c) a commitment by Chicago Title Company to issue ALTA Leasehold Lender's policies of title insurance insuring Administrative Agent that the Liens of the of the Boulder Deed of Trust and the California Deed of Trust are first and primary Liens in Borrower's leasehold interest in the Boulder Real Property Security and the California Real Property Security, respectively, with such endorsements as Administrative Agent may reasonably require, subject only to Permitted Exceptions. Administrative Agent shall cause the Boulder Deed of Trust and the California Deed of Trust to be recorded in the Official Records of the counties in which the Boulder Real Property Security and the California Real Property Security are located, whereupon Borrower shall cause the foregoing title policies to be issued at Borrower's sole cost and expense. Notwithstanding the foregoing, Borrower shall not be in breach of this covenant if Borrower has been unable despite commercially reasonable efforts to obtain the landlord consents set forth in Section 6.14(a) above on or before January 15, 2003. In such event, Borrower shall continue to use commercially reasonable efforts following January 15, 2003 to obtain such consents and thereupon deliver such executed originals of same to Administrative Agent and cause such title policies to be issued.

**6.15 Hypothecation of Material Leases.** Concurrently with entering into any Material Lease, at Administrative Agent's option, (a) deliver to Administrative Agent a Leasehold Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing in commercially reasonable form entered into by Borrower, as Trustor, in favor of Administrative Agent, as Beneficiary (for the account of each Lender in accordance with its Pro Rata Share), encumbering Borrower's leasehold interest in the real property subject to the Material Lease as security for the performance of all Obligations of Borrower, together with any required landlord consent; and (b) cause to be issued by Chicago Title Company or such other title insurer as is reasonably acceptable to Administrative Agent an ALTA Leasehold Lender's leasehold policy of title insurance insuring Administrative Agent that the Lien of foregoing Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing is a first and primary Lien in Borrower's leasehold interest in the real property subject to the Material Lease, with such endorsements as Administrative Agent may reasonably require, subject only to Permitted Exceptions.

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**6.16 Use of Proceeds.** Use the proceeds of Extensions of Credit for lawful general corporate purposes including working capital and capital expenditures not otherwise in contravention of this Agreement.

## SECTION 7 NEGATIVE COVENANTS

So long as any Obligations remain unpaid or unperformed, or any portion of the Commitments remains outstanding, Borrower shall not, nor shall it permit any Subsidiary to, directly or indirectly:

**7.01 Indebtedness.** Create, incur, assume or suffer to exist any Indebtedness except for the following ("Permitted Indebtedness"):

(a) Indebtedness under this Agreement;

(b) Indebtedness outstanding on the date hereof and listed on Schedule 7.01 and any refinancings, refundings, renewals or extensions thereof, provided that (i) the amount of such Indebtedness is not increased at the time of such refinancing, refunding, renewal or extension except by an amount equal to the premium or other amount paid, and fees and expenses incurred, in connection with such refinancing and by an amount equal to any utilized commitments thereunder, and (ii) the weighted average life of the principal payments pursuant to such refinancing, refunded, renewed or extended Indebtedness shall be no shorter than the weighted average life of such payments pursuant to such Indebtedness immediately prior to such refinancing, refunding, renewal or extension.

(c) Ordinary Course Indebtedness;

(d) Indebtedness of Borrower under the Convertible Subordinated Debentures;

(e) Indebtedness of Borrower under any letter of credit facility other than a Letter of Credit (a "Permitted LC Agreement"); provided that (A) the sum at any time of the aggregate face amount of all letters of credit issued and outstanding under all Permitted LC Agreements, plus the aggregate amount of all unremedied drawings under such letters of credit, does not exceed \$10,000,000, and (B) the Indebtedness of Borrower under any Permitted LC Agreement is at all times either unsecured or secured by Liens permitted pursuant to Section 7.02.

(f) Indebtedness of Borrower and its Subsidiaries under loans and Capital Leases incurred by Borrower or any of its Subsidiaries to finance the acquisition by such Person of real property, improvements, fixtures, equipment or other fixed assets (together with attachments, ascensions, additions, "soft costs" and proceeds thereof), provided that in each case, (i) such Indebtedness is incurred by such Person at the time of, or not later than 6 months after, the acquisition by such Person of the property so financed, and (ii) such

Indebtedness does not exceed the purchase price of the property so financed;

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(g) Indebtedness of Borrower and any of its Subsidiaries under Synthetic Lease Obligations;

(h) Indebtedness of Borrower and its Subsidiaries under initial or successive refinancings, refundings, renewals or extensions of any Indebtedness permitted by subsections (d), (e) and (f) above, provided that (i) the amount of such Indebtedness is not increased at the time of such refinancing, refunding, renewal or extension except by an amount equal to the premium or other amount paid, and fees and expenses incurred, in connection with such refinancing, and (ii) the weighted average life of the principal payments pursuant to such refinanced, refunded, renewed or extended Indebtedness shall be no shorter than the weighted average life of such payments pursuant to such Indebtedness immediately prior to such refinancing, refunding, renewal or extension.

(i) Indebtedness of Borrower to any of Borrower's Subsidiaries, Indebtedness of any of Borrower's Subsidiaries to Borrower or Indebtedness of any of Borrower's Subsidiaries to any of Borrower's other Subsidiaries;

(j) Subordinated Debt of Borrower to any Person, provided that (A) such Indebtedness contains subordination provisions no less favorable to Administrative Agent and Lenders than those set forth in Schedule 7.13 or as otherwise approved by Requisite Lenders and (B) the aggregate principal amount of all Subordinated Debt of Borrower outstanding (including the Convertible Subordinated Debentures) does not exceed \$350,000,000 at any time; and (C) the maturity date of the Subordinated Debt shall not be earlier than the Business Day next following the Maturity Date; and

(k) Other Indebtedness not included in (a) through (j) above and not exceeding, in the aggregate at any time, 10% of the total consolidated assets of Borrower and its Subsidiaries determined as of the end of the most recent fiscal quarter.

**7.02 Liens.** Incur, assume or suffer to exist, any Lien upon any of its property, assets or revenues, whether now owned or hereafter acquired, except for the following ("Permitted Liens"):

(a) Liens existing on the date hereof and listed on Schedule 7.01 and any renewals or extensions thereof, provided that the property covered thereby is not increased and any renewal or extension of the obligations secured or benefited thereby is permitted by Section 7.01(a);

(b) Ordinary Course Liens;

(c) Liens securing Investments which constitute Permitted Investments under Section 7.05(d);

(d) Liens on cash or cash equivalents securing reimbursement obligations of Borrower under letters of credit (other than any Letters of Credit) in an aggregate amount of all such cash and cash equivalents not to exceed \$10,000,000;

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(e) Liens on the property or assets of any corporation which becomes a Subsidiary of Borrower after the date of this Agreement, provided that (i) such Liens exist at the time such corporation became a Subsidiary, and (ii) such Liens were not created in contemplation of such acquisition by Borrower;

(f) Rights of vendors or lessors under conditional sale agreements, Capital Leases or other title retention agreements, provided that in each case, (i) such rights secure or otherwise relate to Permitted Indebtedness, (ii) such rights do not extend to any property other than property acquired with the proceeds of such Permitted Indebtedness (together with accessions, additions, replacements and proceeds thereof), and (iii) such rights do not secure any Indebtedness other than Permitted Indebtedness;

(g) Liens securing Indebtedness and any related obligations of Borrower or any of its Subsidiaries which constitutes Permitted Indebtedness under Section 7.01(f) (or refinancings of such Indebtedness under Section 7.01(g)), provided that such Liens cover only those assets subject to Synthetic Lease Obligations (together with accessions, additions, replacements and proceeds thereof);

(h) Liens incurred in connection with leases, subleases, licenses and sublicenses granted to Persons not interfering in any material respect with the business of Borrower and its Subsidiaries and any interest or title of a lessee or licensee under any such leases, subleases, licenses or sublicenses;

(i) Liens in favor of Lenders in connection with the Letter of Credit Cash Collateral Account; and

(j) Liens arising in connection with judgments not constituting an Event of Default pursuant to Section 8.01(h); and

(k) Liens not otherwise permitted hereunder on the property or assets of Borrower and any of its Subsidiaries securing (i) borrowed money Indebtedness, or (ii) all obligations of Borrower arising other than in connection with any securitization which are evidenced by bonds, debentures, notes or other similar instruments; provided that, in each case, the aggregate principal amount of all Indebtedness secured by such Liens does not exceed at any time ten percent (10%) of the Consolidated Tangible Net Worth of Lessee and its Subsidiaries determined as of the end of the fiscal quarter immediately preceding the date of determination.

**7.03 Fundamental Changes.** Merge or consolidate with or into any Person or liquidate, wind-up or dissolve itself, or permit or suffer any liquidation or dissolution or sell all or substantially all of its assets, except that:

(a) any Subsidiary may merge with (i) Borrower, provided that Borrower shall be the continuing or surviving corporation, (ii) any one or more Subsidiaries, and (iii) any joint venture, partnership or other Person, so long as such joint venture, partnership and other Person will, as a result of making such merger and all other contemporaneous related transactions, become a Subsidiary;

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(b) any Subsidiary may sell all or substantially all of its assets (upon voluntary liquidation or otherwise), to Borrower or to another Subsidiary;

(c) Borrower may merge into or consolidate with any other Person, provided that (i) Borrower is the surviving corporation, and (ii) immediately after giving effect to such merger or consolidation, no Default or Event of Default shall have occurred and be continuing; and

(d) any Subsidiary may merge or consolidate with or into any other Person or sell all or substantially all of its assets to the extent such transaction is a Disposition otherwise permitted under Section 7.04 or an Investment otherwise permitted under Section 7.05 and immediately after giving effect to such merger or consolidation, no Default or Event of Default shall have occurred and be continuing.

**7.04 Dispositions.** Make any Dispositions, except:

(a) Ordinary Course Dispositions;

(b) Dispositions permitted by Section 7.03;

(c) Dispositions of the Existing Colorado Springs Parcels or the Subdivided Colorado Springs Parcels; and

(d) Dispositions not otherwise permitted hereunder provided that such Dispositions do not exceed in the aggregate 10% of the Consolidated Tangible Net Worth for the fiscal quarter ending December 31, 2002 as determined in the financial statements delivered in accordance with Section 6.01.

**7.05 Investments.** Make any Investments, except for the following (“Permitted Investments”):

(a) Investments existing on September 30, 2002;

(b) Ordinary Course Investments;

(c) Investments permitted by Section 7.01 or Section 7.03;

(d) Investments arising from rights received by Borrower and its Subsidiaries upon the required payment of any permitted contingent obligations of Borrower and its Subsidiaries;

(e) Investments in the nature of Acquisitions, provided that the aggregate amount of such Acquisitions in any period of four consecutive fiscal quarters does not exceed 10% of Consolidated Tangible Net Worth as determined as of the fiscal quarter immediately preceding the date of determination;

(f) Investments of Borrower and its Subsidiaries in Swap Contracts, provided that all such arrangements are entered into in connection with bona fide hedging operations and not for speculation;

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(g) Investments not otherwise permitted hereunder, provided that the aggregate amount of such other Investments made after September 30, 2002 (less any return on any such Investments) does not exceed 10% of Consolidated Tangible Net Worth as determined as of the fiscal quarter immediately preceding the date of determination.

**7.06 Restricted Payments.** Make any Restricted Payments, except as follows:

(a) Borrower may pay dividends or other distributions payable solely in shares of capital stock of Borrower or any Subsidiary or payable by a Subsidiary to Borrower or to another Subsidiary;

(b) Borrower may distribute rights pursuant to a shareholder rights plan or redeem such rights, provided that such redemption is in accordance with the terms of such shareholder rights plan;

(c) Borrower may make Restricted Payments in connection with or pursuant to any of its Employee Benefits Plans or in connection with the employment, termination or compensation of its employees, officers or directors;

(d) Borrower may make Restricted Payments with the Net Proceeds received from a substantially concurrent issuance of Equity Securities or capital stock or with its Equity Securities or capital stock or Borrower may convert any Equity Securities in accordance with their terms into other Equity Securities; provided, however, that the cash amount of any such Restricted Payment shall be limited to the amount of cash Net Proceeds received from the concurrent issuance of Equity Securities or capital stock;

(e) Borrower may purchase Equity Securities pursuant to one or more stock repurchase programs, provided that (i) no Default or Event of Default shall have occurred and be continuing, (ii) after giving effect to any such repurchases Borrower shall be in compliance with Section 7.12; and (iii) when combined with the amount of all dividends, purchases or redemptions made under Section 7.06(f), the total of all such purchases of Equity Securities shall not exceed the sum of \$5,000,000 in the aggregate over the life of this Agreement; and

(f) Any Subsidiary of Borrower may declare or pay any dividends in respect of its Equity Securities or purchase or redeem shares of its Equity Securities or make distributions to shareholders not otherwise permitted hereunder, provided that (i) the aggregate amount paid or distributed in any period of four consecutive quarters (excluding any amounts covered by subsection (b) above) does not exceed 5% of Consolidated Tangible Net Worth as determined as of the fiscal quarter immediately preceding the date of determination; and (ii) when combined with the amount of all purchases of Equity Securities made under Section 7.06(e), the total of all such dividends, purchases or redemptions shall not exceed the sum of \$5,000,000 in the aggregate in the aggregate over the life of this Agreement.

**7.07 ERISA.** At any time engage in a transaction which could be subject to Sections 4069 or 4212(c) of ERISA, or permit any Pension Plan to (a) engage in any non-exempt “prohibited transaction” (as defined in Section 4975 of the Code); (b) fail to comply with ERISA or any other applicable Laws; or (c) incur any material “accumulated funding deficiency” (as defined in Section 302 of ERISA), which, with respect to each event listed above, has a Material Adverse Effect.

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**7.08 Change in Nature of Business.** Engage, either directly or indirectly through Affiliates, in any line of business other than the digital storage business, any other business incidental or reasonably related thereto, or any businesses that are, as determined by the Board of Directors of Borrower, appropriate extensions thereof.

**7.09 Transactions with Affiliates.** Enter into any transaction of any kind with any Affiliate (other than transactions among Borrower or any of its Subsidiaries and any Subsidiary) of Borrower other than arm’s-length transactions with Affiliates that are otherwise permitted hereunder.

**7.10 Use of Proceeds.** Borrower shall not, and shall not suffer or permit any Subsidiary to, use any portion of the Loan proceeds or any Letter of Credit, directly or indirectly, (i) for any Acquisition unless the prior, effective written consent or approval to such Acquisition of the board of directors or equivalent governing body of the acquiree is obtained, or (ii) to acquire any security in any transaction that is subject to Section 13 (other than an Investment Transaction) or Section 14 of the Exchange Act unless, prior to the time such transaction becomes subject to such Section 13 or 14, the board of directors or other applicable governing body of the Person that is the issuer of such securities has adopted a resolution approving such transaction and approving any “change in control” with respect to such Person whereby Borrower or such Subsidiary may acquire control of such Person. For purposes of this Section 7.10, (x) an “Investment Transaction” means a transaction subject to Section 13(d), but not Section 16, of the Exchange Act, provided that in connection with such transaction Borrower or its Subsidiary (as the case may be) has reported and at all times continues to report to the SEC that such transaction is undertaken for investment purposes only and not for any of the purposes specified in clauses 4(a) through (j), inclusive, of the special instructions for complying with Schedule 13D under the Exchange Act, and (y) “change in control” means, for any Person, an Acquisition with respect to such Person.

**7.11 Certain Indebtedness Payments, Etc.** Neither Borrower nor any of its Subsidiaries shall pay, prepay, redeem, purchase, defease or otherwise satisfy in any manner prior to the scheduled payment thereof any Subordinated Debt except as otherwise permitted under this Section 7.11; amend, modify or otherwise change the terms of any document, instrument or agreement evidencing Subordinated Debt such that such amendment, modification or change would (i) cause the outstanding aggregate principal amount of all such Subordinated Debt so amended, modified or changed to be increased as a consequence of such amendment, modification or change, (ii) cause the subordination provisions applicable to such Subordinated Debt to be less favorable to Administrative Agent and Lenders than those set forth on Schedule 7.13, (iii) increase the interest rate applicable thereto, or (iv) accelerate the scheduled payment thereof. Borrower shall not cause or permit any of its obligations, except the obligations constituting Senior Indebtedness, to constitute “Designated Senior Indebtedness” under the Indenture governing the Convertible Subordinated Debentures (it being understood that the Obligations of Borrower under this Agreement shall at all times constitute “Designated Senior Indebtedness” thereunder). Notwithstanding the foregoing, Borrower may conduct an exchange offer (whether public, private or on a 3(a)(9) basis) for all or part of the Borrower’s Convertible Subordinated Debentures for one or more of the following: (a) new securities (“New Securities”) that are subordinated in right of payment to the obligations of Borrower under the Credit Agreement and other Loan Documents at least to the same extent as the existing Convertible Subordinated Debentures; provided that (w) the aggregate annual interest obligation of Borrower under the New Securities shall be equal to or less than the aggregate annual interest obligation under the existing Convertible Subordinated Debentures, (x) the maturity date of the New Securities shall not be earlier than the maturity date of the existing Convertible Subordinated Debentures, (y) the total principal amount of the obligations represented by Borrower’s Subordinated Debt shall not be increased by means of any exchange of New Securities for all or part of the Borrower’s Convertible Subordinated Debentures, and (z) the New Securities shall not permit any amortization of the principal



amount of the obligations represented thereby prior to the maturity of the existing Convertible Subordinated Debentures; or (b) new securities issued by Maxtor ("Maxtor Securities"). No exchange or series of exchanges of New Securities or Maxtor Securities for all or any part of Borrower's Convertible Subordinated Debentures pursuant to this Section 7.11 shall be deemed to permit any reduction in the amount of Maxtor's reimbursement obligations under the Maxtor Reimbursement Agreement except on a dollar-for-dollar basis to the extent that the obligations represented by Borrower's Subordinated Debt are reduced by means of such exchange or series of exchanges. Borrower may (A) convert, or honor a conversion request with respect to, any such Subordinated Debt into Equity Securities of Borrower in accordance with the terms thereof, (B) pay cash to holders of such Subordinated Debt in connection with such a conversion but solely to the extent representing the value of any fractional shares; and (C) make other payments, repayments, redemptions, purchases, defeasance or other satisfaction of Subordinated Debt not to exceed \$5,000,000 in the aggregate.

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## 7.12 Financial Covenants.

(a) **Consolidated Tangible Net Worth.** Permit Consolidated Tangible Net Worth on the last day of any fiscal quarter (such date to be referred to herein as a "determination date"), commencing with the fiscal quarter ended December 31, 2002, to be less than \$190,000,000.

(b) **Minimum Quick Ratio.** Permit the Quick Ratio determined as of the last day of any fiscal quarter of Borrower (commencing with the quarter ending December 31, 2002) to be less than 1.00:1.00.

(c) **Maximum Adjusted Leverage Ratio.** Permit the Adjusted Leverage Ratio, determined as of the last day of any fiscal quarter of Borrower commencing with the fiscal quarter ending June 30, 2003 (measured on a rolling four quarter basis for the four fiscal quarters ending on such dates), to be greater than the following: (i) for the fiscal quarters ending June 30, 2003 and September 30, 2003, 2.50:1.00; and (ii) for the fiscal quarters ending December 31, 2003 and all fiscal quarters thereafter, 2.00:1.00.

(d) **Minimum Consolidated EBITDA.** Permit Consolidated EBITDA, determined as of the last day of any fiscal quarter of Borrower commencing with the fiscal quarter ending December 31, 2002, to be less than the following: (i) for the fiscal quarter ending December 31, 2002, \$1.00; (ii) for the fiscal quarter ending March 31, 2003, \$18,000,000; (iii) for the fiscal quarter ending June 30, 2003, \$14,000,000; (iv) for the fiscal quarter ending September 30, 2003, \$11,000,000; (v) for the fiscal quarter ending December 31, 2003, \$12,500,000; and (vi) for the fiscal quarter ending March 31, 2004, \$13,000,000.

(e) **Maximum Senior Indebtedness.** Permit Senior Indebtedness of Borrower and its Subsidiaries on a consolidated basis to exceed at any time outstanding \$125,000,000 from the Closing Date through March 31, 2003.

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(f) **Maximum Capital Expenditures.** Permit capital expenditures (as determined pursuant to GAAP) of Borrower and its Subsidiaries on a consolidated basis to exceed \$10,000,000 for each fiscal quarter of Borrower or \$30,000,000 for each fiscal year of Borrower.

(g) **Minimum Unrestricted Cash.** Permit Borrower's Consolidated Cash Balance (as defined in Section 6.02(b)) at any time to fall below \$100,000,000. During any period in which the Consolidated Cash Balance is less than \$200,000,000, Borrower shall maintain a minimum Consolidated Cash Balance of \$100,000,000 deposited in domestic accounts subject to the Deposit Account Control Agreements or Securities Account Control Agreements. During any period in which the Consolidated Cash Balance is equal to or greater than \$200,000,000, Borrower shall maintain a minimum Consolidated Cash Balance of \$50,000,000 deposited in domestic accounts subject to the Deposit Account Control Agreements and Securities Account Control Agreements. The Consolidated Cash Balance covenants set forth in this Section 7.12(g) shall be tested monthly in accordance with the reports to be delivered to Administrative Agent and each Lender pursuant to Section 6.02(b) of this Agreement.

**7.13 Accounting Changes.** Change (i) its fiscal year (currently April 1 to March 31), or (ii) its accounting practices except as permitted by GAAP.

**7.14 Tax Losses.** Alone or together with one or more of its Subsidiaries or Affiliates, incur a Tax Loss the uninsured or unreimbursed portion of which (individually, or together with all other prior Tax Losses) exceeds the Threshold Amount, where (i) an "uninsured" Tax Loss means a Tax Loss which is not the subject of a bona fide insurance policy or contract with an insurer or syndicate of insurers of national repute or as to which such insurer or insurers have disputed or disclaimed contractual liability for such Tax Loss or otherwise breached the terms of such policy or contract, and (ii) an "unreimbursed" Tax Loss means a Tax Loss not reimbursed by Maxtor in accordance with the terms of the Maxtor Reimbursement Agreement.

## SECTION 8 EVENTS OF DEFAULT AND REMEDIES

**8.01 Events of Default.** Any one or more of the following events shall constitute an Event of Default:

(a) Borrower fails to pay any principal on any Outstanding Obligation (other than fees) as and on the date when due; or

(b) Borrower fails to pay any interest on any Outstanding Obligation or any facility fees or other fees specified in Sections 2.04 and 2.08 due hereunder within five (5) Business Days after the date when due; or fails to pay any other fees or amount payable to Administrative Agent or any Lender under any Loan Document within five (5) Business Days after the date due; or

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(c) Any default occurs in the observance or performance of any agreement contained in Section 7; or

(d) Any default occurs in the observance or performance of any agreement contained in Section 6.01 and such default continues for ten days; or

(e) The occurrence of an Event of Default (as such term is or may hereafter be specifically defined in any other Loan Document) under any other Loan Document; or Borrower fails to perform or observe any other covenant or agreement (not specified in subsections (a), (b) (c) or (d) above) contained in any Loan Document on its part to be performed or observed and such failure continues for 30 days; or

(f) Any representation or warranty in any Loan Document proves to have been incorrect in any material respect when made or deemed made; or

(g) (i) Borrower (x) defaults in any payment when due of principal or of interest on any Indebtedness (other than Indebtedness hereunder) having an aggregate principal amount in excess of the Threshold Amount, or (y) defaults in the observance or performance of any other agreement or covenant relating to any Indebtedness (other than Indebtedness hereunder) or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event shall occur, the effect of which default or other event is to cause, or to permit the holder or holders of such Indebtedness (or a trustee or agent on behalf of such holder or holders or beneficiary or beneficiaries) to cause, with the giving of notice if required, any Guaranty Obligation in excess of the Threshold Amount to become payable or cash collateral in respect thereof to be demanded on account of such default or other event; (ii) an Event of Default occurs as defined in the Synthetic Lease; (iii) Borrower is unable or admits in writing its inability to pay its debts generally as they mature; or (iv) the occurrence under any Swap Contract of an Early Termination Date (as defined in such Swap Contract) resulting from (x) any event of default under such Swap Contract as to which Borrower or any Subsidiary is the Defaulting Party (as defined in such Swap Contract) or (y) any termination event under any Swap Contract (as defined therein) as to which Borrower or any Subsidiary is an affected party (as so defined) (other than termination events resulting solely from changes in the value of Borrower's stock price or other rates, prices or indices underlying any such Swap Contract), and as to which, in either event, the Swap Termination Value owed by Borrower or such Subsidiary as a result thereof is greater than the Threshold Amount; provided, however, that a Voluntary Redemption Event shall not constitute an Event of Default under this Section 8.01(f); or

(h) Any Loan Document, at any time after its execution and delivery and for any reason other than the agreement of all Lenders or satisfaction in full of all the Obligations,

ceases to be in full force and effect or is declared by a court of competent jurisdiction to be null and void, invalid or unenforceable in any respect; or Borrower denies that it has any or further liability or obligation under any Loan Document, or purports to revoke, terminate or rescind any Loan Document; or

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(i) (i) A final judgment against Borrower is entered for the payment of money in excess of the Threshold Amount, or any non-monetary final judgment is entered against Borrower which has a Material Adverse Effect and, in each case if such judgment remains unsatisfied without procurement of a stay of execution within 30 calendar days after the date of entry of judgment; or (ii) any writ or warrant of attachment or execution or similar process is issued or levied against all or any material part of the property of any such Person representing an obligation for the payment of money which is (singly or in the aggregate with all other such writs or warrants or similar process) in excess of the Threshold Amount and is not released, vacated or fully bonded (A) within 30 calendar days after its issue or levy or (B) if earlier, five days prior to the date of any proposed sale.

(j) Borrower or any of its Material Subsidiaries institutes or consents to the institution of any proceeding under Debtor Relief Laws, or makes an assignment for the benefit of creditors; or applies for or consents to the appointment of any receiver, trustee, custodian, conservator, liquidator, rehabilitator or similar officer for it or for all or any material part of its property; or any receiver, trustee, custodian, conservator, liquidator, rehabilitator or similar officer is appointed without the application or consent of that Person and the appointment continues undischarged or unstayed for 60 calendar days; or any proceeding under Debtor Relief Laws relating to any such Person or to all or any part of its property is instituted without the consent of that Person and continues undismissed or unstayed for 60 calendar days, or an order for relief is entered in any such proceeding; or

(k) (i) An ERISA Event occurs with respect to a Pension Plan or Multiemployer Plan which has resulted or could reasonably be expected to result in liability of Borrower under Title IV of ERISA to the Pension Plan, Multiemployer Plan or the PBGC in an aggregate amount in excess of the Threshold Amount; (ii) the aggregate amount of Unfunded Pension Liability among all Pension Plans at any time exceeds the Threshold Amount; or (iii) Borrower or any ERISA Affiliate fails to pay when due, after the expiration of any applicable grace period, any installment payment with respect to its withdrawal liability under Section 4201 of ERISA under a Multiemployer Plan in an aggregate amount in excess of the Threshold Amount; or

(l) There occurs (i) any Change of Control, or (ii) any event relating to a change in the corporate ownership, control or governance of Borrower or any Subsidiary as issuer ("Issuer") of any notes, bonds, debentures, Subordinated Debt or other debt securities, the result of which is to cause Indebtedness evidenced by any such notes, bonds, debentures, Subordinated Debt or other debt securities to be subject to mandatory redemption or repurchase by Issuer, provided the outstanding amount of such outstanding Indebtedness exceeds the Threshold Amount.

**8.02 Certain Financial Covenant Defaults.** In the event that, after taking into account any extraordinary charge to earnings taken or to be taken as of the end of any fiscal period of Borrower (a "Charge"), and if solely by virtue of such Charge, there would exist an Event of Default due to breach of Section 7.12 as of such fiscal period end date, such Event of Default shall be deemed to arise upon the earlier of (i) the date after such fiscal period end date on which Borrower announces publicly it will take, is taking or has taken such Charge (including an announcement in the form of a statement in a report filed with the SEC) or, if such announcement is made prior to such fiscal period end date, the date that is such fiscal period end date, and (ii) the date Borrower delivers to Administrative Agent its audited annual or unaudited quarterly financial statements in respect of such fiscal period reflecting such Charge as taken.

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**8.03 Remedies Upon Event of Default.** Without limiting any other rights or remedies of Administrative Agent or Lenders provided for elsewhere in this Agreement, or the other Loan Documents, or by applicable Law, or in equity, or otherwise:

(a) Upon the occurrence, and during the continuance, of any Event of Default other than an Event of Default described in Section 8.01(i):

(i) Requisite Lenders may request Administrative Agent to, and Administrative Agent thereupon shall, terminate the Commitments and/or declare all or any part of the unpaid principal of all Loans, all interest accrued and unpaid thereon and all other amounts payable under the Loan Documents to be immediately due and payable, whereupon the same shall become and be immediately due and payable, without protest, presentment, notice of dishonor, demand or further notice of any kind, all of which are expressly waived by Borrower; and/or

(ii) Issuing Lender may, with the approval of Administrative Agent on behalf of Requisite Lenders, demand immediate payment by Borrower of an amount equal to the aggregate amount of all outstanding Letter of Credit Usage to be held in a Letter of Credit Cash Collateral Account.

(b) Upon the occurrence of any Event of Default described in Section 8.01(i):

(i) the Commitments and all other obligations of Administrative Agent or Lenders shall automatically terminate without notice to or demand upon Borrower, which are expressly waived by Borrower;

(ii) the unpaid principal of all Loans, all interest accrued and unpaid thereon and all other amounts payable under the Loan Documents shall be immediately due and payable, without protest, presentment, notice of dishonor, demand or further notice of any kind, all of which are expressly waived by Borrower; and

(iii) an amount equal to the aggregate amount of all outstanding Letter of Credit Usage shall be immediately due and payable to Issuing Lender without notice to or demand upon Borrower, which are expressly waived by Borrower, to be held in a Letter of Credit Cash Collateral Account.

(c) Upon the occurrence of any Event of Default, Lenders and Administrative Agent, or any of them, without notice to (except as expressly provided for in any Loan Document) or demand upon Borrower, which are expressly waived by Borrower (except as to notices expressly provided for in any Loan Document), may proceed to (but only with the consent of Requisite Lenders) protect, exercise and enforce their rights and remedies under the Loan Documents against Borrower and such other rights and remedies as are provided by Law or equity (including, without limitation, the provisions of the applicable Uniform Commercial Code).

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(d) Except as permitted by Section 10.05, no Lender may exercise any rights or remedies with respect to the Obligations without the consent of Requisite Lenders in their sole and absolute discretion. The order and manner in which Administrative Agent's and Lenders' rights and remedies are to be exercised shall be determined by Requisite Lenders in their sole and absolute discretion. Regardless of how a Lender may treat payments for the purpose of its own accounting, for the purpose of computing the Obligations hereunder, payments shall be applied first, to costs and expenses (including Attorney Costs) incurred by Administrative Agent and each Lender, second, to the payment of accrued and unpaid interest on the Loans to and including the date of such application, third, to the payment of the unpaid principal of the Loans, and fourth, to the payment of all other amounts (including fees) then owing to Administrative Agent and Lenders under the Loan Documents, in each case paid pro rata to each Lender in the same proportions that the aggregate Obligations owed to each Lender under the Loan Documents bear to the aggregate Obligations owed under the Loan Documents to all Lenders, without priority or preference among Lenders. No application of payments will cure any Event of Default, or prevent acceleration, or continued acceleration, of amounts payable under the Loan Documents, or prevent the exercise, or continued exercise, of rights or remedies of Administrative Agent and Lenders hereunder or thereunder or at Law or in equity.

## SECTION 9 ADMINISTRATIVE AGENT

### 9.01 Appointment and Authorization of Administrative Agent.

(a) Each Lender hereby irrevocably (subject to Section 9.09) appoints, designates and authorizes Administrative Agent to take such action on its behalf under the provisions of this Agreement and each other Loan Document and to exercise such powers and perform such duties as are expressly delegated to it by the terms of this Agreement or any other Loan Document, together with such powers as are reasonably incidental thereto. Notwithstanding any provision to the contrary contained elsewhere in this Agreement or in any

other Loan Document, Administrative Agent shall not have any duties or responsibilities, except those expressly set forth herein, nor shall Administrative Agent have or be deemed to have any fiduciary relationship with any Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Loan Document or otherwise exist against Administrative Agent. Without limiting the generality of the foregoing sentence, the use of the term “agent” in this Agreement with reference to Administrative Agent is not intended to connote any fiduciary or other implied (or express) obligations arising under agency doctrine of any applicable law. Instead, such term is used merely as a matter of market custom, and is intended to create or reflect only an administrative relationship between independent contracting parties.

(b) Issuing Lender shall act on behalf of Lenders with respect to any Letters of Credit issued by it and the documents associated therewith until such time and except for so long as Administrative Agent may agree at the request of Requisite Lenders to act for such Issuing Lender with respect thereto; provided, however, that Issuing Lender shall have all of the benefits and immunities (i) provided to Administrative Agent in this Section 9 with respect to any acts taken or omissions suffered by Issuing Lender in connection with Letters of Credit issued by it or proposed to be issued by it and the application and agreements for letters of credit pertaining to the Letters of Credit as fully as if the term “Administrative Agent” as used in this Section 9 included Issuing Lender with respect to such acts or omissions, and (ii) as additionally provided in this Agreement with respect to Issuing Lender.

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**9.02 Delegation of Duties.** Administrative Agent may execute any of its duties under this Agreement or any other Loan Document by or through agents, employees or attorneys-in-fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. Administrative Agent shall not be responsible for the negligence or misconduct of any agent or attorney-in-fact that it selects with reasonable care.

**9.03 Liability of Administrative Agent.** No Administrative Agent-Related Person shall (i) be liable for any action taken or omitted to be taken by any of them under or in connection with this Agreement or any other Loan Document or the transactions contemplated hereby (except for its own gross negligence or willful misconduct), or (ii) be responsible in any manner to any Lender for any recital, statement, representation or warranty made by Borrower or any Subsidiary or Affiliate of Borrower, or any officer thereof, contained in this Agreement or in any other Loan Document, or in any certificate, report, statement or other document referred to or provided for in, or received by Administrative Agent under or in connection with, this Agreement or any other Loan Document, or the validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement or any other Loan Document, or for any failure of Borrower or any other party to any Loan Document to perform its obligations hereunder or thereunder. No Administrative Agent-Related Person shall be under any obligation to any Lender to ascertain or to inquire as to the observance or performance of any of the agreements contained in, or conditions of, this Agreement or any other Loan Document, or to inspect the properties, books or records of Borrower or any of Borrower’s Subsidiaries or Affiliates.

**9.04 Reliance by Administrative Agent.**

(a) Administrative Agent shall be entitled to rely, and shall be fully protected in relying, upon any writing, resolution, representation, notice, consent, certificate, affidavit, letter, telegram, facsimile, telex or telephone message, statement or other document or conversation believed by it to be genuine and correct and to have been signed, sent or made by the proper Person or Persons, and upon advice and statements of legal counsel (including counsel to Borrower), independent accountants and other experts selected by Administrative Agent. Administrative Agent shall be fully justified in failing or refusing to take any action under any other Loan Document unless it shall first receive such advice or concurrence of Requisite Lenders as it deems appropriate and, if it so requests, it shall first be indemnified to its satisfaction by Lenders against any and all liability and expense which may be incurred by it by reason of taking or continuing to take any such action. Administrative Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement or any other Loan Document in accordance with a request or consent of Requisite Lenders or all Lenders, if required hereunder, and such request and any action taken or failure to act pursuant thereto shall be binding upon all of Lenders. Where this Agreement expressly permits or prohibits an action unless Requisite Lenders otherwise determine, and in all other instances, Administrative Agent may, but shall not be required to, initiate any solicitation for the consent or a vote of Lenders.

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(b) For purposes of determining compliance with the conditions specified in Section 4.01, each Lender that has executed this Agreement shall be deemed to have consented to, approved or accepted or to be satisfied with, each document or other matter either sent by Administrative Agent to such Lender for consent, approval, acceptance or satisfaction, or required thereunder to be consented to or approved by or acceptable or satisfactory to such Lender.

(c) Each Lender hereby authorizes Administrative Agent, upon payment of the amount certified by Borrower as the full and final payment of all principal, interest, fees and other charges outstanding under this Agreement, and following termination of the Commitments, to execute with and in favor of Borrower a termination letter that, inter alia, terminates Borrower’s obligation to observe any or all of the covenants in Sections 3, 6 and 7 hereof.

**9.05 Notice of Default.** Administrative Agent shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default, except with respect to defaults in the payment of principal, interest and fees required to be paid to Administrative Agent for the account of Lenders, unless Administrative Agent shall have received written notice from a Lender or Borrower referring to this Agreement, describing such Default or Event of Default and stating that such notice is a “notice of default”. Administrative Agent will notify Lenders of its receipt of any such notice. Administrative Agent shall take such action with respect to such Default or Event of Default as may be directed by Requisite Lenders in accordance with Section 8; provided, however, that unless and until Administrative Agent has received any such direction, Administrative Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to such Default or Event of Default as it shall deem advisable or in the best interest of Lenders.

**9.06 Credit Decision; Disclosure of Information by Administrative Agent.** Each Lender acknowledges that no Administrative Agent-Related Person has made any representation or warranty to it, and that no act by Administrative Agent hereinafter taken, including any consent to and acceptance of any assignment or review of the affairs of Borrower and its Subsidiaries, shall be deemed to constitute any representation or warranty by any Administrative Agent-Related Person to any Lender as to any matter, including whether Administrative Agent-Related Persons have disclosed material information in their possession. Each Lender, including any Lender by assignment, represents to Administrative Agent that it has, independently and without reliance upon any Administrative Agent-Related Person and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, prospects, operations, property, financial and other condition and creditworthiness of Borrower and its Subsidiaries, and all applicable bank regulatory laws relating to the transactions contemplated hereby, and made its own decision to enter into this Agreement and to extend credit to Borrower hereunder. Each Lender also represents that it will, independently and without reliance upon any Administrative Agent-Related Person and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under this Agreement and the other Loan Documents, and to make such investigations as it deems necessary to inform itself as to the business, prospects, operations, property, financial and other condition and creditworthiness of Borrower. Except for notices, reports and other documents expressly required to be furnished to Lenders by Administrative Agent herein, Administrative Agent shall not have any duty or responsibility to provide any Lender with any credit or other information concerning the business, prospects, operations, property, financial and other condition or creditworthiness of Borrower or any of its Subsidiaries which may come into the possession of any Administrative Agent-Related Person.

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**9.07 Indemnification of Administrative Agent.** Whether or not the transactions contemplated hereby are consummated, Lenders shall indemnify upon demand each Administrative Agent-Related Person (to the extent not reimbursed by or on behalf of Borrower and without limiting the obligation of Borrower to do so), pro rata, and hold harmless each Administrative Agent-Related Person from and against any and all Indemnified Liabilities incurred by it; provided, however, that no Lender shall be liable for the payment to any Administrative Agent-Related Person of any portion of such Indemnified Liabilities resulting from such Person’s gross negligence or willful misconduct; provided, however, that no action taken in accordance with the directions of Requisite Lenders shall be deemed to constitute gross negligence or willful misconduct for purposes of this Section. Without limitation of the foregoing, each Lender shall reimburse Administrative Agent upon demand for its ratable share of any costs or out-of-pocket expenses (including Attorney Costs) incurred by Administrative 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, any other Loan Document, or any document contemplated by or referred to herein, to the extent that Administrative Agent is not reimbursed for such expenses by or on behalf of Borrower. The undertaking in this Section shall survive the payment of all Obligations hereunder and the resignation or replacement of Administrative Agent.

**9.08 Administrative Agent in Individual Capacity.** KeyBank and its Affiliates may make loans to, issue letters of credit for the account of, accept deposits from, acquire equity interests in and generally engage in any kind of banking, trust, financial advisory, underwriting or other business with Borrower and its Subsidiaries and Affiliates as though KeyBank were not Administrative Agent or Issuing Lender hereunder and without notice to or consent of Lenders. Lenders acknowledge that, pursuant to such activities, KeyBank or its Affiliates may receive information regarding Borrower or its Affiliates (including information that may be subject to confidentiality obligations in favor of Borrower or such Affiliate) and acknowledge that Administrative Agent shall be under no obligation to provide such information to them. With respect to its Loans, KeyBank shall have the same rights and powers under this Agreement as any other Lender and may exercise the same as though it were not Administrative Agent or Issuing Lender.

**9.09 Successor Administrative Agent.** Administrative Agent may, and at the request of Requisite Lenders shall, resign as Administrative Agent upon 30 days' notice to Lenders. If Administrative Agent resigns under this Agreement, Requisite Lenders shall appoint from among Lenders a successor administrative agent for Lenders which successor administrative agent shall be approved by Borrower. If no successor administrative agent is appointed prior to the effective date of the resignation of Administrative Agent, Administrative Agent may appoint, after consulting with Lenders and Borrower and upon approval of Borrower (other than at any time as there exists an Event of Default) which will not be unreasonably withheld, a successor administrative agent from among Lenders. Upon the acceptance of its appointment as successor administrative agent hereunder, such successor administrative agent shall succeed to all the rights, powers and duties of the retiring Administrative Agent and the term "Administrative Agent" shall mean such successor administrative agent and the retiring Administrative Agent's appointment, powers and duties as Administrative Agent shall be terminated. After any retiring Administrative Agent's resignation hereunder as Administrative Agent, the provisions of this Section 9 and Sections 10.03 and 10.11 shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Administrative Agent under this Agreement. If no successor administrative agent has accepted appointment as Administrative Agent (whether due to absence of Borrower approval or otherwise) by the date which is 30 days following a retiring Administrative Agent's notice of resignation, the retiring Administrative Agent's resignation shall nevertheless thereupon become effective and Lenders shall perform all of the duties of Administrative Agent hereunder until such time, if any, as Requisite Lenders appoint a successor agent as provided for above. Notwithstanding the foregoing, however, KeyBank may not be removed as Administrative Agent at the request of Requisite Lenders unless KeyBank shall also simultaneously be replaced as "Issuing Lender" hereunder pursuant to documentation in form and substance reasonably satisfactory to KeyBank.

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**9.10 Syndication Agent; Documentation Agent.** None of Lenders (or Affiliates of Lenders) identified on the facing page or signature pages of this Agreement as a "Syndication Agent" or "Documentation Agent" shall have any right, power, obligation, liability, responsibility or duty under this Agreement in such capacity. Without limiting the foregoing, none of Lenders (or Affiliates of Lenders) so identified shall have or be deemed to have any fiduciary relationship with any Lender. Each Lender acknowledges that it has not relied, and will not rely, on any of Lenders (or Affiliates of Lenders) so identified in deciding to enter into this Agreement or in taking or not taking action hereunder.

## SECTION 10 MISCELLANEOUS

**10.01 Amendments; Consents.** No amendment, modification, supplement, extension, termination or waiver of any provision of this Agreement or any other Loan Document, no approval or consent thereunder, and no consent to any departure by Borrower therefrom shall be effective unless in writing signed by Requisite Lenders and acknowledged by Administrative Agent, and each such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given. Except as otherwise expressly provided herein, without the approval in writing of Administrative Agent and all Lenders, no amendment, modification, supplement, termination, waiver or consent may be effective:

(a) To reduce the amount of principal, principal prepayments or the rate of interest payable on, any Loan, or the amount of any fee or other amount payable to any Lender under the Loan Documents (unless such modification is consented to by each Lender entitled to receive such fee) or to waive an Event of Default consisting of the failure of Borrower to pay when due principal, interest or any commitment fee;

(b) To postpone any date fixed for any payment of principal of, prepayment of principal of, or any installment of interest on, any Loan or any installment of any commitment fee, to extend the term of, or increase the amount of, any Lender's Commitment (it being understood that a waiver of an Event of Default shall not constitute an extension or increase in the Commitment of any Lender) or modify the Pro Rata Share of any Lender;

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(c) To release collateral in which Lenders have a security interest to secure the performance of Borrower's obligations under the Loan Documents constituting more than 20% of the value of Borrower's consolidated assets;

(d) To amend the definition of "Requisite Lenders" or the provisions of Section 4, Section 9, this Section 10.01 or Section 10.06;

(e) To amend Section 7.12(g); or

(f) To amend any provision of this Agreement that expressly requires the consent or approval of all Lenders; provided, however, that (i) no amendment, waiver or consent shall, unless in writing and signed by Issuing Lender in addition to Requisite Lenders or all Lenders, as the case may be, affect the rights or duties of Issuing Lender, (ii) no amendment, waiver or consent shall, unless in writing and signed by Administrative Agent in addition to Requisite Lenders or all Lenders, as the case may be, affect the rights or duties of Administrative Agent, and (iii) the fee letters may be amended, or rights or privileges thereunder waived, in a writing executed by the parties thereto. Any amendment, modification, supplement, termination, waiver or consent pursuant to this Section shall apply equally to, and shall be binding upon, all Lenders and Administrative Agent.

### 10.02 Transmission and Effectiveness of Communications and Signatures.

(a) **Modes of Delivery.** Except as otherwise provided in any Loan Document, notices, requests, demands, directions, agreements and documents delivered in connection with the Loan Documents (collectively, "communications") shall be transmitted by Requisite Notice to the number and address set forth on Schedule 10.02, may be delivered by the following modes of delivery, and shall be effective as follows:

| <b>Mode of Delivery</b> | <b>Effective on earlier of actual receipt and:</b>                          |
|-------------------------|---|
| Courier                 | Scheduled delivery date   |
| Facsimile               | When transmission in legible form complete                                  |
| Mail                    | Fourth Business Day after deposit in U.S. mail first class postage pre-paid |
| Personal delivery       | When received   |
| Telephone               | When conversation completed   |

provided, however, that communications delivered to Administrative Agent pursuant to Section 2 must be in writing and shall not be effective until actually received by Administrative Agent.

(b) **Reliance by Administrative Agent and Lenders.** Administrative Agent and Lenders shall be entitled to rely and act on any communications purportedly given by or on behalf of Borrower even if (i) such communications (A) were not made in a manner specified herein, (B) were incomplete or (C) were not preceded or followed by any other notice specified herein, or (ii) the terms thereof, as understood by the recipient, varied from any subsequent related communications provided for herein. Borrower shall indemnify Administrative Agent and Lenders from any loss, cost, expense or liability as a result of relying on any communications permitted herein.

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(c) **Effectiveness of Facsimile Documents and Signatures.** Documents and agreements delivered from time to time in connection with the Loan Documents may be transmitted and/or signed by facsimile. The effectiveness of any such documents and signatures shall, subject to applicable Law, have the same force and effect as hardcopies with

manual signatures and shall be binding on all Borrower Parties and Administrative Agent and Lenders. Administrative Agent may also request that any such documents and signature be confirmed by a manually-signed hardcopy thereof; provided, however, that the failure to request or deliver any such manually-signed hardcopy shall not affect the effectiveness of any facsimile documents or signatures.

**10.03 Attorney Costs, Expenses and Taxes.** Borrower agrees (a) to pay or reimburse Administrative Agent for all reasonable costs and expenses incurred in connection with the development, preparation, negotiation and execution of the Loan Documents, and the development, preparation, negotiation and execution of any amendment, waiver, consent, supplement or modification to, any Loan Documents, and any other documents prepared in connection herewith or therewith, and the consummation and administration of the transactions contemplated hereby and thereby, including all reasonable Attorney Costs, and (b) to pay or reimburse Administrative Agent and each Lender for all costs and expenses incurred in connection with any refinancing, restructuring, reorganization (including a bankruptcy reorganization), collection and enforcement or attempted enforcement, or preservation of any rights under any Loan Documents, and any other documents prepared in connection herewith or therewith, or in connection with any refinancing, or restructuring of any such documents in the nature of a “workout” or of any insolvency or bankruptcy proceeding, including Attorney Costs. The foregoing costs and expenses shall include all reasonable search, filing, recording, title insurance and appraisal charges and fees and taxes related thereto, and other out-of-pocket expenses incurred by Administrative Agent and the cost of independent public accountants and other outside experts retained by Administrative Agent or any Lender. Such costs and expenses shall also include administrative costs of Administrative Agent reasonably attributable to the administration of the Loan Documents. Any amount payable by Borrower under this Section shall bear interest from the second Business Day following the date of demand for payment at the Default Rate, unless waived by Administrative Agent. The agreements in this Section shall survive repayment of all Obligations.

**10.04 Binding Effect; Assignment.**

(a) This Agreement and the other Loan Documents to which Borrower is a party will be binding upon and inure to the benefit of Borrower, Administrative Agent, Lenders and their respective successors and assigns, except that, Borrower may not assign its rights hereunder or thereunder or any interest herein or therein without the prior written consent of all Lenders and any such attempted assignment shall be void. Any Lender may at any time pledge its Note or any other instrument evidencing its rights as a Lender under this Agreement to a Federal Reserve Bank, but no such pledge shall release such Lender from its obligations hereunder or grant to such Federal Reserve Bank the rights of a Lender hereunder absent foreclosure of such pledge.

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(b) From time to time following the Closing Date, each Lender may assign to one or more Eligible Assignees all or any portion of its Commitment and/or Extensions of Credit; provided that (i) such assignment, if not to a Lender or an Affiliate of the assigning Lender, shall be consented to by Borrower at all times other than during the existence of a Default or Event of Default and by Administrative Agent and Issuing Lender (which approval of Borrower shall not be unreasonably withheld), (ii) a copy of a duly signed and completed Assignment and Acceptance shall be delivered to Administrative Agent, (iii) except in the case of an assignment (A) to an Affiliate of the assigning Lender or to another Lender or (B) of the entire remaining Commitment of the assigning Lender, the portion of the Commitment assigned shall not be less than the Minimum Amount therefor, and (iv) the effective date of any such assignment shall be as specified in the Assignment and Acceptance, but not earlier than the date which is five Business Days after the date Administrative Agent has received the Assignment and Acceptance. Upon any required consent by Administrative Agent, Issuing Lender and Borrower to such assignment and payment of the requisite fee described below, the assignee named therein shall be a Lender for all purposes of this Agreement, with the Pro Rata Share therein set forth and, to the extent of such Pro Rata Share, the assigning Lender shall be released from its further obligations under this Agreement. Borrower agrees that it shall execute and deliver upon request (against delivery by the assigning Lender to Borrower of any Note) to such assignee Lender, one or more Notes evidencing such assignee Lender’s Loans, and to the assigning Lender if requested, one or more Notes evidencing Loans under any Commitment retained by the assigning Lender. Administrative Agent’s consent to any assignment shall not be deemed to constitute any representation or warranty by any Administrative Agent-Related Person as to any matter. For purposes hereof, each mutual fund that is an Affiliate of a Lender shall be deemed to be a single Eligible Assignee, whether or not such fund is managed by the same fund manager as other mutual funds that are Affiliates of the same Lender.

(c) After receipt of a completed Assignment and Acceptance, and receipt of an assignment fee of \$3,500 from such Eligible Assignee (including in the case of assignments to Affiliates of assigning Lenders), Administrative Agent shall, promptly following the effective date thereof, provide to Borrower and Lenders a revised Schedule 10.02 giving effect thereto.

(d) Each Lender may from time to time, without the consent of any other Person, grant participations to one or more other Person (including another Lender) of all or any portion of its Pro Rata Share of its Commitment or Extensions of Credit; provided, however, that (i) such Lender’s obligations under this Agreement shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations, (iii) the participating banks or other financial institutions shall not be a Lender hereunder for any purpose except, if the participation agreement so provides, for the purposes of Section 3 (but only to the extent that the cost of such benefits to Borrower does not exceed the cost which Borrower would have incurred in respect of such Lender absent the participation) and subject to Sections 10.05 and 10.06, (iv) Borrower, Administrative Agent and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender’s rights and obligations under this Agreement, (v) the participation agreement shall not restrict an increase in the combined Commitments or in granting Lender’s Pro Rata Share, so long as the amount of the participation interest is not affected thereby, and (vi) the consent of the holder of such participation interest shall not be required for amendments or waivers of provisions of the Loan Documents; provided, however, that the assigning Lender may, in any agreement with a participant, give such participant the right to consent to any matter which (A) extends the Maturity Date as to such participant or any other date upon which any payment of money is due to such participant, (B) reduces the rate of interest owing to such participant, any fee or any other monetary amount owing to such participant, or (C) reduces the amount of any installment of principal owing to such participant. Any Lender that sells a participation to any Person that is a “foreign corporation, partnership or trust” within the meaning of the Code shall include in its participation agreement with such Person a covenant by such Person that such Person will comply with the provisions of Section 10.21 as if such Person were a Lender and provide that Administrative Agent and Borrower shall be third party beneficiaries of such covenant.

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**10.05 Set-off.** In addition to any rights and remedies of Administrative Agent and Lenders or any assignee or participant of any Lender or any Affiliate thereof (each, a “Proceeding Party”) provided by law, upon the occurrence and during the continuance of any Event of Default, each Proceeding Party is authorized at any time and from time to time, without prior notice to Borrower, any such notice being waived by Borrower to the fullest extent permitted by law, to proceed directly, by right of set-off, banker’s lien, or otherwise, against any assets of Borrower Parties which may be in the hands of such Proceeding Party (including all general or special, time or demand, provisional or other deposits and other indebtedness owing by such Proceeding Party to or for the credit or the account of Borrower) and apply such assets against the Obligations, irrespective of whether such Proceeding Party shall have made any demand therefor and although such Obligations may be unmatured. Each Lender agrees promptly to notify Borrower and Administrative Agent after any such set-off and application made by such Lender; provided, however, that the failure to give such notice shall not affect the validity of such set-off and application.

**10.06 Sharing of Payments.** Each Lender severally agrees that if it, through the exercise of any right of setoff, banker’s lien or counterclaim against Borrower or otherwise, receives payment on account of the Outstanding Obligations held by it that is ratably more than any other Lender receives in payment on account of the Outstanding Obligations held by such other Lender, then, subject to applicable Laws: (a) the Lender exercising the right of setoff, banker’s lien or counterclaim or otherwise receiving such payment shall purchase, and shall be deemed to have simultaneously purchased, from the other Lender a participation in the Outstanding Obligations held by the other Lender and shall pay to the other Lender a purchase price in an amount so that the share of the Outstanding Obligations held by each Lender after the exercise of the right of setoff, banker’s lien or counterclaim or receipt of payment shall be in the same proportion that existed prior to the exercise of the right of setoff, banker’s lien or counterclaim or receipt of payment; and (b) such other adjustments and purchases of participations shall be made from time to time as shall be equitable to ensure that all Lenders share any payment obtained in respect of the Outstanding Obligations ratably in accordance with each Lender’s share of the Outstanding Obligations immediately prior to, and without taking into account, the payment; provided that, if all or any portion of a disproportionate payment obtained as a result of the exercise of the right of setoff, banker’s lien, counterclaim or otherwise is thereafter recovered from the purchasing Lender by Borrower or any Person claiming through or succeeding to the rights of Borrower, the purchase of a participation shall be rescinded and the purchase price thereof shall be restored to the extent of the recovery, but without interest. Each Lender that purchases a participation in the Outstanding Obligations pursuant to this Section shall from and after the purchase have the right to give all notices, requests, demands, directions and other communications under this Agreement with respect to the portion of the Outstanding Obligations purchased to the same extent as though the purchasing Lender were the original owner of the Outstanding Obligations purchased. Borrower expressly consents to the foregoing arrangements and agrees that any Lender holding a participation in an Obligation so purchased may exercise any and all rights of setoff, banker’s lien or

counterclaim with respect to the participation as fully as if Lender were the original owner of the Obligation purchased.

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**10.07 No Setoff.** As to any and all funds, securities or other assets of Borrower which are now or hereafter held by Administrative Agent or any Lender as collateral pursuant to the Credit Agreement or any other Loan Document for any of the obligations thereunder (including, without limitation, all amounts in the Supplemental Borrowing Account and any other deposit account, securities account or other similar account) (collectively the "Collateral Assets"), Administrative Agent and the Lenders agree that they shall not exercise any right of setoff or recoupment against nor shall they assert any security interest in the Collateral Assets in connection with any other obligation owed to Administrative Agent or any Lender which is unrelated to the Credit Agreement or the Loan Documents, except for: (i) recovery for any items deposited with Administrative Agent or any Lender and returned unpaid or as to which claims have been asserted as to breach of transfer or presentment warranties, (ii) overdrafts on any account which generated the funds which constitute part of the Collateral Assets, (iii) automated clearing house entries, and (iv) Administrative Agent or any Lender's usual and customary fees for services rendered in connection with the assets or bank accounts which constitute the Collateral Assets.

**10.08 No Waiver; Cumulative Remedies.**

(a) No failure by any Lender or Administrative Agent to exercise, and no delay by any Lender or Administrative Agent in exercising, any right, remedy, power or privilege hereunder, shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege under any Loan Document preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. Without limiting the generality of the foregoing, the terms and conditions of Section 4 may be waived in whole or in part, with or without terms or conditions, in respect of any Extension of Credit without prejudicing Administrative Agent's or Lenders' rights to assert them in whole or in part in respect of any other Extension of Credit.

(b) The rights, remedies, powers and privileges herein or therein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by Law. Any decision by Administrative Agent or any Lender not to require payment of any interest (including Default Interest), fee, cost or other amount payable under any Loan Document or to calculate any amount payable by a particular method on any occasion shall in no way limit or be deemed a waiver of Administrative Agent's or such Lender's right to require full payment thereof, or to calculate an amount payable by another method that is not inconsistent with this Agreement, on any other or subsequent occasion.

71.

(c) The terms and conditions of Section 9 are for the sole benefit of Administrative Agent and Lenders.

**10.09 Usury.** Notwithstanding anything to the contrary contained in any Loan Document, the interest and fees paid or agreed to be paid under the Loan Documents shall not exceed the maximum rate of non-usurious interest permitted by applicable Law (the "Maximum Rate"). If Administrative Agent or any Lender shall receive interest or a fee in an amount that exceeds the Maximum Rate, the excessive interest or fee shall be applied to the principal of the Outstanding Obligations or, if it exceeds the unpaid principal, refunded to Borrower. In determining whether the interest or a fee contracted for, charged, or received by Administrative Agent or a Lender exceeds the Maximum Rate, such Person may, to the extent permitted by applicable Law, (a) characterize any payment that is not principal as an expense, fee, or premium rather than interest, (b) exclude voluntary prepayments and the effects thereof, and (c) amortize, prorate, allocate, and spread in equal or unequal parts the total amount of interest throughout the contemplated term of the Obligations.

**10.10 Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**10.11 Integration.** This Agreement, together with the other Loan Documents and any letter agreements referred to herein, comprises the complete and integrated agreement of the parties on the subject matter hereof and supersedes all prior agreements, written or oral, on the subject matter hereof. In the event of any conflict between the provisions of this Agreement and those of any other Loan Document, the provisions of this Agreement shall control and govern; provided that the inclusion of supplemental rights or remedies in favor of Administrative Agent or Lenders in any other Loan Document shall not be deemed a conflict with this Agreement. Each Loan Document was drafted with the joint participation of the respective parties thereto and shall be construed neither against nor in favor of any party, but rather in accordance with the fair meaning thereof.

**10.12 Nature of Lenders' Obligations.** Nothing contained in this Agreement or any other Loan Document and no action taken by Administrative Agent or Lenders or any of them pursuant hereto or thereto may, or may be deemed to, make Lenders a partnership, an association, a joint venture or other entity, either among themselves or with Borrower or any Affiliate of Borrower. Each Lender's obligation to make any Extension of Credit pursuant hereto is several and not joint or joint and several, and in the case of the initial Extension of Credit only is conditioned upon the performance by all other Lenders of their obligations to make the initial Extension of Credit. A default by any Lender will not increase the Pro Rata Share attributable to any other Lender.

**10.13 Survival of Representations and Warranties.** All representations and warranties made hereunder and in any Loan Document, certificate or statement delivered pursuant hereto or thereto or in connection herewith or therewith shall survive the execution and delivery thereof but shall terminate the later of (a) when the Commitments are terminated and (b) when no Obligations remain outstanding under any Loan Document. Such representations and warranties have been or will be relied upon by Administrative Agent and each Lender, notwithstanding any investigation made by Administrative Agent or any Lender or on their behalf.

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**10.14 Indemnity by Borrower.** Borrower agrees to indemnify, defend, save and hold harmless each Administrative Agent-Related Person and each Lender and their respective Affiliates, directors, officers, agents, attorneys and employees (collectively, the "Indemnitees") from and against: (a) any and all claims, demands, actions or causes of action that are asserted against any Indemnitee by any Person (other than Administrative Agent or any Lender) relating directly or indirectly to a claim, demand, action or cause of action that such Person asserts or may assert against Borrower, any of its Affiliates or any of its officers or directors; (b) any and all claims, demands, actions or causes of action arising out of or relating to, the Loan Documents, any predecessor loan documents, the Commitments, the use or contemplated use of the proceeds of any Loan, the Colorado Springs Real Property Security, the Boulder Real Property Security, the California Real Property Security, property that is the subject of any Material Lease or any other collateral given to secure the obligations of Borrower under this Agreement, or the relationship of Borrower, Administrative Agent and Lenders under this Agreement; (c) any administrative or investigative proceeding by any Governmental Authority arising out of or related to a claim, demand, action or cause of action described in subsection (a) or (b) above; and (d) all liabilities, claims, actions, loss, damages, including, without limitation, foreseeable and unforeseeable consequential damages, costs and expenses (including sums paid in settlement of claims and all consultant, expert and legal fees and expenses of Indemnitees' counsel) directly or indirectly arising out of or resulting from any Hazardous Substance being present at any time in or around any part of the Colorado Real Property Security, or in the soil, groundwater or soil vapor on or under the Colorado Real Property Security, including those incurred in connection with any investigation of site conditions or any clean-up, remedial, removal or restoration work, or any resulting damages or injuries to the person or property of any third parties or to any natural resources; (e) any and all liabilities, losses, costs or expenses (including Attorney Costs) that any Indemnitee suffers or incurs as a result of the assertion of any foregoing claim, demand, action, cause of action or proceeding, or as a result of the preparation of any defense in connection with any foregoing claim, demand, action, cause of action or proceeding, in all cases, whether or not an Indemnitee is a party to such claim, demand, action, cause of action or proceeding, including those liabilities caused by an Indemnitee's own negligence (all the foregoing, collectively, the "Indemnified Liabilities"); provided that no Indemnitee shall be entitled to indemnification for any loss caused by its own gross negligence or willful misconduct or for any loss asserted against it by another Indemnitee.

**10.15 Nonliability of Lenders.**

Borrower acknowledges and agrees that:

(a) Any inspections of any property of Borrower made by or through Administrative Agent or Lenders are for purposes of administration of the Loan Documents only, and Borrower is not entitled to rely upon the same (whether or not such inspections are at the expense of Borrower);

(b) By accepting or approving anything required to be observed, performed, fulfilled or given to Administrative Agent or Lenders pursuant to the Loan Documents, neither

Administrative Agent nor Lenders shall be deemed to have warranted or represented the sufficiency, legality, effectiveness or legal effect of the same, or of any term, provision or condition thereof, and such acceptance or approval thereof shall not constitute a warranty or representation to anyone with respect thereto by Administrative Agent or Lenders;

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(c) The relationship between Borrower and Administrative Agent and Lenders is, and shall at all times remain, solely that of borrower and lenders; neither Administrative Agent nor any Lender shall under any circumstance be deemed to be in a relationship of confidence or trust or a fiduciary relationship with Borrower or its Affiliates, or to owe any fiduciary duty to Borrower or its Affiliates; neither Administrative Agent nor any Lender undertakes or assumes any responsibility or duty to Borrower or its Affiliates to select, review, inspect, supervise, pass judgment upon or inform Borrower or its Affiliates of any matter in connection with their property or the operations of Borrower or its Affiliates; Borrower and its Affiliates shall rely entirely upon their own judgment with respect to such matters; and any review, inspection, supervision, exercise of judgment or supply of information undertaken or assumed by Administrative Agent or any Lender in connection with such matters is solely for the protection of Administrative Agent and Lenders and neither Borrower nor any other Person is entitled to rely thereon; and

(d) Neither Administrative Agent nor any Lender shall be responsible or liable to any Person for any loss, damage, liability or claim of any kind relating to injury or death to Persons or damage to property caused by the actions, inaction or negligence of Borrower and/or its Affiliates and Borrower hereby indemnifies and holds Administrative Agent and Lenders harmless from any such loss, damage, liability or claim.

**10.16 No Third Parties Benefited.** This Agreement is made for the purpose of defining and setting forth certain obligations, rights and duties of Borrower, Administrative Agent and Lenders in connection with the Extensions of Credit, and is made for the sole benefit of Borrower, Administrative Agent and Lenders, and Administrative Agent's and Lenders' successors and assigns. Except as provided in Sections 10.04 and 10.13, no other Person shall have any rights of any nature hereunder or by reason hereof.

**10.17 Severability.** Any provision of the Loan Documents that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

**10.18 Confidentiality.** Administrative Agent and each Lender shall use any confidential non-public information concerning Borrower and its Subsidiaries that is furnished to Administrative Agent or such Lender by or on behalf of Borrower and its Subsidiaries in connection with the Loan Documents (collectively, "Confidential Information") solely for the purpose of evaluating and providing products and services to them and administering and enforcing the Loan Documents, and it will hold the Confidential Information in confidence. Notwithstanding the foregoing, Administrative Agent and each Lender may disclose Confidential Information (a) to their Affiliates or any of their or their Affiliates' directors, officers, employees, advisors, or representatives (collectively, the "Representatives") whom it determines need to know such information for the purposes set forth in this Section; (b) to any bank or financial institution or other entity to which such Lender has assigned or desires to assign an interest or participation in the Loan Documents or the Obligations, provided that any such foregoing recipient of such Confidential Information agrees to keep such Confidential Information confidential as specified herein; (c) to any governmental agency or regulatory body having or claiming to have authority to regulate or oversee any aspect of Administrative Agent's or such Lender's business or that of its Representatives in connection with the exercise of such authority or claimed authority; (d) to the extent necessary or appropriate to effect or preserve Administrative Agent's or such Lender's or any of their Affiliates' security (if any) for any Obligation or to enforce any right or remedy or in connection with any claims asserted by or against Administrative Agent or such Lender or any of their Representatives; and (e) pursuant to any subpoena or any similar legal process. For purposes hereof, the term "Confidential Information" shall not include information that (x) is in Administrative Agent's or a Lender's possession prior to its being provided by or on behalf of the Borrower Parties, provided that such information is not known by Administrative Agent or such Lender to be subject to another confidentiality agreement with, or other legal or contractual obligation of confidentiality to, Borrower, (y) is or becomes publicly available (other than through a breach hereof by Administrative Agent or such Lender), or (z) becomes available to Administrative Agent or such Lender on a nonconfidential basis, provided that the source of such information was not known by Administrative Agent or such Lender to be bound by a confidentiality agreement or other legal or contractual obligation of confidentiality with respect to such information.

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**10.19 Further Assurances.** Borrower and its Subsidiaries shall, at their expense and without expense to Lenders or Administrative Agent, do, execute and deliver such further acts and documents as any Lender or Administrative Agent from time to time reasonably requires for the assuring and confirming unto Lenders or Administrative Agent of the rights hereby created or intended now or hereafter so to be, or for carrying out the intention or facilitating the performance of the terms of any Loan Document.

**10.20 Headings.** Section headings in this Agreement and the other Loan Documents are included for convenience of reference only and are not part of this Agreement or the other Loan Documents for any other purpose.

**10.21 Time of the Essence.** Time is of the essence of the Loan Documents.

**10.22 Foreign Lenders.** Each Lender that is a "foreign corporation, partnership or trust" within the meaning of the Code (a "Foreign Lender") shall deliver to Administrative Agent, prior to receipt of any payment subject to withholding under the Code (or after accepting an assignment of an interest herein), two duly signed completed copies of either Form W-8BEN or any successor thereto (relating to such Person and entitling it to a complete exemption from withholding on all payments to be made to such Person by Borrower pursuant to this Agreement) or Form W-8ECI or any successor thereto (relating to all payments to be made to such Person by Borrower pursuant to this Agreement) of the United States Internal Revenue Service or such other evidence satisfactory to Borrower and Administrative Agent that no withholding under the federal income tax laws is required with respect to such Person. Thereafter and from time to time, each such Person shall (a) promptly submit to Administrative Agent such additional duly completed and signed copies of one of such forms (or such successor forms as shall be adopted from time to time by the relevant United States taxing authorities) as may then be available under then current United States laws and regulations to avoid, or such evidence as is satisfactory to Borrower and Administrative Agent of any available exemption from, United States withholding taxes in respect of all payments to be made to such Person by Borrower pursuant to this Agreement, and (b) take such steps as shall not be materially disadvantageous to it, in the reasonable judgment of such Lender, and as may be reasonably necessary (including the re-designation of its Lending Office) to avoid any requirement of applicable Laws that Borrower make any deduction or withholding for taxes from amounts payable to such Person. If such Persons fails to deliver the above forms or other documentation, then Administrative Agent may withhold from any interest payment to such Person an amount equivalent to the applicable withholding tax imposed by Sections 1441 and 1442 of the Code, without reduction. If any Governmental Authority asserts that Administrative Agent did not properly withhold any tax or other amount from payments made in respect of such Person, such Person shall indemnify Administrative Agent therefor, including all penalties and interest and costs and expenses (including Attorney Costs) of Administrative Agent. The obligation of Lenders under this Section shall survive the payment of all Obligations and the resignation or replacement of Administrative Agent.

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### **10.23 Removal and Replacement of Lenders.**

(a) Under any circumstances set forth in this Agreement providing that Borrower shall have the right to remove and replace a Lender as a party to this Agreement, Borrower may, upon notice to such Lender and Administrative Agent, remove such Lender by (i) non ratably terminating such Lender's Commitment, and (ii) if being replaced, causing such Lender to assign its Commitment to one or more other Lenders or Eligible Assignees acceptable to Borrower, Administrative Agent and Issuing Lender; provided, however, that during the existence of any Event of Default, Borrower may not remove or replace a Lender pursuant to this Section 10.22. Any removed or replaced Lender shall be entitled to (x) payment in full of all principal, interest, fees and other amounts owing to such Lender or such Lender's affiliated Indemnitees under any Loan Document through the date of termination or assignment (including any amounts payable pursuant to Section 3.05), (y) appropriate assurances and indemnities (which may include letters of credit) as such Lender may reasonably require with respect to its participation interest in any Letters of Credit and (z) a release of such Lender from its obligations under the Loan Documents. Any Lender being replaced shall execute and deliver an Assignment and Acceptance covering such Lender's Commitment, and shall otherwise comply with Section 10.04. Administrative Agent shall distribute an amended Schedule 2.01, which shall thereafter be incorporated into this Agreement, to reflect adjustments to Lenders and their Commitments.

(b) In order to make all Lender's interests in any outstanding Extensions of Credit ratable in accordance with any revised Pro Rata Shares after giving effect to the removal or replacement of a Lender, Borrower shall pay or prepay, if necessary, on the effective date thereof, all outstanding Extensions of Credit of all Lenders, together with any amounts due

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**10.24 Governing Law.**

(a) THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAW OF THE STATE OF CALIFORNIA APPLICABLE TO AGREEMENTS MADE AND TO BE PERFORMED ENTIRELY WITHIN SUCH STATE; PROVIDED THAT ADMINISTRATIVE AGENT AND EACH LENDER SHALL RETAIN ALL RIGHTS ARISING UNDER FEDERAL LAW.

(b) ANY LEGAL ACTION OR PROCEEDING WITH RESPECT TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT MAY BE BROUGHT IN THE COURTS OF THE STATE OF CALIFORNIA OR OF THE UNITED STATES FOR THE CENTRAL DISTRICT OF SUCH STATE, AND BY EXECUTION AND DELIVERY OF THIS AGREEMENT, BORROWER, ADMINISTRATIVE AGENT AND EACH LENDER CONSENTS, FOR ITSELF AND IN RESPECT OF ITS PROPERTY, TO THE NON-EXCLUSIVE JURISDICTION OF THOSE COURTS. BORROWER, ADMINISTRATIVE AGENT AND EACH LENDER IRREVOCABLY WAIVES ANY OBJECTION, INCLUDING ANY OBJECTION TO THE LAYING OF VENUE OR BASED ON THE GROUNDS OF FORUM NON CONVENIENS, WHICH IT MAY NOW OR HEREAFTER HAVE TO THE BRINGING OF ANY ACTION OR PROCEEDING IN SUCH JURISDICTION IN RESPECT OF ANY LOAN DOCUMENT OR OTHER DOCUMENT RELATED HERETO. BORROWER, ADMINISTRATIVE AGENT AND EACH LENDER WAIVES PERSONAL SERVICE OF ANY SUMMONS, COMPLAINT OR OTHER PROCESS, WHICH MAY BE MADE BY ANY OTHER MEANS PERMITTED BY THE LAW OF SUCH STATE.

**10.25 Waiver of Right to Trial by Jury.** EACH PARTY TO THIS AGREEMENT HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION ARISING UNDER ANY LOAN DOCUMENT OR IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO ANY LOAN DOCUMENT, OR THE TRANSACTIONS RELATED THERETO, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER FOUNDED IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY TO THIS AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE SIGNATORIES HERETO TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY.

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**10.26 Entire Agreement.** This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

QUANTUM CORPORATION, a Delaware corporation, as Borrower

By: /s/Michael J. Lambert

Name: Michael J. Lambert

Title: Executive Vice President and CFO

KEYBANK NATIONAL ASSOCIATION, as  
Administrative Agent, Issuing Lender, Sole  
Arranger, Sole Book Manager and Lender

By: /s/Robert W. Boswell

Name: Robert W. Boswell

Title: Vice President

FLEET NATIONAL BANK, as Lender

By: /s/Greg Roux

Name: Greg Roux

Title: Director

UNION BANK OF CALIFORNIA, N.A., as Lender

By: /s/Sarabelle Hitchner

Name: Sarabelle Hitchner

Title: Vice President

SILICON VALLEY BANK, as Lender

By: /s/Kevin Walsh

Name: Kevin Walsh

Title: Vice President

COMERICA BANK CALIFORNIA, as Lender

By: /s/Rob Ways

Name: Rob Ways

Title: Vice President



MASTER SUPPLY AND INTELLECTUAL PROPERTY LICENSE AGREEMENT

THIS MASTER SUPPLY AGREEMENT ("Agreement") is dated and made effective this 10<sup>th</sup> day of December, 2002 (the "Effective Date") by and between Quantum Corporation, a Delaware corporation having its principal place of business at 501 Sycamore Street, Milpitas, California 95035, and its wholly-owned subsidiaries and Affiliates (collectively "Quantum"), and Jabil Circuit, Inc., a Delaware corporation, having its principal place of business at 10560 Ninth Street North, St. Petersburg, Florida, 33716 and its wholly-owned subsidiaries and Affiliates (collectively "Jabil").

WITNESSETH:

WHEREAS, Jabil Circuit Sdn. Bhd. (Company No. 336537-M), a corporation organized under the laws of Malaysia and having its registered office at 56 Hilir Sungai Keluang 1, Bayan Lepas F12 IV 11900 Penang, Malaysia ("JCS") and Quantum Peripherals (M) Sdn. Bhd. (Company No. 267908-V) ("QPM"), a company established under the laws of Malaysia having its principal place of business at Plot 21 (A), Bayan Lepas, F1Z4, 11900 Penang, Malaysia, (the "Facility") have entered into that certain Asset Purchase Agreement (the "Asset Purchase Agreement") dated August 29, 2002, under which QPM is selling to JCS, and JCS is purchasing from QPM, substantially all of the operations located at the Facility conducted by QPM at the Facility as described on Exhibit A to the Asset Purchase Agreement (the "Acquired Operations"), which such Acquired Operations include, but are not limited to, the assembly and fulfillment operations of the Products set forth in Article 1.14 below and JCS is willing to assume certain obligations relating to the Acquired Operations, all upon the terms and conditions set forth in the Asset Purchase Agreement; and

WHEREAS, Jabil will become a major supplier of products and services relating to the assembly and fulfillment operations for the Products, as defined in Article 1.14 hereof; and

WHEREAS, Quantum and Jabil desire to enter into an agreement under which Jabil will provide assembly and fulfillment services to Quantum following the closing of the transactions contemplated by the Asset Purchase Agreement.

NOW, THEREFORE, in furtherance of the foregoing premises and in consideration of the mutual covenants and obligations hereinafter set forth, the parties hereto, intending to be legally bound hereby, do agree as follows:

Article 1. DEFINITIONS

- 1.1 "Affiliate" shall mean any entity in which either party owns, directly or indirectly, more than 50% of the outstanding securities, or can otherwise exercise direct control.
- 1.2 "Applicable Laws" shall mean any federal, state, local or foreign statute, law, ordinance, rule, administrative interpretation, regulation, order, writ, injunction, directive, judgment, decree or other requirement of any Governmental Authority applicable to the parties and their Affiliates or any of their respective properties, assets, officers, directors, employees, consultants or agents.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

- 1.3 "Approved Vendor List" or "AVL" shall mean the written list of third party suppliers or contractors of materials, parts and components utilized by Jabil in the manufacture and assembly of the Products hereunder, which have been supplied or approved by Quantum.
- 1.4 "Base Platform" shall mean (i) with respect to the DLT Products (those Products which are not SSG Products as defined in Article 1.24), that part of the Products that utilize mechanical subassemblies to pull digital linear tape media across read/write heads to record and read data for storage purposes; and (ii) with respect to the SSG Products (as that term is defined in Article 1.24 hereof), that part of the Products that uses a shuttle mechanism for delivery and retrieval of tape media from the drive.
- 1.5 "Commercially Reasonable Efforts" or "Commercially Reasonable Time" means those efforts or that period of time, as the case may be, that would be deemed both commercially practicable and reasonably financially prudent after having taken into account all relevant commercial considerations. "Relevant commercial considerations" shall be deemed to include, without limitation, (i) all pertinent facts and circumstances; (ii) financial costs; (iii) resource availability and impact; (iv) probability of success; and (v) other commercial practicalities.
- 1.6 "Competitive Price" or "Competitive Pricing" shall mean a per-unit price for any product that is equal to, or less than, the per-unit price offered to Quantum for the manufacture and assembly of that product in accordance with Quantum's Specifications by another person, firm, corporation, or other entity that has the facilities, personnel, experience and technical expertise to manufacture and assemble those products to Quantum's reasonable satisfaction.  
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1.7 "Confidential Information" shall include both the Jabil and Quantum Confidential Information and further include all information, other than that which is in the public domain, relating to the Products, or to the business, assets, finances, financial condition, suppliers, customers, plans or prospects of any party to this Agreement. Quantum's Confidential Information shall include all of the Quantum Technology, and may include (by way of illustration and not limitation) financial information, business plans, pricing information and data regarding customers, suppliers and employees. Jabil's Confidential Information shall include, by way of illustration and not limitation, software, firmware, hardware, technology and know-how and other proprietary information or intellectual property embodied therein that is known, owned or licensed by and proprietary to Jabil and not generally available to the public, including plans, analyses, trade secrets, patent rights, copyrights, trademarks, inventions, supplier contracts and information, fees and pricing information, operating procedures, procedure manuals, processes, methods, computer applications, programs and designs, and any processed or collected data. Confidential Information may be disclosed hereunder from one party to another party hereto orally, in writing or in any other tangible medium; provided, however, that all such Confidential Information shall be: (i) tangible medium and marked "confidential"; (ii) identified by one of the parties hereto to the other party orally or in writing as to the confidential nature of such information; or (iii) information where due to its nature or character, a reasonable person under similar circumstances would treat such information as confidential.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- 1.8 "Configuration Requirements" shall mean the unique configuration requirements for any of the Products to be manufactured and assembled by Jabil hereunder as specified and communicated by Quantum to Jabil by means of the statement of work accompanying the Sales Order or MDS for those Products submitted by Quantum under Article 2.3 hereof.
- 1.9 "Follow-On or Derivative" products shall mean those products that are designed and/or developed by Quantum during the Term hereof and that (i) incorporate tape media; (ii) are based upon and incorporate the Quantum Technology and the Quantum Product IP and any improvements or enhancements thereto; and (iii) use the same Base Platform as the preceding Product.
- 1.10 "Governmental Authority" means any foreign or domestic federal, territorial, state or local governmental authority, quasi-governmental authority, instrumentality, court, government or self-regulatory organization, commission, tribunal or organization or any regulatory, administrative or other agency, or any political or other subdivision, department or branch of any of the foregoing, including, but not limited to, the Malaysian Industrial Development Authority, the Ministry of International Trade & Industry, Malaysia, Penang Development Corporation Malaysia and the state authority of the State of Penang, Malaysia.
- 1.11 "Improvements and Modifications" shall mean and include any and all updates, changes, engineering changes, adaptations, enhancements and/or modifications supplied or approved by Quantum that: (i) correct any errors or defects in any of the Products; (ii) improve or enhance the existing functions of any of the Products; (iii) change any of the functions or add new features or functions to any of the Products; or (iv) reduce the cost of manufacturing and assembling any of the Products.
- 1.12 "Jabil's Created Technology" shall mean and include any and all discoveries, inventions, know-how, technical information, procedures, manufacturing and other processes, software, firmware and technology created, developed, obtained or reduced to practice by or for Jabil which are: (i) incorporated or embodied in any of the Products, including any Improvements or Modifications thereof; or (ii) used by Jabil in the manufacture or assembly of any of the Products, or otherwise used in Jabil's performance of its obligations under this Agreement.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- 1.13 "Jabil's Existing Technology" shall mean and include any and all discoveries, inventions, know-how, technical information, procedures, manufacturing and other processes, software, firmware and technology owned by, or licensed to, Jabil, or otherwise known to the Jabil, as of the Effective Date of this Agreement that are used by Jabil at any time during the Term in the manufacture and assembly of the Products hereunder.
- 1.14 "Long-Lead Time Components" shall mean a component or material used in the manufacture and assembly of the Products for which the lead-time is in excess of twelve (12) weeks.
- 1.15 "Manufacturing Offset" shall mean the time required by Jabil to manufacture, test and assemble the Products.

- 1.16 “Products” shall mean those Quantum Products as listed on Exhibit B, and any and all Follow-On or Derivative products; provided, however, that such Follow-On or Derivative products are subject to Competitive Pricing; and provided further that the Follow-On or Derivative Products shall not include any product for which any Quantum Party acquires the right to manufacture, market, distribute and/or sell at any time after May 20, 2002, pursuant to any merger, acquisition, joint venture, partnership or license agreement with any other person, firm, corporation or other entity.
- 1.17 “Quantum Intellectual Property” shall mean and include any and all patents, copyrights, designs, mask work or semiconductor circuit design rights, trademarks, service marks, trade names and other proprietary rights, and all registrations thereof and applications therefor now or hereafter incorporated in, relating to, or associated with any of the Products and/or the manufacture thereof.
- 1.18 “Quantum IT Software and Infrastructure” shall mean the software and operational IT infrastructure currently used by Quantum and QPM in the manufacture and assembly of the Products.
- 1.19 “Quantum OEM Customer” shall mean any Quantum original equipment manufacture customer.
- 1.20 “Quantum Process IP” shall mean that subset of the Quantum Technology and Quantum Intellectual Property that pertains to processes for manufacturing the Products.
- 1.21 “Quantum Product IP” shall mean that subset of the Quantum Technology and Quantum Intellectual Property that pertains to, or is incorporated into, any of the Products.
- 1.22 The “Quantum Technology” shall mean and include all designs, concepts, drawings, blueprints, models, methods, Specifications, bills of materials, manufacturing equipment requirements, manufacturing data and procedures, performance data and criteria, quality assurance standards, computer software and firmware know-how and other technical information, in whatever form, tangible or intangible, relating to the design, development, manufacture, production, configuration, operation, maintenance and/or repair of any or all of the Products.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- 1.23 “Sales Order” shall mean the binding order for Products (including any Purchase Order, in the case of the SSG Products) issued by Quantum to Jabil indicating type of Products, Configuration Requirements, delivery date, quantity of Products and shipping instructions.
- 1.24 The “Specifications” shall mean Quantum’s specifications for manufacture and assembly of each of the Products, as supplied or approved by Quantum and notified to Jabil in writing as of the Effective Date of this Agreement and/or from time to time during the Term, which shall include, but will not be limited to: (i) Configuration Requirements; (ii) Improvements and Modifications; (iii) those product requirements for Product packaging and storage detailed in the then current Quantum Supplier Quality Management Handbook or otherwise specified in writing; (iv) testing requirements; and (v) written waivers to previously agreed specifications that are issued by Quantum, or amended in writing, at their sole discretion from time to time during the Term .
- 1.25 “Strategic Components” are those components of the Products identified in Exhibit A for which Quantum will retain certain process qualification and direct vendor relation responsibilities (but not primary procurement or processing responsibilities), in accordance with the provisions of Article 4.3 hereof.
- 1.26 The “SSG Products” shall mean that subset of the Products including the Autoloader, Canister Assemblies and M1500 Products.
- 1.27 “Workmanship” shall mean that standard of care used by Jabil to manufacture and assemble the Products (including, but not limited to, the incoming inspection of components and materials) in accordance with the Specifications.

**Article 2: DEFINITIONS**

2.1 Quantum shall submit quarterly forecasts, which shall set forth the anticipated requirements of Quantum for each of the Products for the rolling twelve (12) month period to which each such Forecast pertains (the "Forecast"); provided, however, that each Forecast submitted by Quantum under this Article 2.1 shall be in quarterly increments and is intended for planning purposes only, and no such Forecast shall be binding upon any of the parties hereto, except to the extent that such Forecast shall be express authorization for Jabil to purchase in accordance with any applicable component supplier's minimum order quantity requirements all Long Lead-Time Components and other components on a lead-time plus Manufacturing Offset basis required in order to meet the Forecast. From time to time, the parties shall meet to review, monitor and revise, as appropriate, the list of Long Lead-Time Components. The requirements for the manufacture and assembly of the Products shall be set forth in the Master Demand Schedules ("MDS") submitted by Quantum to Jabil in accordance with Article 2.2 hereof. The Configuration Requirements for the Products manufactured and assembled by Jabil shall be set forth in the Sales Orders submitted by Quantum to Jabil pursuant to Article 2.3 hereof.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- 2.2 On a weekly basis (except with respect to SSG Products which shall be on a monthly basis) during the Term, Quantum shall submit to Jabil an MDS for the Products to be manufactured and assembled by Jabil during the rolling twelve (12) week period to which each such MDS pertains. Quantum will provide Jabil with recommended inventory levels for basic drive assemblies, in an unconfigured format ("BDA"), for safety stock inventory and critical component inventory at levels to be mutually agreed upon by the parties. Quantum will also provide Jabil with recommended inventory levels for BDA surge inventory and critical component inventory required for final configuration. Jabil and Quantum will negotiate these inventory levels in good faith.
- 2.3 During the Term, Quantum shall submit Sales Orders to Jabil for the Products to be configured by Jabil. Each such Sales Order submitted by Quantum under this Article 2.3 shall include a statement of work, which shall set forth any and all Specifications, including, but not limited to, the Configuration Requirements, for the Products to be supplied by Jabil pursuant to that Sales Order.
- 2.4 Each MDS submitted by Quantum to Jabil under Article 2.2 hereof, and each Sales Order submitted by Quantum to Jabil under Article 2.3 hereof, shall constitute a binding order by Quantum for the Products listed on that MDS or that Sales Order, as the case may be, subject to the provisions of Article 2.5 hereof governing the cancellation and rescheduling of orders for the Products. Jabil shall accept the orders for all Products set forth on each MDS or Sales Order, as the case may be, submitted by Quantum hereunder unless the quantity of Products ordered by Quantum on that MDS or Sales Order for any calendar week exceeds the quantity of such Products set forth in the applicable Forecast and is inconsistent with the terms and conditions of Exhibit C, Section 1(b) ("Reschedule, Cancellation, Obsolete, EOL Slow Moving Inventory").
- 2.5 Quantum may cancel or reschedule the delivery date(s) for any or all of the Products ordered pursuant to any MDS or Sales Order submitted by Quantum to Jabil subject to the written notice, timetable, and cancellation or rescheduling fee requirements set forth on Exhibit C hereto ("Reschedule, Cancellation, Obsolete, EOL Slow Moving Inventory"). All costs incurred by Jabil as a result of the rescheduling or cancellation of any MDS or Sales Order under this Article 2.5 shall be payable by Quantum within ten (10) days after the date of Jabil's invoice therefor. Such costs incurred by Jabil shall be subject to: (i) the terms set forth in Exhibit C; and (ii) Jabil's duty of mitigation under Article 2.6.
- 2.6 Jabil will use Commercially Reasonable Efforts to mitigate the costs associated with the cancellation or rescheduling of any MDS or Sales Order by Quantum as follows:

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- (a) as soon as commercially practicable, reduce or cancel all pending purchase orders for materials, parts and components for the Products covered by that MDS or Sales Order, as the case may be, to the extent that Jabil is contractually permitted to do so;
- (b) return all unused materials, parts and components for the Products covered by that MDS or Sales Order, as the case may be, to the suppliers thereof, to the extent that Jabil is contractually permitted to do so, provided, however, that Quantum shall be responsible for any approved restocking charges;

- (c) sell any remaining materials, parts and components for the Products covered by that MDS or Sales Order, as the case may be, to one or more other persons, firms, corporations or other entities, provided, however, Quantum shall be responsible for the difference between the sale price and the actual purchase price for such materials, parts and components; and
- (d) provide Quantum with all assistance reasonably requested by Quantum in determining whether the work in process for the Products covered by that MDS or Sales Order should be completed, scrapped or shipped to Quantum "as is".

**Article 3: Manufacturing Services**

- 3.1 Subject to the terms and conditions of this Agreement, Jabil shall manufacture, assemble and supply to Quantum one hundred percent (100%) of Quantum's requirements for the Products and, subject to Article 3.9, Follow-On or Derivative Products throughout the Term, unless this Agreement is altered or terminated as to certain Products only in accordance with the provisions of Article 9 hereof. All of the Products manufactured and assembled by Jabil hereunder shall conform to the Specifications and to the Configuration Requirements set forth on any statement of work, and shall be delivered to Quantum, in accordance with the applicable MDS or Sales Order, as the case may be, as submitted by Quantum to Jabil in accordance with the provisions of Article 2.2 or Article 2.3 hereof.
- 3.2 All Products to be supplied by Jabil under this Agreement shall be tested by Jabil in accordance with testing procedures and quality assurance standards supplied or approved by Quantum, the Specifications, under the Quantum Quality Assurance Plan and under ISO 9002 quality assurance standards, and/or as otherwise notified in writing by Quantum to Jabil (the "Quantum Tests"). Jabil shall not ship any Product that has not passed the Quantum Tests specified for such Product, unless otherwise agreed to in writing by Quantum. Jabil and Quantum shall negotiate in good faith and come to mutual agreement on a method for determining the amount of any costs and expenses for initial ISO certification and any additional certifications which the Parties mutually determine to obtain that will be reimbursed by Quantum to Jabil.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- 3.3 \*\*\*\*\*
- 3.4 All Products to be supplied by Jabil under this Agreement shall be packaged for international shipment and shipped by Jabil to Quantum or their respective customers in accordance with the packing and shipping Specifications supplied or approved in writing by Quantum to Jabil under Article 7.3 hereof. Quantum shall be solely responsible for the sufficiency and adequacy of any packing and shipping Specifications and instructions as well as delivery dates and ship to locations.
- 3.5 Prior to the Effective Date of this Agreement, Quantum shall deliver to Jabil the Specifications for the Products, documents and materials that contain or embody all of the Quantum Technology and such of Quantum's Confidential Information as Quantum reasonably determines to be necessary or appropriate for Jabil to manufacture, assemble and supply the Products in accordance with this Agreement. Jabil shall use the Specifications, the Quantum Product IP and such Quantum Confidential Information, which does not include the Quantum Process IP, solely for the performance of its obligations under this Agreement, and for no other purpose whatsoever, except as otherwise authorized in writing by Quantum.
- 3.6 Quantum warrants that the Specifications, the Quantum Technology, ISO procedures, calibration and maintenance records for all equipment involved in the manufacture of the Products and Quantum's Confidential Information delivered by Quantum or QPM, to Jabil under Article 3.5 hereof, constitute all of the Specifications, Quantum Technology and Quantum Confidential Information used by Quantum or QPM in the manufacture, assembly and supply of the Products immediately prior to the Effective Date of this Agreement.
- 3.7
  - (a) Subject to the provisions of Article 3.7(b), Jabil shall be solely responsible for furnishing all facilities, machinery and equipment, labor, manufacturing processes (including basic specifications, ISO procedures and calibration and maintenance of all equipment involved in the manufacture of the Products in accordance with the equipment manufacturers' specifications), manufacturing technology (other than the Quantum Technology), systems, transportation logistics and, subject to the provisions of Article 4 hereof, materials, parts and components for the performance of Jabil's obligations under this Agreement. The parties agree to perform a joint qualification of the lines for the manufacturing and assembly of the Product for the purpose of verifying the adequacy of the facilities, machinery and equipment, labor, manufacturing processes and technology and systems sufficient to fulfill Quantum's requirements of the Products, as set forth in Exhibit B.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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(b) The parties hereby acknowledge that Quantum or QPM has used: (i) certain tooling owned by Quantum or QPM suppliers or customers and consigned to Quantum or QPM ("Supplier and Customer Tooling"); and (ii) certain test equipment owned by Quantum (the "Quantum Owned Test Equipment"), in the manufacture and assembly of the Products prior to the Effective Date of this Agreement. Quantum shall make all such Quantum Owned Test Equipment heretofore consigned to, or owned by, Quantum or QPM available to Jabil, at no charge to Jabil, for use by Jabil solely in the manufacture and assembly of the Products in accordance with the provisions of this Agreement. Quantum shall be solely responsible for the maintenance of all such Quantum Owned Test Equipment throughout the Term in accordance with the maintenance Specifications provided by Quantum. Quantum shall also make all of the Supplier and Customer Tooling available for use by Jabil solely in the manufacture and assembly of the Products in accordance with the written Specifications of the Quantum Parties.

3.8 Quantum shall have the right, upon reasonable prior written notice, during normal business hours, to inspect and review Jabil's manufacture and assembly of the Products. Upon reasonable prior written notice from Quantum, subject to execution of a non-disclosure agreement in a form acceptable to Jabil prior to such inspection, Quantum's OEM Customers shall also have access to inspect and review the manufacturing and assembly of the Products provided that the Quantum OEM Customer is accompanied at all times by both a Quantum employee and Jabil employee. Any and all of Jabil's Confidential Information disclosed, revealed or otherwise made available to Quantum shall be subject to the confidentiality provisions of this Agreement. Any inspection by Quantum or by any Quantum OEM Customer of Jabil's manufacture and assembly of the Products hereunder shall not be deemed to (i) constitute the acceptance by Quantum or by that Quantum OEM Customer, as the case may be, of any such Products; or (ii) affect or impair Jabil's warranty with respect to such Products, as set forth in Article 11.2 hereof.

3.9 Subject to the terms and conditions of this Agreement, Jabil shall manufacture, assemble and supply to Quantum one hundred percent (100%) of Quantum's requirements for the Follow-On or Derivative Products throughout the Term provided that Jabil maintains Competitive Pricing for such Follow-On or Derivative Products.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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3.11 Attached to this Agreement as Exhibit B are the parties' mutually agreed goals and schedule for the reduction in Jabil's cost of manufacturing, assembling and supplying the Products to Quantum hereunder. \*\*\*\*\*. The cost reduction goals set forth in Exhibit B hereof are based on the forecast of Quantum's requirements of the Products set forth in Exhibit B. The Parties further agree that they shall implement the quarterly meeting scheme set forth in Exhibit B.

3.12 \*\*\*\*\*.

3.13 As soon as reasonably practicable after the Effective Date of this Agreement, the parties shall implement an electronic interface (EI) between Quantum and Jabil in order to facilitate the ordering and production planning of the Products and other communications between and among the parties hereto. This EI system will include, at a minimum, the ability of Quantum to obtain real-time data on manufacturing processes and procedures, as well as accurate estimates of delivery dates.

#### **Article 4: Procurement of Parts, Components and Materials**

4.1 Subject to the provisions of Article 4.3 hereof, Jabil shall procure all materials, parts and components required for the manufacture and assembly of the Products throughout the Term from the suppliers on the Approved Vendor List. Quantum shall use Commercially Reasonable Efforts to make Jabil the beneficiary of any and all existing Quantum supplier contracts for the procurement and supply of all such materials, parts and components.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- 4.2 Jabil shall obtain all materials, parts and components for the Products under Article 4.1 hereof solely from those suppliers listed on the Approved Vendor List . In the event that Jabil reasonably determines that the procurement of one or more materials, parts or components from suppliers on the most current AVL: (i) is inconsistent with Jabil's cost reduction goals, as set forth on Exhibit B hereof; (ii) will not meet Quantum's quality assurance standards, as specified in Article 3.2 hereof ; or (iii) is otherwise inconsistent with the parties' objectives hereunder, Jabil shall give written notice to Quantum of a proposed change to the AVL. Upon receipt of any written notice of a proposed change to the AVL, Quantum shall use Commercially Reasonable Efforts to work with Jabil to qualify and approve the materials, parts or components to be supplied by the new supplier for use in the manufacture and assembly of the Products, subject to Quantum's quality assurance standards and commitments to their respective customers with respect to the notification, qualification and approval of sources of supply of materials, parts and components for the Products and the requirements of all Quantum OEM Customers ; provided, however, that Jabil shall not implement any change to the AVL until the supplier has been approved in writing by Quantum for addition to the AVL.
- 4.3 During the Term , Quantum shall retain certain process qualification and direct vendor relation responsibilities (but not primary procurement or processing responsibilities) for the Strategic Components. Quantum shall provide a list of qualified vendors of the Strategic Components to Jabil, so as to permit Jabil to procure those Strategic Components in order to manufacture and assemble the Products for Quantum . All such Strategic Components procured exclusively for Quantum under this Article 4.3 shall be used by Jabil solely in the manufacture and assembly of the Products hereunder unless otherwise approved by Quantum in writing, and Jabil shall use Quantum Intellectual Property solely for the manufacture and assembly of the Products hereunder, with the exception of the Quantum Process IP as set forth in Article 5.2.

#### **Article 5: Intellectual Property Licenses**

- 5.1 License to Jabil: Quantum hereby grants to Jabil a limited, non-exclusive, non-transferable, royalty-free license to use Quantum's Intellectual Property, the Quantum Product IP and Quantum's Confidential Information solely and exclusively for the manufacture, assembly and supply of the Products in accordance with the terms and conditions of this Agreement. Except as specifically provided in Article 5.2 hereof, Jabil shall not utilize any of Quantum's Intellectual Property, the Quantum Product IP or Quantum's Confidential Information for any other purpose whatsoever, and Jabil acknowledges and agrees that except as specifically provided in Articles 5.1 and 5.2, Jabil shall acquire no right, title or interest whatsoever in or to any of the Quantum Intellectual Property, the Quantum Product IP or Quantum's Confidential Information.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- 5.2 Additional License Rights to Quantum Process IP: Quantum hereby grants to Jabil a worldwide, non-exclusive, non-transferable (except for the transfer to a Jabil affiliate or its embodiment in any manufactured products), fully paid-up, royalty-free right and license to utilize the Quantum Process IP and Quantum IT Software and Infrastructure in connection with the manufacture and assembly of products for Quantum and any other persons, firms, corporations and other entities.
- 5.3 License to Quantum Parties: Jabil hereby grants to Quantum a worldwide, limited, non-exclusive, fully paid-up, royalty-free right and license to use Jabil's Existing Technology and Jabil's Confidential Information insofar as is required for Quantum to use, sell or distribute the Product provided by Jabil pursuant to this Agreement. Quantum shall not utilize any of Jabil's Existing Technology or Jabil's Confidential Information for any other purposes, and Quantum acknowledges and agrees that, except as specifically provided in this Agreement, Quantum shall acquire no right, title or interest in or to any of Jabil's Existing Technology or Jabil's Confidential Information.
- 5.4 Without limiting the generality of Article 5.3 hereof, except with respect to a termination of this Agreement for a material breach arising from nonpayment by Quantum, upon the expiration or termination of this Agreement , Quantum shall have the right to use, or to permit another person, firm, corporation or other entity to use such portion of Jabil's Existing Technology and Jabil's Confidential Information as is required to produce, manufacture, and assemble those Products in production at the time of termination of this Agreement.
- 5.5 Subject to the provisions of Article 6 hereof, the parties agree that any and all Improvements and Modifications to the Quantum Product IP, even if derived from, or through the use of, Jabil's Existing Technology and/or Jabil's Confidential Information, shall be the sole and exclusive property of Quantum.

#### **Article 6: Improvements and Modifications**

6.1 Quantum's Improvements and Modifications: In the event that Quantum develops any Improvements or Modifications to the Products, Quantum shall provide written notice of such Improvements and Modifications to Jabil, which written notice shall include appropriate amendments to the Specifications to incorporate those Improvements or Modifications into the Products. Within five (5) days after receipt of any written notice from Quantum under this Article 6.1, Jabil shall provide Quantum with written notice of the cost implications (either addition or reduction), if any, of incorporating such Improvements and Modifications into the Products. In the event that Quantum elects to have those Improvements or Modifications incorporated into the Products, Quantum shall give written notice thereof within a Commercially Reasonable Time after receipt of Jabil's written notice hereunder, and shall furnish Jabil with the Specifications and other appropriate documents and materials, in an acceptable format, containing or embodying the Quantum Product IP and Quantum's Confidential Information relating to those Improvements and Modifications. Jabil's use of all of the Quantum Technology and Quantum's Confidential Information relating to all such Improvements and Modifications, as furnished by Quantum under this Article 6.1, shall be in accordance with, and subject to the terms and conditions of, Article 5.1 hereof.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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6.2 Jabil's Improvements and Modifications: In the event that Jabil develops any Improvements or Modifications to the Products, Jabil shall give timely written notice thereof to Quantum, including the cost implications (either addition or reduction), if any, of incorporating such Improvements and Modifications into the Products. Quantum shall give written notice to Jabil of its acceptance of such Improvements and Modifications within a Commercially Reasonable Time after receipt of any written notice of such Improvements and Modifications from Jabil under this Article 6.2. Following the date of Quantum's written notice of acceptance of such Improvements and Modifications under this Article 6.2 which shall include amended Specifications incorporating the Improvement or Modification, Jabil shall use Commercially Reasonable Efforts to implement the revised Specifications including such Improvements and Modifications on the mutually agreed upon implementation date.

6.3 Jabil will assign to Quantum all right, title and interest in and to the Improvements or Modifications developed by Jabil. Quantum hereby grants to Jabil a worldwide, non-exclusive, fully paid-up, royalty-free right and license in and to the Improvements and Modifications.

6.4 Jabil's Created Technology: Jabil shall disclose in a timely manner to Quantum all of Jabil's Created Technology pertaining to the Products, any Improvements and Modifications and/or the manufacture and assembly of the Products, created, developed, obtained or reduced to practice by Jabil during the Term. Quantum shall have the following rights in and to all of Jabil's Created Technology disclosed to Quantum under this Article 6.4:

(a) Jabil shall assign, transfer and convey to Quantum all rights, title and interests in and to that portion of Jabil's Created Technology that relates directly to the Products or any Improvements and Modifications thereof. Quantum hereby grants to Jabil a worldwide, non-exclusive, fully paid-up, royalty-free right and license in and to the Jabil Created Technology relating directly to the Products.

(b) Jabil shall grant to Quantum a limited, non-exclusive, transferable, perpetual, worldwide, royalty-free right and license to use that portion of Jabil's Created Technology that relates to the processes and procedures used by Jabil Malaysia in the manufacture and assembly of the Products. Quantum shall have the rights to use, and to authorize one or more other persons, firms, corporations, or other entities to use the Jabil Created Technology licensed to Quantum under this Article 6.4(b) in the production, manufacture and assembly of Quantum products.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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## **Article 7: Pricing, Delivery and Payment Terms**

7.1 The parties expressly agree that the prices to be charged for the Products sold to Quantum hereunder shall be those set forth on Exhibit B.



- 7.2 The prices set forth for each of the Products on Exhibit B shall include all relevant charges associated with the selected shipping terms. The parties agree to allocate responsibility for shipping, transportation, risk of loss, insurance, and freight forwarding charges applicable to the shipment of the products per the relevant INCOTERMS 2000 notation set forth in Exhibit B, and which party will serve as importer and exporter of record, as defined by the selected terms. Transfer of title shall occur at the time that risk of loss shifts under the relevant INCOTERM. The parties may agree in writing on other shipping and pricing terms provided that such agreement is approved in writing by a Program Manager or officer of each of the Parties. With respect to any Products shipped by Jabil to a third-party warehouse or hub to which Jabil retains title and risk of loss, the additional terms in Exhibit D shall apply.
- 7.3 Quantum shall pay the purchase price for all Products supplied by Jabil hereunder within \*\*\*\*\*after the later of (i) the date of shipment of those Products by Jabil; or (ii) the date of Jabil's invoice for those Products. All payments made hereunder shall be in United States Dollars. Jabil shall have the right to charge Quantum a late fee of 1.5% per month or the maximum amount allowed by law, whichever is less, for any overdue or unpaid invoices that are not subject to a good faith dispute provided that the parties have attempted in good faith to resolve the dispute by escalating the issue to the appropriate financial management of each of the parties.
- 7.4 In the event Jabil fails to conform to the written shipping instructions furnished by Quantum and such failure causes a material delay in the shipment or delivery of the affected order of Products, Jabil shall immediately work with Quantum and do some or all of the following to rectify such failure at Jabil's sole expense: \*\*\*\*\*, work necessary overtime, recall the shipment or replace the shipment. Costs incurred by Jabil pursuant to this Article 7.4 shall not be included in any discussions of cost allocations between the Parties. Jabil's Chronic Failure (defined as more than one failure that causes economic loss to Quantum within a calendar quarter) to conform to written shipping instructions shall be considered a material breach of this Agreement. Notwithstanding the foregoing, this Article 7.4 shall not apply to the extent such failure by Jabil arises under Article 15.2 (Force Majeure).

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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## **Article 8: Legal Compliance and Export Control**

- 8.1 In the exercise of their respective rights and the performance of their respective obligations, all parties to this Agreement shall comply with all Applicable Laws. Without limiting the generality of this Article 8.1, each party:
- (a) Shall assist the other in obtaining all licenses, permits, approvals and other governmental authorizations needed to allow shipment of the Products. Each party agrees that it shall not export, re-export, resell or transfer, or otherwise require the other to ship or deliver any Product, assembly, component or any technical data or software which violate any export controls or limitations imposed by the United States or any other governmental authority, or to any country for which an export license or other governmental approval is required at the time of export without first obtaining all necessary licenses and approvals and paying all duties and fees. Each party shall provide the other with all licenses, certifications, approvals and authorizations in order to permit the parties to comply with all import and export laws, rules and regulations for the shipment and delivery of the Product. Each party shall also be responsible for complying with any legislation or regulations governing the importation of the Product into the country of destination and for payment of any duties thereon on those shipments for which it is the importer of record.
  - (b) Agrees that, at all times during the Term, subject to timely notification of any changes in the Products or relevant changes in the laws, it shall maintain all such required licenses, permits, approvals, governmental authorizations, notifications, filings and registrations in full force and effect.
- 8.2 Without limiting the generality of the foregoing, the parties further acknowledge that all of the Quantum Intellectual Property, the Quantum Technology, Quantum's Confidential Information, Quantum's IT Software and Infrastructure, Jabil Existing Technology, Jabil Created Technology and Jabil Confidential Information (collectively the "Technical Data") are subject to export controls under the laws and regulations of the United States, including, but not limited to the Export Administration Regulations, 15 C.F.R. Parts 730-774. Jabil and Quantum further acknowledge that all Products manufactured under this Agreement are also subject to such United States export controls.
- 8.3 In the exercise of its rights, and the performance of its obligations under this Agreement, each party shall comply with all United States export control laws pertaining to the Technical Data and the Products. Without limiting the generality of this Article 8, neither party shall:
- (a) export, reexport, divert, transfer or disclose any of the Technical Data directly or indirectly to any destination to which the export or reexport of such Technical Data is restricted or prohibited by those United States export control laws and regulations, or to any national or resident thereof; or

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- (b) .export any of the Products except in accordance with Quantum's written instructions.
- 8.4 Each party shall prepare all export and shipping documentation for each shipment of any of the Products hereunder in accordance with its status as exporter and/or importer of record as set forth in Article 7.
- 8.5 During the Term and thereafter, upon written request by either party, each party shall make records available to the other so as to permit each party to verify the Parties' compliance with the export control and compliance obligations under this Article 8.
- 8.6 In the event Jabil fails to comply with all Applicable Laws and such failure causes a material delay in the shipment or delivery of the affected order of Products, Jabil shall immediately work with Quantum and do some or all of the following to rectify such failure at Jabil's sole expense: expedite freight, work necessary overtime, recall the shipment or replace the shipment and/or resolve (where such Products are under Jabil's control pursuant to the applicable INCOTERMS 2000) or otherwise provide assistance to Quantum in resolving any compliance problems with regulatory authorities caused by Jabil. Costs incurred by Jabil pursuant to this Article 8.6 shall not be included in any discussions of cost allocations between the Parties. Jabil's Chronic Failure (defined as more than one failure that causes economic loss to Quantum within a calendar quarter) to comply with all Applicable Laws shall be considered a material breach of this Agreement. Notwithstanding the foregoing, this Article 8.6 shall not apply to the extent such failure by Jabil arises under Article 15.2 (Force Majeure).

**Article 9: Term and Termination**

- 9.1 The term of this Agreement shall be for three (3) years from the Effective Date, unless earlier terminated in accordance with the provisions of this Agreement.
- 9.2 \*\*\*\*\* The original three (3) year term and any extension(s) thereto shall be referred to herein as the "Term" of this Agreement.
- 9.3 This Agreement may be terminated by a party hereto in accordance with the following terms and conditions :
  - (a) either party may terminate this Agreement by giving notice in writing to the other party, which notice shall be effective upon dispatch, should the other party file, or have filed against it, a petition of any type as to its bankruptcy; be declared bankrupt; become insolvent; make an assignment for the benefit of creditors; go into liquidation or receivership;

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- (b) subject to compliance with the terms and conditions of Article 9.6, either party may terminate this Agreement by giving notice in writing to the other party in the event the other party is in material breach of this Agreement and shall have failed to cure such breach within twenty (20) business days (including cases of non-payment of undisputed invoices to Jabil) of receipt of written notice thereof from the first party; or
- (c) \*\*\*\*\*.
- 9.4 In the event of termination of this Agreement under Article 9.3 hereof, the parties shall have the following rights and obligations:
  - (a) Termination of this Agreement shall not release either party from the obligation to make payment of all amounts due to the other Party, including, but not limited to, all amounts that have accrued and remain outstanding as of the date of termination, including, subject to the terms and conditions of Article 2.6, Quantum's obligation to pay for all materials, parts, components and work in process procured, on order or manufactured by Jabil pursuant to a quarterly Forecast, MDS or Sales Order submitted by Quantum under Article 2 hereof, but not yet fully incorporated into finished Products as of the effective date of termination. The parties' liability on termination of this Agreement shall also be subject to Article 15.8.

- (b) .Jabil shall fill all MDSs and Sales Orders for the Products submitted by Quantum prior to the effective date of termination, and shall supply the Products covered by those MDSs and Sales Orders to Quantum in accordance with the terms and conditions: of those MDSs and Sales Orders. Notwithstanding the foregoing, in the event of a material breach due to nonpayment, and after following the dispute resolution procedure set forth in Article 9.6, Jabil shall have the right to suspend all shipments on MDSs and Sales Orders pending at termination until such material breach is cured.
- (c) In the event that the dispute resolution procedure set forth in Article 9.6 does not lead to a satisfactory resolution of a material breach due to nonpayment by Quantum, Jabil shall be entitled to seek post-termination relief that includes the suspension of the licenses to Jabil's Created Technology, Jabil's Existing Technology, and Jabil's Confidential Information set forth in this Agreement without the necessity to post a bond. Upon Quantum posting a bond covering the disputed amount due to Jabil, any such license suspension shall be lifted and Quantum shall have the full rights to use Jabil's Created Technology, Jabil's Existing Technology, and Jabil's Confidential Information consistent with the license granted herein. Inclusion of this explicit right of Jabil shall not restrict Quantum's remedies for any breach by Jabil affecting the Quantum Intellectual Property licensed to Jabil herein.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- (d) Each party's rights and obligations under Articles 8, 10, 11, 12, 14 and 15 shall survive the expiration or termination of this Agreement for any reason whatsoever.

9.5 \*\*\*\*\*.

9.6 Notwithstanding anything to the contrary contained in this Agreement, except for any material breach by either party of Article 10, each party agrees that, unless otherwise required in order to comply with deadlines under Applicable Laws, it will not terminate this Agreement, file an action or institute legal proceedings with respect to any dispute, controversy, or claim arising out of, relating to, or in connection with this Agreement until: (a) the other party has failed to provide a prompt and effective remedy within the cure period set forth in Article 9.3(b); (b) it has given a senior executive of the other party written notice of its grievance; and (c) it has requested that senior executives for both parties to meet and discuss the matter in order to consider informal and amicable means of resolution; and (d) either such meeting failed to occur within five (5) days after such request or the meeting did not produce a mutually satisfactory resolution of the matter.

#### **Article 10: Confidentiality**

10.1 Each party agrees that it will not use in any way for its own account, or for the account of any third party, nor disclose to any other person, firm, corporation or other entity, except as authorized in this Agreement, any Confidential Information disclosed or revealed to it by another party to this Agreement. Each party shall take every reasonable precaution to protect the confidentiality of all such Confidential Information. Each party shall use the same standard of care in protecting the Confidential Information of the other party hereto as it normally uses in protecting its own trade secrets and proprietary information.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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10.2 Notwithstanding any other provision of this Agreement, no information disclosed or revealed to a party hereunder shall be Confidential Information if that information is or becomes:

- (a) published or otherwise made available to the public other than by a breach of this Agreement;
- (b) .furnished to a party by a third party without restriction on its dissemination;
- (c) approved for release in writing by the party designating said information as Confidential Information; or
- (d) disclosed to a third party by the party transferring said information hereunder without restricting its subsequent disclosure and use by said third party.

- 10.3 Disclosure of any Confidential Information by a party hereto shall not be precluded if such disclosure is in response to the requirements of Applicable Law or any valid order of a court or other governmental body, provided that the receiving party promptly notifies the other Parties of such order and makes a good faith effort, at the expense of the other party, to assist such Party in obtaining a protective order requiring the Confidential Information so disclosed be kept in confidence and used only for the purpose for which such order was issued
- 10.4 Disclosure of any Confidential Information by a party hereto other than under the provisions of Article 10.3 is agreed by the parties to constitute "irreparable harm" for the purposes of determining whether an injunction shall issue in any court action alleging breach of this Article 10.

**Article 11: Product Acceptance and Warranty**

- 11.1 **Product Acceptance:** All Products supplied by Jabil to Quantum hereunder shall be subject to acceptance by Quantum. Upon delivery of the Products by Jabil, in accordance with Article 7.2 hereof, Quantum or the Quantum OEM Customer shall conduct such inspections and acceptance testing as is reasonably necessary or appropriate to confirm that the Products conform to the Specifications therefor. In the event that Quantum or a Quantum OEM Customer reasonably determines that any Product fails to conform to the Specifications therefor, Quantum shall give written notice of rejection of that Product, including a detailed and complete description of Quantum's basis for asserting that the Product does not conform to the Specifications ("Specification Notice"), to Jabil within 10 business days after delivery of that Product by Jabil. In the event that Quantum provides a Specification Notice under this Article 11.1 and Jabil does not dispute such Specification Notice by delivering to Quantum a detailed and complete description of its claim that the Product does in fact conform to the Specifications within 10 business days of receipt of the Specification Notice, Jabil shall repair or replace that Product in accordance with the RMA procedure set forth in Article 11.3 hereof. Any specified times for delivery of Products shall be tolled during the resolution of a good faith dispute over whether a product conforms to the Specifications. In the event that Quantum fails to give written notice of rejection of any Product or deliver a Specification Notice within 10 business days after delivery of that Product by Jabil hereunder, that Product shall be deemed accepted by Quantum; provided, however, that acceptance of any Product by Quantum shall not affect or impair Quantum's rights under Jabil's warranty with respect to that Product, as set forth in Article 11.2 hereof.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- 11.2 **Jabil Parties' Workmanship Warranty:** Jabil warrants that all of the Products supplied to Quantum hereunder shall conform to all applicable Specifications, and shall be free from defects in Workmanship for a period \*\*\*\*\*. This warranty is extended to, and may only be enforced by, Quantum. In addition, Jabil shall use Commercially Reasonable Efforts to assure that vendor warranties with respect to all materials, parts and components used in the Products extend for the benefit of Quantum, regardless of the length of any such warranty. For the avoidance of doubt, this warranty shall not apply to defects resulting from the design of the Products, or from materials, parts, or components, provided that such materials, parts or components have been purchased by Jabil pursuant to the AVL, or as otherwise approved in writing by Quantum.

- 11.3 **Repair or Replacement of Defective Product:** In accordance with Jabil's standard return material authorization process and procedure ("RMA"), Jabil shall either repair or replace, in its sole discretion, any Product that contains a defect caused by a breach of the warranty set forth in Article 11.2 provided that the Product is received within thirty (30) days following the end of any applicable Warranty Period ("RMA Product"). If Quantum desires to return a Product based on a claim of breach of the warranty set forth in Article 11.2, Quantum shall request an RMA number from Jabil. \*\*\*\*\* Quantum shall pay all shipping, transportation, insurance, freight forwarding and other costs relevant to DDP shipments incurred in connection with the shipment of all such defective Products to Jabil's repair facility. Jabil shall analyze any such RMA Product and:

- (a) in the event a breach of warranty in Article 11.2 is found ("Defect"), then Jabil shall:
- (i) repair or replace the RMA Product within twenty (20) business days of receipt by Jabil of the RMA Product and all required associated documentation;
  - (ii) reimburse Quantum for the reasonable cost of transporting the RMA Product to the designated repair facility;

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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(iii) deliver the repaired RMA Product or its replacement, DDP (INCOTERMS 2000) to Quantum's designated destination; and

(iv) bear all shipping, transportation, insurance and freight forwarding costs incurred in connection with the shipment of all repaired RMA Products, or their replacements, to Quantum's designated destination.

(b) if no such Defect is found, then Quantum shall:

(i) reimburse Jabil for all fees, costs and expenses incurred to attempt a repair or replacement of the non-Defective RMA Product; and

(ii) bear responsibility for all transportation costs to and from Jabil's designated repair facility.

The estimates of expected Defect repair costs are set forth on Exhibit B, and any proposed changes thereto shall be addressed in the quarterly true-up meetings mentioned therein.

11.4 **LIMITATION OF JABIL'S WARRANTY: THE REMEDY SET FORTH IN THIS ARTICLE 11.3 SHALL BE QUANTUM'S SOLE AND EXCLUSIVE REMEDY FOR A BREACH OF JABIL'S WARRANTY SET FORTH IN ARTICLE 11.2 HEREOF. THE WARRANTY SET FORTH IN ARTICLE 11.2 IS IN LIEU OF AND JABIL EXPRESSLY DISCLAIMS, AND QUANTUM EXPRESSLY WAIVES ALL OTHER PRODUCT WARRANTIES OF ANY KIND WHATSOEVER WHETHER EXPRESS, IMPLIED, STATUTORY, ARISING BY COURSE OF DEALING OR PERFORMANCE, CUSTOM, USAGE IN THE TRADE OTHERWISE OR PURSUANT TO ANY OTHER PROVISION OF THIS AGREEMENT OR ANY OTHER COMMUNICATION, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OR MISAPPROPRIATION OR INFRINGEMENT OF ANY RIGHT, TITLE OR INTEREST OF QUANTUM OR ANY THIRD PARTY (INCLUDING, WITHOUT LIMITATION ANY INTELLECTUAL PROPERTY INTEREST), \*\*\*\*\* QUANTUM UNDERSTANDS AND AGREES THAT IT SHALL HAVE FULL AND EXCLUSIVE LIABILITY WITH RESPECT TO ANY PRODUCT DESIGN LIABILITY, AND DAMAGE TO PERSON OR PROPERTY OWING TO IMPROPER DESIGN. NO ORAL OR WRITTEN STATEMENT OR REPRESENTATION BY JABIL, ITS AGENTS OR EMPLOYEES SHALL CONSTITUTE OR CREATE A WARRANTY OR EXPAND THE SCOPE OF ANY WARRANTY HEREUNDER.**

**QUANTUM ACKNOWLEDGES THAT JABIL'S PRODUCT WARRANTY, AS SET FORTH IN ARTICLE 11.2 HEREOF, IS EXPRESSLY CONTINGENT UPON THE USE OF THE PRODUCT IN A MANNER FOR WHICH THE PRODUCT WAS INTENDED, AND DOES NOT COVER A PRODUCT IF ANY OF THE FOLLOWING CONDITIONS APPLY: (I) THE PRODUCT IS MODIFIED WITHOUT THE PRIOR WRITTEN APPROVAL OF JABIL; (II) THE PRODUCT IS SUBJECTED TO OPERATING AND/OR ENVIRONMENTAL CONDITIONS IN EXCESS OF THE MAXIMUM VALUES ESTABLISHED IN APPLICABLE SPECIFICATIONS, OR TO HAVE BEEN THE SUBJECT OF MISHANDLING, ACCIDENT, MISUSE, NEGLIGENCE, IMPROPER TESTING, IMPROPER OR UNAUTHORIZED REPAIR, ALTERATION, DAMAGE, ASSEMBLY, PROCESSING OR ANY ACTION OR INACTION THAT ALTERS PHYSICAL OR ELECTRICAL PROPERTIES, OR PHYSICAL, ENVIRONMENTAL OR ELECTRICAL STRESS; OR (III) THE SERIAL NUMBER LABEL IS REMOVED OR DAMAGED TO THE EXTENT THAT THE WARRANTY STATUS OF THE PRODUCT CANNOT BE DETERMINED. THIS WARRANTY SHALL NOT APPLY TO ANY DEFECT IN THE PRODUCT ARISING FROM THE SPECIFICATIONS, OR (1) DESIGN ELEMENTS OF THE PRODUCTS SUPPLIED OR CONTROLLED BY QUANTUM; (2) TESTING SUPPLIED OR CONTROLLED BY QUANTUM; OR (3) MANUFACTURING PROCESSES FOR THE PRODUCTS SUPPLIED OR CONTROLLED BY QUANTUM, OR ANY MATERIALS, PARTS OR COMPONENTS INCLUDED BY QUANTUM IN THE SPECIFICATIONS.**

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

11.5 **Warranty Reports:** Jabil shall provide Quantum with a written report of all warranty claims submitted by Quantum and its customers, on a monthly basis, no later than 15 days after the close of the calendar month to which each such monthly report pertains.

**Article 12: Indemnification \*\*\*\*\***

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

**Article 13: Reports and Communications**

13.1 During the Term and thereafter, Jabil shall maintain complete records of all transactions hereunder, including, but not limited to, records pertaining to the manufacture, assembly and supply of all Products hereunder, including product yields, import/export documentation, shipping records, legal documents and notices, contracts for the supply of all materials, parts and components and all correspondence thereunder, purchase orders, sales orders, manufacturing process changes, engineering change notices and engineering changes and all other documents and materials created or used by Jabil in the performance of their obligations under this Agreement. All records required to be maintained by Jabil with respect to any Products manufactured, assembled and supplied by Jabil hereunder shall be retained for a period of at least seven (7) years after the announced end of life of that Product, and all other records required to be maintained by Jabil hereunder shall be retained for at least seven (7) years from the completion of the transaction to which those records pertain, unless Quantum shall give written notice to Jabil of a longer record retention requirement required by law or regulation. Subject to the terms and conditions of Article 10 and Jabil's obligations under third party confidentiality agreements, upon reasonable written notice from Quantum, Jabil shall make such relevant records available to Quantum for inspection and copying from time to time, during the Term and/or thereafter during the retention period.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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13.2 Quantum and Jabil shall each appoint a program manager whose primary responsibility shall be to act as a focal point for discussions between the parties (the "Program Manager"). Such discussions shall include, but not be limited to, pricing and delivery reviews, the volume requirements of Quantum, analyses of orders made against such volume requirements, and such other technical and commercial issues as are related to the subject matter of this Agreement. The Program Managers shall also be responsible for maintaining pertinent records as are necessary to fulfill the terms and conditions of this Agreement. Unless otherwise specified by one of the parties hereto, all operational written notices and other communications hereunder shall be sent to the parties' respective Program Managers as designated under this Article 13.2. Unless otherwise agreed by the parties, the Program Managers will meet no less frequently than every six (6) months. The names, addresses and contact information of the Program Managers of the parties are as follows:

Quantum: Quantum Corporation  
10125 Federal Drive  
Colorado Springs, CO 80908-4508  
Attn: \*\*\*\*\*.

Quantum Corporation  
10125 Federal Drive  
Colorado Springs, CO 80908-4508  
Attn: \*\*\*\*\*.

Jabil: Jabil Circuit, Inc.  
10560 9<sup>th</sup> Street North  
St. Petersburg, FL 33716  
Attn: \*\*\*\*\*.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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13.3 The Parties mutually agree to a Monthly Business Review with a before-hand mutually agreed upon agenda. The Parties will hold a Quarterly Business Review ("QBR") using the existing Quantum QBR format.

13.4 The Quantum Program Manager shall receive regularly from the Jabil Program Manager, or from any appropriate Jabil employee or authorized representative, such reports relating to the manufacture, assembly and supply of the Products as Quantum reasonably requests. Such reports may come through the Jabil Supplier Interface System, Customer Interface System, or any other system that provides equivalent access or functionality.

13.5 The terms and conditions under which the parties will operate, support and maintain the Quantum IT Software and Infrastructure, EI systems specified in Article 3.12, the Jabil MES system, their reporting infrastructure, and/or other Jabil owned IT Software and Infrastructure are set forth in the Transition Services Agreement attached to the Asset Purchase Agreement.

**Article 14: Insurance**

- 14.1 **Insurance Requirements:** Jabil shall, at its own expense, maintain throughout the Term at least the forms and amounts of insurance set forth below. All coverage shall be placed with an insurance carrier licensed to do business in the state(s) or country(ies) of Jabil's operations.
- (a) Commercial General Liability Insurance – including products/completed operations and broad form property damage, personal injury liability, contractual liability, and fire legal liability and/or tenant's legal liability. Minimum Limits -- \$1,000,000 each occurrence and \$2,000,000 general aggregate combined single limit for bodily injury and property damage. Coverage must also include a \$1,000,000 Products/Completed Operations Aggregate.
  - (b) Auto Liability Insurance – including coverage for all owned, non-owned, and hired autos, including loading/unloading coverage. Minimum Limits -- \$1,000,000 combined single limit per occurrence for bodily injury and property damage.
  - (c) Worker's Compensation and Employers' Liability Insurance - Minimum Limits – Workers' Compensation limits as required in the state(s) or country(ies) of Contractor's operations, and \$1,000,000 Employers' Liability coverage per injury or illness.
  - (d) Errors & Omissions Liability Insurance - \$2,000,000 per occurrence and in the aggregate. Coverage territory must be worldwide.
  - (e) Umbrella and/or Excess Liability Insurance - \$2,000,000 per occurrence and in the aggregate.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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- (f) Property Insurance – “All Risk” property insurance in an amount sufficient to cover improvements, contents, personal property, and other possessions (including third party property) located at or in any Jabil facility, including, but not limited to, the Facility.  
  
Coverage must extend to any Quantum property in the care, custody, or control of Jabil.
  - (g) Crime/Employee Dishonesty - \$1,000,000 per occurrence.
- 14.2 **Ten (10) Day Notice of Cancellation or Material Change in Insurance:** All insurance policies provided pursuant to Article 14.1 hereof shall provide for a ten (10) day advance written notice to Quantum in the event of termination, cancellation or material change in insurance.
- 14.3 **Certificate of Insurance:** Upon Request by Quantum, Jabil shall furnish Quantum with certificates of insurance evidencing the coverage required in this Article 14. Quantum's mailing address, to which each certificate of insurance and required endorsement(s) shall be sent, is:
- Quantum Corporation  
Risk Management Department  
501 Sycamore Drive  
Milpitas, CA 95035

**Article 15: General**

- 15.1 **Amendment:** This Agreement may be modified only by a written document signed by duly authorized officers of the parties.
- 15.2 **Force Majeure:** A party shall not be liable for a failure or delay in the performance of any of its obligations under this Agreement (other than the payment of money) where such failure or delay is the result of fire, flood, typhoons, earthquakes, tornadoes, or other natural disaster, sabotage, destruction of production facilities, power failures, Act of God, war, terrorism, embargo, riot, labor dispute, strike or the intervention or acts of any government authority, including changes in law or regulations that materially and adversely impact the party, providing that the party failing in or delaying its performance immediately notifies the other party of its inability to perform and states the reason for such inability.

15.3 **Assignment:** Neither party shall have the right or the power to assign, transfer or sublicense any of its rights, or delegate or subcontract the performance of any of its obligations, under this Agreement without the prior written authorization of the other party, except that each party (the "assigning party") shall have the right to assign this Agreement or any of the rights or obligations hereunder to any of its Affiliates without the prior written consent of the other party; provided, however, that (a) the assigning party shall remain subject to all obligations under this Agreement; and (b) any such assignment shall not result in any violation of any Applicable Laws. Notwithstanding the provisions of this Article 15.3, upon written notice to Quantum, Jabil shall have the right to assign their rights to receive monies due and payable to Jabil hereunder without the prior written authorization of Quantum, subject to compliance with Applicable Laws.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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15.4 **Counterparts:** This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute but one and the same instrument.

15.5 **Governing Law and Dispute Resolution:** This Agreement, shall be governed by, and interpreted in accordance with, the laws of the State of Delaware, excluding conflicts of laws principles and any application of the U.N. Convention on Contracts for the International Sale of Goods. Any dispute between the parties relating to the validity, performance, interpretation or construction of this Agreement shall be resolved in accordance with Delaware law and in the federal or state courts of Delaware. The parties to this Agreement hereby irrevocably consent to the personal jurisdiction of the federal and state courts in Delaware for the resolution of all disputes hereunder. Notwithstanding the provisions of this Article 15.5, the Parties shall have the right to seek relief, including preliminary and permanent injunctive relief, in any court of competent jurisdiction to prevent the unauthorized use, misappropriation, disclosure or infringement of any of intellectual property of the Parties or Confidential Information.

15.6 **Waiver:** Should any party hereto fail to exercise or enforce any provision of this Agreement, or waive any right in respect thereto, such failure or waiver shall not be construed as constituting a waiver or a continuing waiver of its rights to enforce such other provision or right or any other provision or right.

15.7 **Severability:** If any provision of this Agreement or the application thereof to any situation or circumstance shall be invalid or unenforceable, the remainder of this Agreement shall not be affected, and each remaining provision shall be valid and enforceable to the fullest extent.

15.8 **Limitation of Liability:** **IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR TO ANY OTHER PERSON OR ENTITY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES, LOSS OF GOODWILL OR BUSINESS PROFITS, LOST REVENUE, WORK STOPPAGE, WHETHER DUE TO BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE AND WHETHER SUCH PARTY WAS INFORMED OR WAS AWARE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE; \*\*\*\*\* OR LIMIT THE LIABILITY OF QUANTUM WITH RESPECT to a breach of the terms and conditions of article 3.1 and any related provisions of this agreement.**

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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15.9 **Effect of Headings:** The headings and sub-headings contained herein are for information purposes only and shall have no effect upon the intended purpose or interpretation of the provisions of this Agreement.

15.10 **Integration:** This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter of this Agreement and integrates all prior discussions, proposals, and agreements (whether oral or written) between them related to the subject matter hereof.

15.11 **Publicity:** Neither party shall publicize or otherwise disclose the terms of this Agreement without the prior written approval of the other party.

15.12 **No Partnership or Agency Created:** The relationship of Quantum and Jabil shall be that of independent contractors only. Nothing in this Agreement shall be construed as making Jabil the agent or legal representative of Quantum or Quantum the agent or legal representative of Jabil or otherwise as giving either party the power or authority to bind the other party in any manner.

15.13 **Binding Effect:** This Agreement and the rights and obligations hereunder shall be binding upon and inure to the benefit of the parties hereto and to their respective successors and assigns.



15.14

**Notices:** Any legal notice to be made in connection with any right or obligation arising under this Agreement, shall be provided by registered or certified mail, reputable domestic or international air courier or facsimile (with a confirmation copy sent by registered or certified mail or reputable domestic or international air courier) by one party to the other at the following addresses. All notices shall be deemed to be effective upon receipt by the receiving party thereof:

Quantum:           Quantum Corporation  
                      501 Sycamore Drive  
                      Milpitas, CA 95035  
                      Attention: \*\*\*\*\*.

Jabil:                Jabil Circuit, Inc.  
                      10560 Ninth Street North  
                      St. Petersburg, FL 33716  
                      Attention: \*\*\*\*\*.

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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IN WITNESS WHEREOF, the parties have had this Agreement executed by their respective duly authorized officers on the day and date first written above.

Quantum Corporation

By: /s/Michael J. Lambert  
Name: Michael J. Lambert  
Title: Executive Vice President and CFO  
Quantum Peripherals Europe, S.A.

By: /s/Franco Mazullo  
Name: Franco Mazzullo  
Title: Vice President  
Jabil Circuit Inc.

By: /s/ Chis A. Lewis  
Name: Chris A. Lewis  
Title: Chief Financial Officer

[SIGNATURE PAGE TO THE MASTER SUPPLY AND INTELLECTUAL PROPERTY LICENSE AGREEMENT]

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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**Exhibit A\*\*\*\*\*.**

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**Exhibit B \*\*\*\*\*.**

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**Exhibit C\*\*\*\*\*.**

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**Exhibit D\*\*\*\*\*.**

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\*\*\*\*\* Confidential treatment has been requested for omitted portions.

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**REPAIR SERVICES AGREEMENT**

between

**JABIL GLOBAL SERVICES, INC**

and

**Quantum Corporation**

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## REPAIR SERVICES AGREEMENT

This Repair Services Agreement (this "Agreement") is entered into by and between Jabil Global Services Inc. ("Jabil"), a Florida corporation, with an address at 4601 Cromwell Avenue, Memphis, TN 38118 and its wholly owned subsidiaries and Affiliates, and Quantum Corporation, a Delaware corporation ("Quantum"), having its principal place of business at 501 Sycamore Street, Milpitas, California 95035 and its wholly owned subsidiaries and Affiliates. Jabil and Quantum are referred to in this Agreement as "Party" or "Parties".

### RECITALS

**A.** Jabil is in the business of providing repair, testing, refurbishment, packaging, shipping and RMA fulfillment services for circuit boards, electronic assemblies, subassemblies, systems and subsystems.

**B.** Quantum is in the business of designing, developing, distributing, marketing and selling products containing circuit boards, electronic assemblies, subassemblies, systems and subsystems.

**C.** Whereas, the Parties desire that Jabil repair, test, refurbish, package and ship the circuit boards, electronic assemblies, subassemblies, systems and subsystems as set forth in this Agreement.

**NOW, THEREFORE**, in consideration of the foregoing and the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

### TERMS

**1. Definitions.** In addition to terms defined elsewhere in this Agreement, the capitalized terms set forth below shall have the following meaning:

**1.1 "Affiliate"** means with respect to a Person, any other Person which directly or indirectly controls, or is controlled by, or is under common control with, the specified Person or an officer, director or 10% or more shareholder of the specified Person, including without limitation the parent or parents of the specified Person. For purposes of the preceding sentence, "control" of a Person shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, or direct or indirect ownership (beneficially or of record) of, or direct or indirect power to vote, 5% or more of the outstanding shares of any class of capital stock of such Person (or in the case of a Person that is not a corporation, 5% or more of any class of equity interest).\

**1.2 "Approved Vendor List"** means the written list of third party suppliers or contractors of materials, parts and components utilized by Jabil in the manufacture and assembly of the Products hereunder, which have been supplied or approved by Quantum.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

### 1.

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**1.3 "Components Supplied by Quantum"** means those components or materials that Quantum provides, directly or indirectly, to Jabil to be incorporated into the Product.

**1.4 "Electronic Exchange"** shall mean the exchange of information using, electronic data interchange, internet or web based applications, or any other emerging business to business applications.

**1.5 "End of Life Buys"** shall mean a purchase by Jabil, as required by Quantum, of materials, components or other items due to the phase out of manufacture of such items.

**1.6 "Effective Date"** shall mean the date upon which the terms and conditions of this Agreement shall become effective by and between the Parties. The Parties have agreed that the Effective Date of this Agreement shall be the \_\_\_\_\_ day of December, 2002.

**1.7 "Improvements and Modifications"** shall mean and include any and all updates, changes, engineering changes, adaptations, enhancements and/or modifications supplied or approved by Quantum that: (i) correct any errors or defects in any of the Products; (ii) improve or enhance the existing functions of any of the Products; (iii) change any of the functions or add new features or functions to any of the Products; or (iv) reduce the cost of manufacturing and assembling any of the Products.

**1.8 "in writing"** shall mean written documents, Electronic Exchange (SEE ABOVE)with phone confirmation, verified faxes and successfully transmitted e-mails.

**1.9 "Inventory"** shall mean the repair parts, component, consumables, packaging and other inventory held by Jabil.

**1.10 "Jabil's Created Technology"** shall mean and include any and all discoveries, inventions, know-how, technical information, procedures, manufacturing and other processes, software, firmware and technology created, developed, obtained or reduced to practice by or for Jabil which are: (i) incorporated or embodied in any of the Products, including any Improvements or Modifications thereof; or (ii) used by Jabil in the manufacture or assembly of any of the Products, or otherwise used in Jabil's performance of its obligations under this Agreement.

**1.11 "Jabil's Existing Technology"** shall mean and include any and all discoveries, inventions, know-how, technical information, procedures, manufacturing and other processes, software, firmware and technology owned by, or licensed to, Jabil, or otherwise known to the Jabil, as of the Effective Date of this Agreement that are used by Jabil at any time during the Term in the manufacture and assembly of the Products under this Agreement.

**"Loaned Equipment"** means capital equipment (including tools) which is loaned to Jabil by or on behalf of Quantum to be used by Jabil to perform the Services and includes all equipment, tools and fixtures purchased specifically for Quantum, by Jabil, to perform the Services and that are paid for in full by Quantum. The loaned Equipment furnished by Quantum to Jabil as of the Effective Date is set forth on Schedule 3 to this Agreement.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

## 2.

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**1.13 "Packaging and Shipping Specifications"** shall mean packaging and shipping Specifications supplied by Quantum to Jabil or otherwise supplied and/or approved by Quantum.

**1.14 "Person"** means any corporation, business entity, natural person, firm, joint venture, limited or general partnership, limited liability entity, limited liability partnership, trust, unincorporated organization, association, government, or any department or agency of any government.

**1.15 "Product(s)"** means the Quantum product(s) for which Jabil provides Services under this Agreement as identified in Schedule 1 to this Agreement (or any subsequent Schedule 1 to this Agreement as amended and agreed to by the parties in writing) including any updates, renewals, modifications or amendments thereto.

**1.16 "Product Specifications"** means the Product Specifications supplied by Quantum to Jabil or otherwise supplied and/or approved by Quantum.

**1.17 "Proprietary Information and Technology"** means software, firmware, hardware, technology and know-how and other proprietary information or intellectual property embodied therein that is known, owned or licensed by and proprietary to either Party and not generally available to the public, including plans, analyses, trade secrets, patent rights, copyrights, trademarks, inventions, fees and pricing information, operating procedures, procedure manuals, processes, methods, computer applications, programs and designs, and any processed or collected data. All of the foregoing information shall be either (a) in written, recorded or other tangible form and labeled at the time of initial disclosure, as "Proprietary", "Confidential" or other similar legend; or (b) oral form and identified as "proprietary" or "confidential" in writing within thirty (30) days of its disclosure. The failure to label any of the foregoing as "confidential" or "proprietary" as set forth above shall mean that it shall not be treated as Proprietary Information and Technology.

**1.18 "Quantum IT Software and Infrastructure"** means the software and operational IT infrastructure currently used by Quantum in repair the Products.

**1.19 "Quantum Process IP"** means any Quantum intellectual property that pertains to the process for repair of the Products.

**1.20 "Services"** means the services performed by Jabil under this Agreement which shall include but not be limited to repair, testing, refurbishment, shipping and packaging services as more specifically set forth in the Schedules that are attached to this Agreement or will be attached to this Agreement from time to time by mutual written agreement between the Parties.

**1.21 "Service Forecast"** means the monthly forecast provided to Jabil by Quantum, in writing, of future Service requirements for a nine (9) month rolling period.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

## 3.

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**1.22 "Service Location(s)"** means the location(s) at which Jabil will provide the Services as agreed from time to time in writing between the Parties. The initial Service Location shall be the facility located at Plot 55, Bayan Lepas Industrial Zone, 11900 Penang, Malaysia.

**1.23 "Service Specifications"** means the Service Specifications supplied by Quantum to Jabil or otherwise supplied and/or approved

by Quantum. Specifications may be amended from time to time by amendments in the form of written engineering change orders agreed to by the Parties.

**1.24 "SOW"** shall mean the statement of work for each of the Services set forth in any Schedule 2 to this Agreement, as amended in writing from time to time upon mutual agreement of the Parties.

**1.25 "Specifications"** shall mean Quantum's specification for repair services, as supplied or approved by Quantum and delivered to Jabil in writing as of the Effective Date and/or from time to time during the term of this Agreement, including but not limited to written waivers to previously agreed specifications that are issued by Quantum, at its sole discretion during the term of this Agreement.

**1.26 "Subsidiary(ies)"** means any corporation, partnership, joint venture, limited liability entity, trust, association or other business entity of which a Party or one or more of its Subsidiaries, owns or controls more than 50% of the voting power for the election of directors, managers, partners, trustees or similar parties.

**1.27 "Test Procedures"** shall mean testing Specifications, standards, procedures and parameters supplied by Quantum to Jabil or as otherwise supplied and/or approved by Quantum.

**1.28 "Unique Components"** means those non-standard components or materials procured exclusively for incorporation into the Product.

**1.29 "Workmanship"** shall mean that standard of care used by Jabil to repair the Products in accordance with the Specifications.

**2. List of Schedules.** This Agreement includes the following Schedules describing the Services to be provided under this Agreement, which are hereby incorporated in this Agreement and made a part of this Agreement:

Schedule 1 – Products & Pricing

Schedule 2 – Scope of Work

Schedule 3 – Loaned Equipment

Schedule 4 – Shipping Terms

**3. Services** Quantum hereby authorizes Jabil to perform the Services (directly or, if agreed by the parties, through an Affiliate) as set forth in this Agreement. Jabil agrees to use commercially reasonable efforts to perform the Services under this Agreement. Jabil shall provide the Services described in this Agreement at the Service Location(s) unless specifically agreed to by Quantum.

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\*\*\*\*Confidential treatment has been requested for omitted portions.

#### 4.

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**3.1 Testing.** Jabil will test the Product in accordance with the Test Procedures. Quantum shall be solely responsible for the sufficiency and adequacy of the Test Procedures and shall hold Jabil harmless for any claim arising therefrom.

**3.2 Packaging and Shipping.** Jabil will package and ship the Product in accordance with Packaging and Shipping Specifications. Quantum shall be solely responsible for the sufficiency and adequacy of the Packaging and Shipping Specifications and shall hold Jabil harmless for any claim arising therefrom.

**3.3 Items to be Supplied by Quantum.** Unless otherwise agreed in the SOW, Quantum shall supply to Jabil, according to the terms and conditions specified herein, Quantum Proprietary Information and Technology and, if applicable, the Loaned Equipment, Components Supplied by Quantum and Unique Components necessary for Jabil to perform the Services. Quantum will also provide to Jabil all Service Specifications, Test Procedures, Packaging and Shipping Specifications, Product Specifications, approved vendor listings, material component descriptions (including approved substitutions), service requirements, and any other specifications necessary for Jabil to perform the Services. Quantum shall be solely responsible for delay in delivery, defects and enforcement of warranties related to the Loaned Equipment, Components Supplied by Quantum and Unique Components and shall hold Jabil harmless for any claim arising therefrom. Jabil hereby acknowledges and agrees that, as of the Effective Date of this Agreement, there are no Components Supplied by Quantum or Unique Components that are required for Jabil to perform the Services under this Agreement.

**3.4 Items to be Supplied by Jabil.** Jabil will provide required technology, capacity, labor, transportation logistics, component parts, systems and facilities necessary for Jabil to perform the Services.

**3.5 Materials Procurement.** Jabil shall procure all materials, parts and components required for the performance of the Services under this Agreement from suppliers on Quantum's Approved Vendor List, as furnished to Jabil by Quantum, in accordance with the Service Forecast furnished by Quantum to Jabil under this Agreement. Quantum shall use commercially reasonable efforts to make Jabil the beneficiary of any and all existing Quantum supplier contracts for the procurement and supply of all such materials, parts and components. Jabil will establish minimum and maximum Inventory levels and location based upon the Service Forecast.

4. **Warranty.**

**4.1 Jabil Warranty.** Jabil warrants that all of the Services performed by Jabil under this Agreement shall conform to all applicable Specifications and shall be free from defects in Workmanship for a period of ninety (90) days (unless otherwise specified in the SOW) from the date any repaired Product is initially delivered to Quantum or to Quantum's designated carrier ("Warranty Period"). In addition, Jabil shall use commercially reasonable efforts to assure that vendor warranties with respect to all materials, parts and components used in any of the repair Products extend for the benefit of Quantum regardless of any such warranty.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**4.2 Breach of Warranty.** In the event of any breach by Jabil of the warranty set forth in Section 4.1 above, the parties' respective rights and obligations, and the remedies available to Quantum, shall be in accordance with Jabil's standard return material authorization process and procedure ("RMA"), Jabil shall either repair or replace, in its sole discretion, any Product that contains a defect caused by a breach of the warranty set forth in Section 4.1 above provided that the Product is received within thirty (30) days following the end of any applicable Warranty Period ("RMA Product"). If Quantum desires to return a Product based on a claim of breach of the warranty set forth in Section 4.1 above, Quantum shall request an RMA number from Jabil. Upon issuance by Jabil of an RMA number, Quantum shall send the alleged defective Product DDP (INCOTERMS 2000) to Jabil's designated repair facility, and specify the Jabil assigned RMA number. Quantum shall pay all shipping, transportation, insurance and freight forwarding costs incurred in connection with the shipment of all such defective Products to Jabil's repair facility. Jabil shall analyze any such RMA Product and:

- (a) in the event a breach of warranty is found ("Defect"), then Jabil shall:
- (i) repair or replace the RMA Product within twenty (20) business days of receipt by Jabil of the RMA Product and all required associated documentation;
  - (ii) reimburse Quantum for the reasonable cost of transporting the RMA Product to the designated repair facility;
  - (iii) deliver the repaired RMA Product or its replacement, DDP (INCOTERMS 2000) to Quantum's designated destination or as otherwise set forth in the SOW; and
  - (iv) bear all shipping, transportation, insurance and freight forwarding costs incurred in connection with the shipment of all repaired RMA Products, or their replacements, to Quantum's designated destination.
- (b) if no such Defect is found, then Quantum shall:
- (i) reimburse Jabil for all fees, costs and expenses incurred to attempt a repair or replacement of the non-Defective RMA Product; and
  - (ii) bear responsibility for all transportation costs to and from Jabil's designated repair facility.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**4.3 Limitation of Warranty.** THE REMEDY SET FORTH IN SECTION 4.2 ABOVE SHALL BE QUANTUM'S SOLE AND EXCLUSIVE REMEDY FOR A BREACH OF JABIL'S WARRANTY, AS SET FORTH IN SECTION 4.1 ABOVE. THE WARRANTY SET FORTH IN SECTION 4.1 ABOVE IS IN LIEU OF, AND JABIL EXPRESSLY DISCLAIMS, AND QUANTUM EXPRESSLY WAIVES, ALL OTHER WARRANTIES WITH RESPECT TO ANY AND ALL REPAIRED PRODUCTS OF ANY KIND WHATSOEVER WHETHER EXPRESS, IMPLIED, STATUTORY, ARISING BY COURSE OF DEALING OR PERFORMANCE, CUSTOM, USAGE IN THE TRADE, OTHERWISE OR PURSUANT TO ANY OTHER PROVISION OF THIS AGREEMENT OR ANY OTHER COMMUNICATION, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OR MISAPPROPRIATION OR INFRINGEMENT OF ANY RIGHT, TITLE OR INTEREST OF QUANTUM OR ANY THIRD PARTY (INCLUDING WITHOUT LIMITATION ANY INTELLECTUAL PROPERTY INTEREST), PROVIDED THAT THIS WARRANTY DISCLAIMER SHALL NOT BE INTERPRETED TO LIMIT OR EXPAND THE SCOPE OF JABIL'S INDEMNIFICATION AS SET FORTH IN SECTION 17 BELOW. QUANTUM UNDERSTANDS AND AGREES THAT IT SHALL HAVE FULL AND EXCLUSIVE LIABILITY WITH RESPECT TO ANY PRODUCT DESIGN LIABILITY, AND DAMAGE TO PERSON OR PROPERTY OWING TO IMPROPER DESIGN OF ANY OF THE PRODUCTS. NO ORAL OR WRITTEN STATEMENT BY JABIL, ITS AGENTS OR EMPLOYEES SHALL CONSTITUTE OR CREATE A WARRANTY OR EXPAND THE SCOPE OF ANY WARRANTY UNDER THIS AGREEMENT, UNLESS OTHERWISE SPECIFICALLY AGREED IN WRITING BY JABIL.

JABIL'S WARRANTY SHALL NOT APPLY TO ANY PART OF THE PRODUCT UPON WHICH JABIL DID NOT PROVIDE SERVICES UNDER THIS AGREEMENT OR ANY PRODUCT JABIL DETERMINES TO HAVE BEEN SUBJECTED TO TESTING FOR OTHER THAN SPECIFIED ELECTRICAL CHARACTERISTICS OR TO OPERATING AND/OR ENVIRONMENTAL CONDITIONS IN EXCESS OF THE MAXIMUM VALUES ESTABLISHED IN APPLICABLE SPECIFICATIONS, OR TO HAVE BEEN THE SUBJECT OF MISHANDLING, ACCIDENT, MISUSE, NEGLIGENCE, IMPROPER TESTING, IMPROPER OR UNAUTHORIZED REPAIR, ALTERATION, DAMAGE, ASSEMBLY, PROCESSING OR ANY

**OTHER INAPPROPRIATE OR UNAUTHORIZED ACTION OR INACTION, BY ANY PARTY, THAT ALTERS PHYSICAL OR ELECTRICAL PROPERTIES. THIS WARRANTY SHALL NOT APPLY TO ANY DEFECT IN THE PRODUCT ARISING FROM ANY DRAWING, DESIGN, SPECIFICATION, PROCESS, TESTING OR OTHER PROCEDURE, ADJUSTMENT OR MODIFICATION SUPPLIED AND/OR CONTROLLED BY QUANTUM.**

**5. Limitation of Damages**

**EXCEPT WITH REGARD TO ANY INDEMNITIES SET FORTH IN THIS AGREEMENT, UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR TO ANY OTHER PERSON OR ENTITY UNDER ANY CONTRACT, TORT, STRICT LIABILITY, NEGLIGENCE, OR OTHER LEGAL OR EQUITABLE CLAIM OR THEORY FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR INDIRECT DAMAGES, LOSS OF GOODWILL OR BUSINESS PROFITS, LOST REVENUE, WORK STOPPAGE, DATA LOSS, COMPUTER FAILURE OR MALFUNCTION, OR FOR ANY AND ALL OTHER DAMAGES, LOSS, OR EXEMPLARY OR PUNITIVE DAMAGES WHETHER SUCH PARTY WAS INFORMED OR WAS AWARE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE. THE FOREGOING SHALL NOT EXCLUDE OR LIMIT EITHER PARTY'S LIABILITY FOR DEATH OR PERSONAL INJURY RESULTING FROM ITS NEGLIGENCE TO THE EXTENT THAT SUCH LIABILITY CANNOT BY LAW BE LIMITED OR EXCLUDED.**

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**6. Delivery, Risk of Loss and Payment Terms.** All repaired Products shall be delivered in accordance with, and the parties shall allocate responsibility for shipping, transportation, risk of loss, insurance and freight forwarding charges applicable to the shipment of all such repaired Products in accordance with the applicable INCOTERMS set forth on Schedule 4 to this Agreement, which shall also define which party shall act as the importer and exporter of record of those repaired Products. The parties may agree in writing on other shipping terms, provided that such agreement is approved in writing by an officer of each of the parties. Jabil's liability to Quantum for any insurable loss of or any damage to any Products of Quantum while on Jabil's premises shall be the net book value of such product (for non-defective product - determined by book value provided to Jabil by Quantum and for defective product - determined by book value provided to Jabil by Quantum less a mutually agreed deduction for the defect). Net book value shall in no event exceed \$500 per unit

**6.1 Payment.** Jabil shall invoice Quantum for all Services performed under this Agreement in accordance with prices set forth on Schedule 1 to this Agreement (a) monthly, (b) in accordance with the SOW, or (c) as otherwise agreed by the parties in writing. Payment of all invoices shall be net \*\*\*\*\* days from date of invoice. Payment to Jabil shall be in U.S. dollars and in immediately available funds. Jabil shall apply a 1% charge for undisputed payables outstanding after \*\*\*\*\* days. In the event of any good faith dispute between the parties related to charges on Jabil's invoices, Quantum shall pay all undisputed amounts, and the parties shall use their best efforts to resolve such dispute as expeditiously as possible but in no event more that \*\*\*\*\* days from the applicable invoice due date. The time for payment of such disputed portion of an invoice shall be extended, and no service charge under this section shall accrue during such \*\*\*\*\* day period with respect to the amount in dispute. In the event that the parties cannot resolve the dispute within such \*\*\*\*\* day period, the parties shall comply with the dispute resolution procedure set forth in Section 21.13 below.

**6.2 Taxes.** Quantum shall be responsible for all federal, foreign, state and local sales, use, excise and other taxes (except taxes based on Jabil's income), all delivery, shipping, and transportation charges and all foreign agent or brokerage fees, document fees, custom charges and duties.

**7. Import and Export.** Except as otherwise provided in the SOW, each party shall comply with all import and export laws and regulations applicable to it as the exporter of record and/or importer of record of any of the repaired Products in accordance with the INCOTERM applicable to the supply and delivery of that Product. Also without limiting the generality of this Section 7, Quantum shall be responsible for obtaining any required import or U.S. export licenses necessary for Jabil to ship Product, including certificates of origin, manufacturer's affidavits, and U.S. Federal Communications Commission's identifier, if applicable and any other licenses required under U.S. or foreign law. Neither party shall export, re-export, resell or transfer, or otherwise ship or deliver any Product, assembly, component or any technical data or software which violate any export controls or limitations imposed by the United States or any other governmental authority, or to any country for which an export license or other governmental approval is required at the time of export without first obtaining all necessary licenses and approvals and paying all duties and fees. Quantum shall provide Jabil with all licenses, certifications, approvals and authorizations for which Quantum is responsible under Section 6 above or this Section 7 in order to permit Jabil to comply with all import and export laws and regulations for the shipment and delivery of the Product. Each party shall also be responsible for complying with any legislation or regulations governing the importation of the Product into the country of destination for which that party is the importer of record as provided in the SOW, and for payment of any duties thereon.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**8. Change Orders, Rescheduling and Cancellation.** Quantum may, in writing, request a change in components, Services, or the SOW at any time. Jabil will analyze the requested change and provide Quantum with an assessment of the effect that the requested change will have on cost, manufacturing, scheduling, delivery and implementation. Quantum will be responsible for all costs associated with any accepted changes. Any such change shall be documented in a written change order and shall become effective only upon mutual written agreement of both Parties to the terms and conditions of such change order, including changes in time required for performance, cost and applicable delivery schedules.

**9. Service Increases.** Subject to the provisions of Schedule 2 to this Agreement, Quantum may, in writing, request increases in the volume of Services for an outstanding Service Forecast in writing at any time. Jabil will analyze the request and determine if it can meet the requested increase. If Jabil can satisfy the requested increase it will provide Quantum with a schedule setting forth the expected completion date of the changed services. If Jabil is unable to satisfy or comply with Quantum's requested increase, Jabil will provide the reasons preventing Jabil from satisfying the requested increase. Any such change shall be documented in writing and shall become effective only upon mutual written agreement of both Parties to the terms and conditions of such change, including changes in time required for performance, cost and applicable delivery schedules.

**10. Treatment of Excess, Surplus and Obsolete Inventory.** In the event that Jabil determines that it is holding Inventory in excess of 90 days usage, or if Jabil determines that it is holding Inventory that is obsolete, either of which is due in part to Quantum or the suppliers' decisions or actions, including but not limited to: change in support strategy, termination of contract, reduction of services, forecasting errors, or End of Life Buys then Jabil shall have the right, in its sole discretion, to either (a) exhaust existing Inventory or (b) require that Quantum or the suppliers purchase the Inventory at Jabil's cost plus the margin as agreed to in the SOW or as otherwise agreed to by the parties in writing. The Parties agree to review and reconcile the status of the Inventory on a quarterly basis.

**11. Termination Charges.** Upon termination, expiration or cancellation of this Agreement for any reason other than by Quantum for Cause in accordance with Section 14.1 below, Jabil shall submit to Quantum Jabil's written claim for termination/cancellation charges within 60 days from the effective date of such termination or cancellation for materials, components, equipment or any other costs incurred by Jabil on Quantum's behalf. Jabil's claim shall be based upon costs incurred by Jabil up to and including the date of termination, expiration or cancellation ("Termination Effective Date"). Jabil will provide to Quantum all information necessary to confirm the costs and expenses sustained by Jabil due to termination, expiration or cancellation. To the extent that Jabil cannot mitigate its costs as specified below, upon cancellation, expiration or termination for any reason, Quantum's obligation shall be to pay the charges claimed by Jabil as follows.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**11.1** The applicable price as provided on Schedule 1 to this Agreement for the Services which Jabil has completed prior to the Termination Effective Date for which payment has not been made.

**11.2** Reimbursements for material acquisition costs, for all Inventory at the time of Termination Effective Date which were purchased pursuant to Service Forecasts at Jabil's cost.

**11.3** Jabil's reasonable cancellation costs incurred for any materials, components, equipment subcontracted items or any other items that Jabil had on order on behalf of Quantum on the Termination Effective Date pursuant Service Forecasts.

**11.4** Except in the event of termination due to Jabil's default under this Agreement, depreciation on equipment idle up to six months after the Termination Effective Date.

**11.5** An amount equal to Jabil's net book value, as of the Termination Effective Date, of equipment or tooling purchased by Jabil specifically for the repair, test, design, or packaging of Product and any other Services rendered or costs incurred by Jabil under this Agreement. All goods for which Quantum shall have paid the amount specified in this Section 11.5 shall be held by Jabil for Quantum's account and Quantum may arrange for its acquisition of them on AS-IS, WHERE-IS basis.

**12. Duty to Mitigate Costs.** Both Parties shall, in good faith, undertake reasonable measures to mitigate the costs of termination, expiration or cancellation. Jabil shall make reasonable efforts to cancel all applicable component and material purchase orders and reduce the Inventory through return for credit programs or allocate such components and materials for alternate Quantum programs if applicable, or other customer orders provided the same can be used within thirty (30) days of the termination date. Quantum shall assist Jabil with the cancellation of component and material orders and to reduce the Inventory through return for credit programs or through allocating such components and materials for alternate Quantum programs if applicable.

**13. Term.** This Agreement has a term of one (1) year from the Effective Date and until terminated by either Party in a manner set forth in Section 14 below. Notwithstanding the foregoing, Sections 4.1, 4.2, 4.3, 5, 6, 7, 10, 11 above, this Section 13, and Sections 14, 15, 17, and 21 below shall survive the expiration or termination of this Agreement.

**14 Termination.** This Agreement may be terminated as follows:

**14.1 Termination for Cause.** Either party may terminate this Agreement based on the material breach by the other party of the terms of this Agreement, provided that such party provides written notice setting forth the nature of the breach at least thirty (30) days (10 days for any failure to pay any amount when due) prior to the intended termination date. During such time the defaulting party may cure the



alleged breach and if such breach is cured within such thirty (30) day (or 10 day) period, no termination will occur and this Agreement will continue in accordance with its terms. If such breach shall not have been cured, termination shall occur upon the termination date set forth in such notice.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**14.2 Termination for Bankruptcy/Insolvency.** Upon the happening of any of the following events with respect to a Party, this Agreement may be terminated immediately:

**14.2.1** The appointment of a receiver or custodian to take possession of any or all of the assets of a Party, or should a Party make an assignment for the benefit of creditors, or should there be an attachment, execution, or other judicial seizure of all or a substantial portion of a Party's assets, and such attachment, execution or seizure is not discharged within thirty (30) days.

**14.2.2** A Party becomes a debtor, either voluntarily or involuntarily, under Title 11 of the United States Code or any other similar law and, in the case of an involuntary proceeding, such proceeding is not dismissed within thirty (30) days of the date of filing.

**14.2.3** The dissolution or termination of the existence of a Party whether voluntarily, by operation of law or otherwise.

**14.3 Termination Consequences.** If this Agreement is terminated for any reason, except due to a material breach by Jabil, Quantum shall not be excused from performing its obligations under this Agreement with respect to payment for all monies due Jabil under this Agreement including fees, costs and expenses incurred by Jabil up to and including the Termination Effective Date.

**14.4 Physical Inventory.** Unless otherwise agreed by the Parties in writing, a complete physical inventory will be conducted by Jabil or a party designated by Jabil. In the event that Jabil terminates this Agreement for cause Quantum shall pay the cost of the complete physical inventory.

**14.5 Loaned Equipment.** Upon the termination, cancellation or expiration of this Agreement, all Loaned Equipment shall be returned by Jabil to Quantum, in accordance with Quantum's written instructions.

**14.6 Legal Proceedings.** Notwithstanding anything to the contrary contained in this Agreement, except for any material breach by either party of Article 15, each party agrees that, unless otherwise required in order to comply with deadlines under Applicable Laws, it will not terminate this Agreement, file an action or institute legal proceedings with respect to any dispute, controversy, or claim arising out of, relating to, or in connection with this Agreement until: (a) the other party has failed to provide a prompt and effective remedy within the cure period set forth in Article 14.1; (b) it has given a senior executive of the other party written notice of its grievance; and (c) it has requested that senior executives for both parties to meet and discuss the matter in order to consider informal and amicable means of resolution; and (d) either such meeting failed to occur within five (5) days after such request or the meeting did not produce a mutually satisfactory resolution of the matter.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**15. Confidentiality.**

**15.1 Confidentiality Obligations.** In order to protect both Parties' Proprietary Information and Technology the Parties agree that each Party shall use the same degree of care, but no less than a reasonable degree of care, as such Party uses with respect to its own similar information to protect the Proprietary Information and Technology of the other Party and to prevent any use of Proprietary Information and Technology other than for the purposes of this Agreement. This Section 15 imposes no obligation upon a Party with respect to Proprietary Information and Technology which (a) was known to such Party before receipt from the disclosing Party; (b) is or becomes publicly available through no fault of the receiving Party; (c) is rightfully received by the receiving Party from a third party without a duty of confidentiality; (d) is disclosed by the disclosing Party to a third party without imposing a duty of confidentiality on the third party; (e) is independently developed by the receiving Party without a breach of this Agreement; or (f) is disclosed by the receiving Party with the disclosing Party's prior written approval. If a Party is required by a government body or court of law to disclose Proprietary Information and Technology, then such Party agrees to give the other Party reasonable advance notice so that the other Party may seek a protective order or otherwise contest the disclosure.

**15.2 Term and Enforcement.** The confidentiality obligation set forth in this Agreement shall be observed during the term of the Agreement and for a period of five (5) years following the date of disclosure of the information. Each Party acknowledges that a breach of any of the terms of this Section 15 may cause the non-breaching Party irreparable damage, for which the award of damages would not be adequate compensation. Consequently, the non-breaching Party may institute an action to enjoin the breaching Party from any and all acts in violation of those provisions .

**15.3 Return of Proprietary Information and Technology.** Upon the termination, cancellation or expiration of this Agreement all Proprietary Information and Technology shall, upon written request, be returned to the respective Party, or at the respective Party's discretion,

destroyed by the receiving Party.

**16. Intellectual Property Rights; Assignment.**

**16.1 Jabil Existing Technology.** Jabil shall retain all right, title and ownership to any Jabil Existing Technology that is used during performance of the Services or as part of any other work provided pursuant to this Agreement or any other related agreement executed by the Parties.

**16.2 Jabil Created Technology.**

a. Jabil shall assign, transfer and convey to Quantum all rights, title and interests in and to that portion of the Jabil Created Technology that relates directly to the Products. Quantum hereby grants to Jabil a worldwide, non-exclusive, fully paid-up, royalty-free right and license in and to Jabil's Created Technology relating directly to the Products.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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b. Jabil shall grant to Quantum a limited, non-exclusive, transferable, perpetual, worldwide, royalty-free license to use that portion of Jabil's Created Technology that relates to the processes and procedures used by Jabil in the performance of the Services under this Agreement, including, but not limited to, the repair and testing of the Products. Quantum shall have the right to use, and to authorize one or more other Persons to use the Jabil Created Technology licensed to Quantum under this Section 16.2(b) in the manufacture, assembly and/or repair of the Products.

c. Quantum hereby grants to Jabil a worldwide, non-exclusive, non-transferable (except for the transfer to a Jabil affiliate or its embodiment in any manufactured products), fully paid-up, royalty-free right and license to utilize the Quantum Process IP and Quantum IT Software and Infrastructure in connection with the repair of products for Quantum and any other persons, firms, corporations and other entities.

**17. Indemnification.**

**17.1 \*\*\*\*\*.**

**17.2** Jabil may employ counsel, at its own expense to assist Jabil with respect to any such claims, provided that if such counsel is necessary because Quantum does not assume control of the defense of a claim for which Quantum is obligated to indemnify Jabil under Section 17.1 above, Quantum shall bear such expense. Quantum shall not enter into any settlement that impairs Jabil's rights or interests without Jabil's prior written approval, which shall not be unreasonably withheld. Jabil will provide such assistance and cooperation as is reasonably requested by Quantum or its counsel in connection with such indemnified claims.

**17.3 \*\*\*\*\*.**

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**17.4** Quantum may employ counsel, at its own expense to assist Quantum with respect to such claims, provided that if such counsel is necessary because Jabil does not assume control of the defense of a claim for which Jabil is obligated to indemnify Quantum under Section 17.3 above, Jabil shall bear such expense. Jabil shall not enter into any settlement that impairs Quantum's rights or interests without Quantum's prior written approval, which shall not be unreasonably withheld. Quantum will provide such assistance and cooperation as is reasonably requested by Jabil or its counsel in connection with such indemnified claims.

**17.5 \*\*\*\*\*.**

**18. Relationship of Parties.** Jabil shall perform its obligations under this Agreement as an independent contractor. Nothing contained herein shall be construed to imply a partnership or joint venture relationship between the Parties. The Parties shall not be entitled to create any obligations on behalf of the other Party, except as expressly contemplated by this Agreement. The Parties will not enter into any contracts with third parties in the name of the other Party without the prior written consent of the other Party.

**19. Insurance.** Each Party will keep its business and properties insured at all times against such risks for which insurance is usually maintained by reasonably prudent Persons engaged in a similar business (including insurance for force majeure events and other hazards, and insurance against liability on account of damage to Persons or property and insurance under all applicable workman's compensation laws). The insurance maintained shall be in such monies and with such limits and deductibles usually carried by Persons engaged in the same or a similar business.

**20. Force Majeure.** Neither Party will be liable for any delay in performing, or for failing to perform, its obligations under this Agreement (other than the payment of money) resulting from any cause beyond its reasonable control including, acts of God; blackouts;

power failures; inclement weather; fire; explosions; floods; hurricanes; tornadoes; earthquakes; epidemics; strikes; work stoppages; slow-downs; industrial disputes; sabotage; accidents; destruction of production facilities; riots or civil disturbances; acts of government or governmental agencies, including changes in law or regulations that materially and adversely impact the Party; provided that the Party affected by such event promptly notifies (in no event more than ten (10) business days of discovery of the event) the other Party of the event. If the delays caused by the force majeure conditions are not cured within sixty (60) days of the force majeure event, then either Party may immediately terminate this Agreement. Termination of this Agreement pursuant to this Section 21 shall not affect Quantum's obligation to pay Jabil, as set forth in this Agreement.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**21. Miscellaneous.**

**21.1 Notices. \*\*\*\*\*.**

All notices, demands and other communications made under this Agreement shall be in writing and shall be given either by personal delivery, by nationally recognized overnight courier (with charges prepaid), by facsimile or Electronic Exchange (with telephone confirmation) addressed to the respective Parties at the following addresses:

Notice to Jabil:

Jabil Global Services, Inc.  
Penang, Malaysia  
Facsimile: \*\*\*\*\*  
Attn: \*\*\*\*\*

with a copy to:

Jabil Global Services, Inc.  
4601 Cromwell Avenue  
Memphis, TN 38118  
Facsimile:\*\*\*\*\*  
Attn: \*\*\*\*\*

and

Jabil Circuit, Inc.  
10560 9th Street North  
St. Petersburg, FL 33716  
Facsimile:\*\*\*\*\*  
Attn: \*\*\*\*\*

Notice to Quantum:

Quantum Corp.  
10125 Federal Drive  
Colorado Springs, CO 80908-4508  
Attn: \*\*\*\*\*

with a copy to:

Quantum Corp.  
10125 Federal Dive  
Colorado Springs, CO 80908-4508  
Attn: \*\*\*\*\*

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**21.2 Attorneys' Fees and Costs.** In the event that attorneys' fees or other costs are incurred to enforce payment or performance of any obligation, agreement or covenant between the Parties or to establish damages for the breach of any obligation, agreement or covenant under this Agreement, or to obtain any other appropriate relief under this Agreement, whether by way of prosecution or defense, the prevailing Party shall be entitled to recover from the other Party its reasonable attorneys' fees and costs, including any appellate fees and the costs, fees and expenses incurred to enforce or collect such judgment or award and any other relief granted.

**21.3 Amendment.** No course of dealing between the Parties to this Agreement shall be effective to amend, modify, or change any provision of this Agreement. This Agreement may not be amended, modified, or changed in any respect except by an agreement in writing signed by the Party against whom such change is to be enforced. The Parties may, subject to the provisions of this Section 21.3, from time to time, enter into supplemental written agreements for the purpose of adding any provisions to this Agreement or changing in any manner the rights and obligations of the Parties under this Agreement or any Schedule to this Agreement. Any such supplemental written agreement executed by the Parties shall be binding upon the Parties.

**21.4 Partial Invalidity.** Whenever possible, each provision of this Agreement shall be interpreted in such a way as to be effective and valid under applicable law. If a provision is prohibited by or invalid under applicable law, it shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

**21.5 Monies.** All references to monies in this Agreement shall be deemed to mean lawful monies of the United States of America.

**21.6 Entire Agreement.** This Agreement, the Schedules and any addenda attached to this Agreement or referenced in this Agreement, constitute the complete and exclusive statement of the agreement of the Parties with respect to the subject matter of this Agreement, and replace and supersede all prior agreements and negotiations by and between the Parties. Each Party acknowledges and agrees that no agreements, representations, warranties or collateral promises or inducements have been made by any Party to this Agreement except as expressly set forth herein or in the Schedules and any addenda attached to this Agreement or referenced herein, and that it has not relied upon any other agreement or document, or any verbal statement or act in executing this Agreement. These acknowledgments and agreements are contractual and not mere recitals. In the event of any inconsistency between the provisions of this Agreement and any Schedule and any addenda attached to this Agreement or referenced herein, the provisions of this Agreement shall prevail unless expressly stipulated otherwise, in writing executed by the Parties. Pre-printed language on each Party's forms, including purchase orders, shall not constitute part of this Agreement and shall be deemed unenforceable.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**21.7 Binding Effect.** This Agreement shall be binding on the Parties and their successors and assigns; provided, however, that neither Party shall assign, delegate or transfer, in whole or in part, this Agreement or any of its rights or obligations arising under this Agreement (except with regard to payment of monies) without the prior written consent of the other Party; and provided further that nothing in this Section 21.7 shall be construed to restrict or impair the right of any Affiliate of Quantum to require Jabil to perform the Services specified in this Agreement directly for that Quantum Affiliate. Any purported assignment without such consent shall be null and void. Quantum acknowledges and agrees that Jabil may use temporary employees or contract labor in its performance of the Services.

**21.8 Waiver.** Waiver by either Party of any breach of any provision of this Agreement shall not be considered as or constitute a continuing waiver or a waiver of any other breach of the same or any other provision of this Agreement.

**21.9 Captions.** The captions contained in this Agreement are inserted only as a matter of convenience or reference and in no way define, limit, extend or describe the scope of this Agreement or the intent of any of its provisions.

**21.10 Construction.** Since both Parties have engaged in the drafting of this Agreement, no presumption of construction against any Party shall apply.

**21.11 Section References.** All references to Sections or Schedules shall be deemed to be references to Sections of this Agreement and Schedules attached to this Agreement, except to the extent that any such reference specifically refers to another document. All references to Sections shall be deemed to also refer to all subsections of such Sections, if any.

**21.12 Business Day.** If any time period set forth in this Agreement expires upon a Saturday, Sunday or U.S. national, legal or bank holiday, such period shall be extended to and through the next succeeding business day.

**21.13 Governing Law and Dispute Resolution.** This Agreement, shall be governed by, and interpreted in accordance with, the laws of the State of Delaware, excluding conflicts of laws principles and any application of the U.N. Convention on Contracts for the International Sale of Goods. Subject to Section 14.6, any dispute between the parties, relating to the validity, performance, interpretation or construction of this Agreement shall be resolved in accordance with Delaware law and in the federal or state courts of Delaware. The parties to this Agreement hereby irrevocably consent to the personal jurisdiction of the federal and state courts in Delaware for the resolution of all disputes under this Agreement. Notwithstanding the provisions of this Section 21.13, the Parties shall have the right to seek relief, including preliminary and permanent injunctive relief, in any court of competent jurisdiction to prevent the unauthorized use, misappropriation, disclosure or infringement of any of intellectual property of the Parties or Confidential Information.

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

## 17.

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**21.14 Other Documents.** The Parties shall take all such actions and execute all such documents that may be necessary to carry out

the purposes of this Agreement, whether or not specifically provided for in this Agreement.

**21.15 Counterparts.** This Agreement may be executed by facsimile and delivered in one or more counterparts, each of which shall be deemed to be an original and all of which, taken together, shall be deemed to be one agreement.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

\*\*\*\*\*Confidential treatment has been requested for omitted portions.

18.

**IN WITNESS WHEREOF**, the Parties have caused this Agreement to be executed by their duly authorized representatives.

**JABIL GLOBAL SERVICES, INC.**

By: /s/ Chris A. Lewis  
Name: Chris A. Lewis  
Title: Chief Financial Officer and President

**QUANTUM CORPORATION**

By: /s/Michael J. Lambert  
Name: Michael J. Lambert  
Title: Executive Vice President and CFO.

**QUANTUM PERIPHERALS (Europe) S.A.**

By: /s/ Franco Mazzullo  
Name: Franco Mazzullo  
Title: Vice President

[SIGNATURE PAGE TO THE REPAIR SERVICES AGREEMENT]

\*\*\*\*\*Confidential treatment has been requested for omitted portions.

19.

**SCHEDULE 1\*\*\*\*\*.**

\*\*\*\*\*Confidential treatment has been requested for omitted portions.

20.

**SCHEDULE 2\*\*\*\*\*.**

\*\*\*\*\*Confidential treatment has been requested for omitted portions.

21.

**SCHEDULE 3\*\*\*\*\*.**

\*\*\*\*\*Confidential treatment has been requested for omitted portions.

22.

**SCHEDULE 4\*\*\*\*\*.**

\*\*\*\*\*Confidential treatment has been requested for omitted portions.

23.



## TRANSITION SERVICES AGREEMENT

**THIS AGREEMENT** (the "Agreement") made this 10<sup>th</sup> day of December, 2002 by and between Quantum Peripherals (M) Sdn. Bhd. (Company No. 267908-V), a corporation organized under the laws of Malaysia and having its registered office at Plot 21(A), Bayan Lepas FIZ IV, 11900 Penang, Malaysia (the "Seller"), and Jabil Circuit Sdn. Bhd. (Company No. 336537-M), a corporation organized under the laws of Malaysia and having its registered office at 56, Hilir Sungai Keluang 1, Bayan Lepas FIZ IV, 11900 Penang, Malaysia (the "Purchaser").

### RECITALS

A. The Seller and the Purchaser have entered into an Asset Purchase Agreement dated August 29, 2002 (the "Purchase Agreement"), by which the Purchaser will purchase from the Seller and the Seller will sell to the Purchaser substantially all of the assembly and fulfillment operations for the production of the Seller's Products currently assembled by the Seller at the Facility (capitalized terms not expressly defined in this Agreement shall have the meanings ascribed to them in the Purchase Agreement); and

B. Each of the Purchaser and the Seller will provide certain services as set forth in this Agreement in connection with the transition of the responsibility for the manufacture and assembly of the Products (the "Business") from the Seller to the Purchaser in accordance with the terms and conditions of that certain Master Supply and Intellectual Property Agreement, dated as of the date of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

#### **Section 1. Provision of Services**

Each of the Seller and the Purchaser shall provide the transition services specified on the applicable Exhibits attached to this Agreement (the "Services") and for the periods set forth on such Exhibits. It is understood by the parties that the manner and level of the Services to be provided under this Section 1 shall be substantially consistent with recent historical practice and that the Services shall be provided by each party with no less than the same degree of quality and timeliness customarily exercised by it in connection with its own business operations.

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#### **Section 2. Compensation**

Each party shall pay for the Services provided under this Agreement in accordance with the Exhibit attached to this Agreement setting forth the Services so performed.

#### **Section 3. Warranty, Liability and Indemnity**

(a) Except as provided in the last sentence of Section 1, neither party makes any warranties, express or implied, with respect to the Services to be provided under this Agreement.

(b) Neither party shall be liable to the other party for any loss (including loss of profits), damage, claim, liability or expense of any kind caused directly or indirectly ("Losses") by any action taken in connection with the Services to be provided under this Agreement, except, with respect to the liability of the Seller or the Purchaser, to the extent such Losses arise from the negligence or willful misconduct of such party. Under no circumstances shall either party have any liability to the other party for any indirect or consequential damages with respect to the performance of the Services specified in this Agreement.

(c) Each party shall indemnify and hold harmless the other party and its directors, officers, employees and agents from and against all Losses resulting or arising from the negligent acts or omissions or willful misconduct of the indemnifying party or its directors, officers, employees or agents.

#### **Section 4. Force Majeure**

Neither party shall be in default under this Agreement for failure or delay in performance of its obligations under this Agreement, if caused by an act of God or public enemy, war, government acts, regulations or orders, fire, flood, embargo, quarantine, epidemic, labor stoppages or other disruptions, accident, unusually severe weather or other cause similar or dissimilar, reasonably beyond the control of such party, provided that such party gives the other party written notice thereof promptly upon discovery thereof and uses reasonable efforts to cure or mitigate the delay or failure to perform.

#### **Section 5. Proprietary Information and Rights**

Each party acknowledges that the other possesses, and will continue to possess, information that has been created, discovered or developed by it and/or in which property rights have been assigned or otherwise conveyed to it, which information has commercial value and is not in the public domain. The proprietary information of each party will be and remain the sole property of such party and its assigns. Each party shall use the same degree of care that it normally uses to protect its own proprietary information to prevent the disclosure to third parties of information that has been identified as proprietary by written notice to such party from the other party. Neither party shall make any

use of the information of the other which has been identified as proprietary except as contemplated or required by the terms of this Agreement. Notwithstanding the foregoing, this Section shall not apply to any information that a party can demonstrate: (a) was, at the time of disclosure to it, in the public domain through no fault of such party; (b) was received after disclosure to it from a third party who had a lawful right to disclose such information to it; or (c) was independently developed by the receiving party. Notwithstanding anything in this Agreement to the contrary, each party shall comply with the provisions in Section 6.04 of the Purchase Agreement restricting the use by each party of non-public information of the other party.

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#### **Section 6. Termination**

(a) This is a master agreement and shall be construed as a separate and independent agreement for each and every Service. Any termination of this Agreement with respect to any Service shall not terminate this Agreement with respect to any other Service then being provided pursuant to this Agreement.

(b) Upon 30 days' written notice, either party may terminate this Agreement with respect to any Service in the event of the failure of the other party to pay any invoice within\*\*\*\*\*days after the receipt by such other party of such invoice or upon any other material breach by such other party of this Agreement with respect to such Service, unless such other party is disputing the invoice in good faith or such other party shall have paid the invoice or cured such breach within the 30 day notice period; provided, however, each of the parties acknowledge and agree that the Purchaser shall not be in breach of this Agreement in the event it is unable to perform its obligations under this Agreement primarily as a result of the Seller's inability to maintain the "Service Level Expectations" as set forth on Exhibit A.

(c) This Agreement will terminate automatically as to particular Services upon the completion of performance of those Services as provided in the relevant Exhibit to this Agreement. All accrued and unpaid charges payable by the parties for Services performed under this Agreement shall be paid upon termination of this Agreement with respect to such Services.

(d) Following any termination of this Agreement, each party shall cooperate in good faith with the other to transfer and/or retain all records, prepare and file tax returns and take all other actions necessary to provide the Seller and the Purchaser and their respective successors and assigns with sufficient information in the form requested by the Seller or the Purchaser, or their respective successors and assigns, as the case may be, to make alternative service arrangements substantially consistent with those contemplated by this Agreement.

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#### **Section 7. No Implied Assignments or Licenses**

Nothing in this Agreement is to be construed as an assignment or grant of any right, title or interest in any trademark, copyright, design or trade dress, patent right or other intellectual or industrial property right.

#### **Section 8. Relationship of Parties**

The parties are independent contractors. Except as expressly set forth in this Agreement, neither party has the authority to, and each party agrees that it shall not, directly or indirectly contract any obligations of any kind in the name of or chargeable against the other party without such party's prior written consent.

#### **Section 9. Assignment and Delegation**

Neither party to this Agreement may assign or delegate any of its rights or obligations under this Agreement without the prior written consent of the other party; provided, however that either party may assign this Agreement to an Affiliate, or to a third party in connection with a transfer of all or substantially all of its business or assets.

#### **Section 10. Notices**

All notices and other communications pursuant to this Agreement shall be in writing and shall be deemed given if delivered personally, telecopied, sent by nationally-recognized overnight courier or mailed by registered or certified mail (return receipt requested), postage prepaid, to the parties at the addresses set forth below or to such other address as the party to whom notice is to be given may have furnished to the other parties to this Agreement in writing in accordance with this Agreement. Any such notice or communication shall be deemed to have been delivered and received (a) in the case of personal delivery, on the date of such delivery, (b) in the case of telecopier, on the date sent if confirmation of receipt is received and such notice is also promptly mailed by registered or certified mail (return receipt requested), (c) in the case of a nationally-recognized overnight courier in circumstances under which such courier guarantees next Business Day delivery, on the next Business Day after the date when sent and (d) in the case of mailing, on the fifth Business Day following that on which the piece of mail containing such communication is posted:

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if to the Seller, to

Quantum Peripherals (M) Sdn.Bhd.  
c/o Quantum Corporation  
501 Sycamore Drive  
Milpitas, California 95035  
Attention: \*\*\*\*\*  
Telephone: \*\*\*\*\*  
Telecopy: \*\*\*\*\*

with copies to:

Quantum Peripherals (M) Sdn.Bhd.  
c/o Quantum Corporation  
10125 Federal Drive  
Colorado Springs, CO 80908-4508  
Attention: \*\*\*\*\*  
Telephone: \*\*\*\*\*  
Telecopy: \*\*\*\*\*

Baker & McKenzie  
Two Embarcadero Center  
24th Floor  
San Francisco, CA 94111-3909  
Attention: \*\*\*\*\*  
Telephone: \*\*\*\*\*  
Telecopy: \*\*\*\*\*

if to the Purchaser, to:

Jabil Circuit, Inc.  
10560 9<sup>th</sup> Street North  
St. Petersburg, Florida 33716  
Attention: \*\*\*\*\*  
Telecopy: \*\*\*\*\*

With copies to:

Jabil Circuit, Inc.  
10560 9<sup>th</sup> Street North  
St. Petersburg, Florida 33716  
Attention: \*\*\*\*\*  
Telecopy: \*\*\*\*\*

Holland & Knight LLP  
400 North Ashley Drive  
Suite 2300  
Attention: \*\*\*\*\*  
Telephone: \*\*\*\*\*  
Telecopy: \*\*\*\*\*

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or to such other address as the Person to whom notice is given may have previously furnished to the others in writing in the manner set forth above. Any party to this Agreement may give any notice, request, demand, claim or other communication under this Agreement using any other means (including ordinary mail or electronic mail), but no such notice, request, demand, claim or other communication shall be deemed to have been duly given unless and until it actually is received by the individual for whom it is intended.

**Section 11. Entire Agreement**

This Agreement, including the Exhibits, contains the entire agreement between the parties with respect to the subject matter under this Agreement and supersedes all prior agreements and understandings, oral or written, with respect to such matters.

**Section 12. Parties in Interest**

This Agreement shall inure to the benefit of and be binding upon the parties and their respective successors and permitted assigns. Nothing in this Agreement, express or implied, is intended to confer upon any Person other than the Seller or the Purchaser or their respective successors or permitted assigns any rights or remedies under or by reason of this Agreement.

**Section 13. Governing Law**

This Agreement shall be governed by, and construed in accordance with, the laws of the State of Florida without regard to conflicts of laws principles.

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**Section 14. Amendment; Waiver**

(a) Any provision of this Agreement may be amended or waived if, and only if, such amendment or waiver is in writing and signed, in the case of an amendment, by all parties to this Agreement, or in the case of a waiver, by the party against whom the waiver is to be effective.

(b) No waiver by a party of any default, misrepresentation or breach of a warranty or covenant under this Agreement, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation or breach of a warranty or covenant under this Agreement or affect in any way any rights arising by virtue of any prior or subsequent occurrence. No failure or delay by a party to this Agreement in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided in this Agreement shall be cumulative and not exclusive of any rights or remedies provided under Applicable Law.

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IN WITNESS WHEREOF, the parties to this Agreement here caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

**SELLER:**

Quantum Peripherals (M) Sdn. Bhd., a corporation organized under the laws of Malaysia

By: /s/Shawn Hall  
Shawn Hall, Director

**PURCHASER:**

Jabil Circuit Sdn. Bhd.,  
a corporation organized under the laws of Malaysia

By: /s/Chris A. Lewis  
Chris A. Lewis, Director

[SIGNATURE PAGE TO THE TRANSITION SERVICES AGREEMENT]

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**EXHIBIT A\*\*\*\*\***

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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**EXHIBIT B\*\*\*\*\***

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\*\*\*\*\*Confidential treatment has been requested for omitted portions.

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