

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

RONALD FRIEDMAN, as trustee for the
SportCo Creditors' Liquidation Trust,

Plaintiff,

v.

Adversary No. 19-80071-dd

WELLSPRING CAPITAL MANAGEMENT,
LLC, WELLSPRING CAPITAL PARTNERS IV,
L.P., WCM GENPAR IV, L.P., WCM GENPAR
IV GP, LLC, ALEXANDER E. CARLES,
BRADLEY JOHNSON, F. HEWITT GRANT,
CHARLES E. WALKER, JR., TODD BOEHLY,
BERNARD ZIOMEK, and ANDREW KUPCHIK,

Defendants.

**PLAINTIFF'S OMNIBUS RESPONSE TO DEFENDANTS' MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
FACTUAL BACKGROUND.....	5
A. Ellett’s first seventy-five years are a story of American entrepreneurship, careful management, and consistent success.	5
B. Wellspring Capital acquired Ellet and saddled it with debt while paying itself and the Transferee Defendants more than \$188 million in dividends.	6
C. The AcuSport Purchase drains Ellett of assets necessary to survive an economic downturn.	8
D. Prospect files claims in South Carolina state court, the Debtors file for bankruptcy, and the claims become a part of the liquidation trust.	11
ARGUMENT	12
A. South Carolina law applies to the Trustee’s claim under § 544(b).....	13
1. The Loan Agreements’ choice-of-law clause does not control because the Transferee Defendants are not parties to those agreements.....	13
2. Under applicable conflict-of-law rules, South Carolina law applies to the claim for fraudulent transfer.	17
i. Federal law provides the relevant conflict-of-laws rules.....	17
ii. An action to recover a fraudulent transfer is a unique equitable claim, but one closest to a “tort” for conflict-of-law purposes.....	19
iii. The harm occurred in South Carolina, and South Carolina has the greatest interests in having its law apply.	20
B. The Trustee sufficiently pleads constructive fraudulent-transfer claims under the Statute of Elizabeth.	25
1. A transfer is void if it is made for no consideration and the debtor fails to retain sufficient property to pay its creditors.	25

2.	Prospect and Summit were creditors at the time of the Fraudulent Transfers.	27
3.	Prospect and Summit held unsecured claims at the time of the Debtors’ bankruptcy because they were under-secured.	28
C.	Defendants’ affirmative defenses of limitations and ratification lack merit and cannot be decided on a motion to dismiss.	30
1.	The statute of limitations did not begin to run until Ellett failed to pay its debts under the Loan Agreements.....	30
2.	Prospect did not and could not ratify the fraudulent transfers.	33
D.	The Trustee pleads claims under § 550 against the Transferee Defendants and Wellspring Capital.	35
E.	The Trustee, as assignee of Prospect, sufficiently pleads a claim for negligent misrepresentation.	38
1.	Carles and Johnson owed Prospect a duty to exercise reasonable diligence in their communications concerning the AcuSport purchase, which they failed to do.	39
2.	Claims for negligent misrepresentation are not subject to Rule 9(b)’s heightened pleading standard.	43
CONCLUSION.....		45

TABLE OF AUTHORITIES

Cases

<i>Albertson v. Robinson</i> <u>371 S.C. 311</u> , (Ct. App. 2006)	34
<i>Amusement Indus., Inc. v. Stern</i> No. 07 CIV 11586 LAKGWG, <u>2010 WL 2976199</u> (S.D.N.Y. July 26, 2010).....	15
<i>Anderson v. Bajaj et al. (In re Med. Mgmt. Grp.), LLC</i> <u>534 B.R. 646</u> (Bankr. D.S.C. 2015)	38
<i>Anderson v. Buonforte</i> <u>365 S.C. 482</u> (Ct. App. 2005)	32
<i>Ashcroft v. Iqbal</i> <u>556 U.S. 662</u> (2009).....	12
<i>Ashe v. Union Cent. Life Ins. Co.</i> <u>115 F. 234</u> (C.C.D.S.C. 1902)	34
<i>Ashmore for Wilson v. Dodds</i> <u>262 F. Supp. 3d 341</u> (D.S.C. 2017).....	20
<i>Atlas Food Sys. And Servs., Inc. v. Crane Nat’l Vendors Div. of Unidynamics Corp.</i> <u>319 S.C. 556</u> (1995)	33
<i>Baltimore Cty. v. Cigna Healthcare</i> <u>238 F. App’x 914</u> (4th Cir. 2007)	44
<i>Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.</i> No. 03 CIV. 1537 (MBM), <u>2003 WL 23018888</u> (S.D.N.Y. Dec. 22, 2003)	16
<i>Bank of Am., N.A. v. Corporex Companies, LLC</i> <u>99 F. Supp. 3d 708</u> (E.D. Ky. 2015)	23
<i>Barber v. Carolina Auto Sales</i> <u>236 S.C. 594</u> (1960)	35
<i>Bell Atl. Corp. v. Twombly</i> <u>550 U.S. 544</u> (2007).....	12
<i>Berger v. AXA Network LLC</i> <u>459 F.3d 804</u> (7th Cir. 2006)	18

<i>Campbell v. Hanckel (In re Hanckel)</i> 512 B.R. 539 (Bankr. D.S.C. 2014)	26
<i>Carr v. Guerard</i> 365 S.C. 151 (2005)	33
<i>Chisolm v. Transouth Fin. Corp.</i> 164 F.3d 623 (4th Cir. 1998)	45
<i>Compliance Marine, Inc. v. Campbell (In re Merritt Dredging Co., Inc.)</i>	19, 24
839 F.2d 203 (4th Cir. 1988)	
<i>Dawkins v. State</i> 306 S.C. 391 (1991)	21
<i>Del Norte v. WorldBusiness Capital, Inc.</i> No. 14 CIV. 10143 (CM), 2017 WL 4334005 (S.D.N.Y. Apr. 5, 2017)	15
<i>Dow Corning Corp. v. Chem. Design, Inc.</i>	15
3 F. Supp. 2d 361 (W.D.N.Y.1998)	
<i>Durham v. Blackard</i> 438 S.E.2d 259 (S.C.Ct.App.1993)	34
<i>ECN Capital (Aviation) Corp. v. Airbus Helicopters SAS (In re CHC Grp. Ltd.)</i> No. 3:17-CV-00075-C, 2017 WL 1380514 (Bankr. N.D. Tex. Mar. 28, 2017)	19
<i>First Citizens Bank and Trust Co. v. Scofield</i> 335 S.E.2d 248 (S.C.Ct.App.1985)	34
<i>Future Grp., II v. Nationsbank</i> 324 S.C. 89 (1996)	26
<i>Gardner v. Kirven</i> 191 S.E. 814 (S.C. 1937)	23, 26, 33
<i>Goodman v. H.I.G. Capital, LLC et al. (In re Gulf Fleet Holdings, Inc.)</i> 491 B.R. 747 (Bankr. W.D. La. 2013)	18, 22
<i>Harman v. First Am. Bank (In re Jeffrey Bigelow Design Grp., Inc.)</i> 956 F.2d 479 (4th Cir. 1992)	21, 23
<i>Hodgin v. UTC Fire & Sec. Americas Corp.</i> 885 F.3d 243 (4th Cir. 2018)	35
<i>Hovis v. Ducate (In re Ducate)</i>	

<u>369 B.R. 251</u> (Bankr. D.S.C. 2007).....	passim
<i>Hydro Inv’rs, Inc. v. Trafalgar Power Inc.</i> <u>227 F.3d 8</u> (2d Cir. 2000)	43
<i>Hyman v. Ford Motor Co.</i> <u>142 F. Supp. 2d 735</u> (D.S.C. 2001).....	34
<i>In re 500 Fifth Ave. Assocs.</i>	29
<u>148 B.R. 1010</u> (Bankr. S.D.N.Y. 1993), <i>aff’d</i> , No. 93 CIV. 844 (LJF), <u>1993 WL 316183</u> (S.D.N.Y May 21, 1993)	
<i>In re Adelphia Recovery Tr.</i> <u>634 F.3d 678</u> (2d Cir. 2011).....	34, 35
<i>In re Amtron, Inc.</i> <u>192 B.R. 130</u> (Bankr. D.S.C. 1995).....	33
<i>In re Blast Fitness Grp., LLC</i> <u>603 B.R. 219</u> (Bankr. D. Mass. 2019)	37
<i>In re Compton Corp.</i> <u>831 F.2d 586</u> (5th Cir.1987)	37
<i>In re J.R. Deans Co., Inc.</i> <u>249 B.R. 121</u> (Bankr. D.S.C. 2000).....	passim
<i>In re Lucas Dallas, Inc.</i>	37
<u>185 B.R. 801</u> (B.A.P. 9 th Cir. 1995)	
<i>In re Morris</i> <u>30 F.3d 1578</u> (7th Cir. 1994)	19
<i>In re Morse Tool, Inc.</i> <u>108 B.R. 384</u> (Bankr. D. Mass. 1989)	14
<i>In re ms55, Inc.</i> <u>420 B.R. 806</u> (Bankr. D. Colo. 2009), <i>aff’d</i> , No. 10-CV-00042-PAB, 2011 WL..... 1084967 (D. Colo. Mar. 21, 2011)	19
<i>In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC</i> <u>917 F.3d 85</u> (2d Cir. 2019).....	23
<i>In re Richardson Miles Hanckel, III</i> No. 2:14-CV-2898, <u>2015 WL 7251714</u> (D.S.C. Mar. 10, 2015).....	26

<i>In re Stephen S. Meredith, CPA, P.C.</i> <u>527 F.3d 372</u> (4th Cir.2008)	37, 38
<i>In re Sverica Acquisition Corp., Inc.</i> <u>179 B.R. 457</u> (Bankr. E.D. Pa. 1995)	23
<i>In re Tanglewood Farms, Inc. of Elizabeth City</i> <u>487 B.R. 705</u> (Bankr. E.D.N.C. 2013).....	21
<i>India.Com, Inc. v. Dalal</i> <u>412 F.3d 315</u> (2d Cir. 2005).....	14
<i>Innovative Container Co., LLC v. Son Light Trucking, Inc.</i> No. CIV.A. 6:05-280-HMH, <u>2006 WL 895021</u> (D.S.C. Apr. 3, 2006).....	21
<i>Integrity Worldwide, Inc. v. Int’l Safety Access Corp.</i> No. 14-cv-0246, <u>2015 WL 1297823</u> (D.S.C. Mar. 23, 2015).....	22
<i>Jackson Nat’l Life Ins. Co. v. Dobbins</i> <u>761 F. App’x 389</u> (5th Cir. 2019)	19
<i>Johns v. Johns</i> <u>309 S.C. 199</u> (Ct. App. 1992)	34
<i>Johnston v. Bowen</i> <u>313 S.C. 61, 64</u> (1993)	33
<i>Kaiser Steel Corp. v. Jacobs (In re Kaiser Steel Corp.)</i> <u>87 B.R. 154</u> (Bankr. D. Colo. 1988)	22
<i>Kimmell v. Schaefer</i> <u>224 A.D.2d 217</u> (1st Dep’t 1996)	40, 41, 43
<i>Kimmell v. Schaefer</i> <u>89 N.Y.2d 257</u> (1996)	39, 40, 42
<i>King Cty., Wash. v. IKB Deutsche Industriebank AG</i> <u>863 F. Supp. 2d 317</u> (S.D.N.Y. 2012).....	42, 43
<i>Kirkland v. Sam’s E., Inc.</i> <u>411 F. Supp. 2d 639</u> (D.S.C. 2005).....	21
<i>Knight Textile Corp. v. Knight</i> No. CV 8:05-2145-HFF, <u>2006 WL 8444769</u> (D.S.C. Aug. 7, 2006)	45
<i>Lotz v. Charles Crosby & Son, Inc.</i>	

No. 1:07-CV-1282 LEK/DRH, 2009 WL 2156916 (N.D.N.Y. July 15, 2009).....	16
<i>Lukich v. Lukich</i> 368 S.C. 47 (Ct. App. 2006), <i>aff'd</i> , 379 S.C. 589 (2008).....	34
<i>Mathis v. Burton</i> 319 S.C. 261 (Ct. App. 1995)	4
<i>MC Asset Recovery LLC v. Commerzbank AG, et al. (In re Mirant Corp.)</i> No. 03-046590 DML, 2010 WL 8708772 (Bankr. N.D. Tex. Apr. 22, 2010).....	21, 22
<i>McAlhany v. Carter et al.</i> 415 S.C. 54 (Ct. App. 2015), <i>aff'd</i> , No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017)	31
<i>Mendel v. Henry Phipps Plaza W., Inc.</i> 6 N.Y.3d 783 (2006)	16
<i>Montoya v. Akbari-Shahmirzadi (In re Akbari-Shahmirzadi)</i> Nos. 11-15351-t11, 13-01035-t, 2016 WL 6783245 (Bankr. D.N.M. Nov. 14, 2016).....	21
<i>Morris v. Wachovia Sec., Inc.</i> 277 F. Supp. 2d 622 (E.D. Va. 2003)	45
<i>Nasdaq, Inc. v. Exch. Traded Managers Grp., LLC</i> No. 17 CIV. 8252 (PAE), 2018 WL 3996932 (S.D.N.Y. Aug. 21, 2018).....	16
<i>Numerica Sav. Bank, F.S.B. v. Mountain Lodge Inn, Corp.</i> 134 N.H. 505 (1991)	17
<i>Orban v. Field</i> 1993 WL 547187 (Del. Ch. Dec. 30, 1993).....	17
<i>Oskin v. Johnson</i> 400 S.C. 390 (2012)	20
<i>PCS Nitrogen Inc. v. Ross Dev. Corp. Rivers</i> No. 16-1540 (L), 2018 WL 2111081 (4th Cir. Mar. 19, 2018)	26
<i>PCS Nitrogen, Inc. v. Ross Dev. Corp.</i> 127 F. Supp. 3d 568 (D.S.C. 2015).....	26
<i>Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)</i> 440 B.R. 243 (Bankr. S.D.N.Y. 2010).....	36

<i>Piccoli A/S v. Calvin Klein Jeanswear Co.</i> <u>19 F. Supp. 2d 157</u> (S.D.N.Y. 1998).....	16
<i>Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.</i> <u>296 F.3d 308</u> (4th Cir. 2002)	39, 43
<i>Probulk Carriers Ltd. v. Peraco Chartering USA LLC</i> No. 11 Civ. 5686(RJS), <u>2012 WL 3095319</u> (S.D.N.Y. July 20, 2012)	43
<i>Qwest Commc’ns Corp. v. Weisz</i> <u>278 F. Supp. 2d 1188</u> (S.D. Cal. 2003).....	37
<i>Rauton v. Pullman Co.</i> <u>191 S.E. 416</u> (S.C. 1937)	21
<i>Restis v. Am. Coal. Against Nuclear Iran, Inc.</i> <u>53 F. Supp. 3d 705</u> (S.D.N.Y. 2014).....	15
<i>Rogers v. Lee</i> <u>414 S.C. 225</u> (Ct. App. 2015)	22
<i>Rosa v. TCC Commc’ns, Inc.</i> No. 15CV1665, <u>2017 WL 980338</u> (S.D.N.Y. Mar. 13, 2017).....	23
<i>Santee Portland Cement Co. v. Daniel Int’l Corp.</i> <u>299 S.C. 269</u> (1989)	33
<i>Saratoga Schenectady Gastroenterology Assocs., P.C. v. Bette & Cring, LLC</i> <u>921 N.Y.S.2d 393</u> (N.Y. App. Div. 2011)	17
<i>Schaufler v. Mengel, Metzger, Barr & Co., LLP</i> <u>296 A.D.2d 742</u> (3d Dep’t 2002)	36
<i>SEC v. Infinity Grp. Co.</i> <u>27 F. Supp. 2d 559</u> (E.D. Pa. 1998)	20
<i>Silvercreek Mgmt., Inc. v. Citigroup, Inc.</i> <u>248 F. Supp. 3d 428</u> (S.D.N.Y. 2017).....	44
<i>Slack v. James</i> <u>364 S.C. 609</u> (2005)	42
<i>Smith v. Nationstar Mortg., LLC</i> No. 2:15-CV-0888-RMG, <u>2015 WL 13759742</u> (D.S.C. Aug. 3, 2015)	44

<i>Stephenson v. Citco Grp. Ltd.</i> <u>700 F. Supp. 2d 599</u> (S.D.N.Y. 2010).....	16
<i>Strong v. Univ. of S.C. Sch. of Med.</i> <u>316 S.C. 189</u> (1994).....	31
<i>Terry v. Meredith (In re Meredith)</i> <u>527 F.3d 372</u> (4th Cir. 2008)	37
<i>Terry v. Walker</i> No. CIV.A. 304CV00064, <u>2006 WL 736861</u> (W.D. Va. Mar. 23, 2006)	23
<i>Tow v. Rafizadeh (In re Cyrus II P’ship)</i> <u>413 B.R. 609</u> (Bankr. S.D. Tex. 2008)	18
<i>Tradition Chile Agentes de Valores Ltda. v. ICAP Sec. USA LLC</i> No. 09 CIV. 10343 WHP, <u>2010 WL 4739938</u> (S.D.N.Y. Nov. 5, 2010)	15
<i>Tronox, Inc. v. Kerr-McGree Corp. (In re Tronox Inc.)</i> <u>503 B.R. 239</u> (Bankr. S.D.N.Y. 2013).....	22
<i>U.S. Bank Nat. Ass’n v. Verizon Commc’ns Inc.</i> <u>479 B.R. 405</u> (N.D. Tex. 2012).....	34
<i>United States v. Family Med. Centers of S.C., LLC</i> No. CV 3:14-382-MBS, <u>2016 WL 6601017</u> (D.S.C. Nov. 8, 2016)	45
<i>Watkins v. Hall</i> No. 2015-001720, <u>2017 WL 4810799</u> (S.C. Ct. App. July 19, 2017)	46
<i>Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)</i> <u>503 B.R. 348</u> (Bankr. S.D.N.Y. 2014).....	34
<i>Wellin v. Wellin</i> <u>211 F. Supp. 3d 793</u> (D.S.C. 2016).....	24
<i>West Side Fed. Sav. & Loan Ass’n v. Hirschfeld</i> <u>476 N.Y.S.2d 292</u> (1st Dep’t 1984)	42
<i>Windsor Properties, Inc. v. Dolphin Head Const. Co.</i> <u>331 S.C. 466</u> (1998).....	26
<i>Wright v. Am. Flyers Airline Corp.</i> <u>263 F. Supp. 865</u> (D.S.C. 1967).....	21

<i>Zazzali v. U.S. (In re DBSI, Inc.)</i>	
<u>554 B.R. 234</u> (D. Idaho 2015), <i>aff'd</i> , <u>869 F.3d 1004</u> (9 th Cir. 2017)	18
Statutes	
§ 10 Governing Law., UVTA, cmt. 1	25
<u>11 U.S.C. § 506</u>	29
<u>11 U.S.C. § 506(a)</u>	29
<u>11 U.S.C. § 544</u>	2, 25, 28
<u>11 U.S.C. § 544(b)</u>	passim
<u>11 U.S.C. § 101(10)(A)</u>	27
<u>11 U.S.C. § 550</u>	36, 37, 38
<u>11 U.S.C. §§ 544(b) and 550</u>	34
<u>11 U.S.C.A. § 506(a)(1)</u>	29
Del. Code §§, 15-306(a), 17-403(b)	36
N.C. Gen. Stat. Ann. <u>§ 39-23.9A(b)</u> (North Carolina UVTA)	25
N.Y. Debt. & Cred. Law § 279	24
N.Y. Partnership Law § 121-303(a)	36
S. C. Code Ann. § 27–23–10	25, 33, 34
Section 27–23–10(A) of the South Carolina Code	2
South Carolina’s Statute of Elizabeth	passim
Texas Business and Commerce Code §§ 24.005, 24.006, and 24.008	34
U.C.C. § 9-301 (2014)	25
Uniform Voidable Transactions Law § 279, NY LEGIS 580 (McKinney 2019)	24
Other Authorities	
BLACK’S LAW DICTIONARY (11th ed. 2019)	27
Restatement (First) of Conflict of Laws 12 Intro. Note (1934)	24
RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6	20, 24
Rules	
<u>Federal Rule of Civil Procedure 15(a)(2)</u>	46
<u>Federal Rule of Civil Procedure 12(b)(6)</u>	1 and 12
Federal Rule of Civil Procedure Rule 9(b)	44, 45

Ronald Friedman (the “**Trustee**” or “**Plaintiff**”), as trustee for the SportCo Creditors’ Liquidation Trust, hereby files this Omnibus Response to Defendants’ Motions to Dismiss the First Amended Complaint (“**FAC**”) pursuant to Rule 12(b)(6):¹

INTRODUCTION

This dispute centers on a venerable South Carolina business that was destroyed by a private equity firm more concerned with paying itself nine-figure dividends and collecting management fees than setting the business up for long-term success. As alleged in the FAC, Ellett Brothers, LLC (“**Ellett**”) was an eighty year-old business that survived the Great Depression, recessions in the 1970s and 1990s, and the Great Recession, but could not survive Wellspring Capital Partners, LLC’s (“**Wellspring Capital**”) mismanagement.

Wellspring Capital, through its investment fund, Wellspring Capital Partners IV (“**Wellspring IV**”), extracted more than \$188 million in capital (the “**Fraudulent Transfers**”) from Ellett and provided no consideration in return. Although Wellspring Capital could have made an equity infusion back into Ellett to support the business and ensure that it had sufficient assets to pay its creditors, Wellspring Capital chose not to. Instead, Wellspring Capital, through its self-dealing and mismanagement (and related negligent misrepresentations), left Ellett unable to pay its debts when they came due. After Wellspring Capital drained all the assets it could from Ellett, it placed Ellett, and its parent companies, United Sporting Company, Inc. (“**United Sporting**”) and SportCo Holdings (“**SportCo**”), into bankruptcy.

Wellspring Capital and other Defendants argue that they should not have to return the Fraudulent Transfers they received and that they did not make any misrepresentations to

¹ Unless otherwise indicated, the abbreviations contained herein mirror those in the FAC.

Prospect Capital Corporation (“**Prospect**”), one of Ellett’s primary lenders. But, as explained below, none of Defendants’ arguments have merit.

First, contrary to Defendants’ arguments, the Trustee can avoid the Fraudulent Transfers under South Carolina’s Statute of Elizabeth,² as incorporated by § 544 of the Bankruptcy Code, because the Fraudulent Transfers provided no value to Ellett, and Ellett undisputedly could not pay its debts when they came due.³ Recognizing the clear merit of the Trustee’s claims, Defendants desperately seek to avoid the application of South Carolina law. But under § 544 and relevant conflict-of-laws rules, the law applicable to the Fraudulent Transfers is South Carolina law.

Defendants cannot rely on the choice-of-law clause in an amendment to the Loan Agreements to alter this result.⁴ Although these agreements contain a choice-of-law clause pointing to New York law, that clause *expressly limits its application to disputes between the parties* to the Loan Agreements—and no Defendant was a party to those agreements. Moreover, Defendants are not third-party beneficiaries of the Loan Agreements. Their argument that they are third-party beneficiaries of an amendment to the Loan Agreements executed after the Fraudulent Transfers were made because they were shareholders of SportCo, which was a shareholder of United Sporting, which, in turn, was a shareholder of Ellett—the entity that actually signed the Loan Agreements—strains credulity.

² Section 27–23–10(A) of the South Carolina Code.

³ As set out more fully in the FAC, the Trustee pleads that Ellett or, in the alternative, SportCo made the initial transfers. See *generally* FAC ¶¶ 19–21, 71–90. But for the sake of simplicity herein, the Trustee alleges that Ellett made the Fraudulent Transfers.

⁴ “Loan Agreements” refers to the 2012 Loan Agreements and the 2013 Loan Agreements and any amendments thereto.

Because the Loan Agreements' choice-of-law clause does not apply, the Court must look to either federal or South Carolina conflict-of-laws rules. Although the standards differ depending upon which conflict-of-laws paradigm is employed, the result is the same: South Carolina law applies. When a debtor-transferor makes a fraudulent transfer, its assets are depleted, which, in turn, leaves it unable to pay its creditors. The relevant harm is thus the depletion of debtor's assets, and courts agree that a debtor suffers or incurs this harm in the state in which it has its principle place of business—here, South Carolina.

Contrary to Defendants' argument, this Court should not look to the location of the Debtors' creditors to determine applicable law under § 544(b). Defendants' argument ignores the economic reality that the Debtors' creditors lost money only because the Debtors became insolvent. Defendants' argument is also impractical and leads to unpredictable results because a single fraudulent transfer often defrauds multiple creditors who, as here, reside in different jurisdictions. Applying the law of the jurisdiction in which the debtor maintains its principal place of business—as opposed to analyzing the law of each state in which every creditor resides—ensures uniformity and predictability, and simply makes sense.

Second, the Trustee pleads a claim under the Statute of Elizabeth because Prospect was a creditor prior to the Fraudulent Transfers and held unsecured claims at the time of Ellett's bankruptcy. A claim for constructive fraudulent transfer under the South Carolina Statute of Elizabeth exists where: (1) the transferor was indebted to the creditor at the time of the transfer; (2) the transfer was without consideration; and (3) the transferor “*failed to retain sufficient property to pay the indebtedness to the [creditor] in full*—not merely at the time of the transfer,

but in the final analysis *when the creditor seeks to collect his debt.*”⁵ Defendants do not even contest that the Trustee’s allegations meet this standard. Instead, Defendants argue that Prospect only had secured claims, and thus cannot serve as a triggering creditor. But this assertion is belied by the record. The Debtors’ assets were woefully insufficient to repay Prospect, making Prospect an unsecured creditor to the extent of the deficiency. The order from the Bankruptcy Court cited by Defendants makes this clear, and so does the Debtors’ Fourth Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation (the “**Plan of Liquidation**”). Likewise, Defendants’ assertion that Prospect was a “subsequent creditor,” and thus cannot bring a constructive fraudulent-transfer claim, finds no support in the FAC or record. Prospect became a creditor the instant it made a loan to Ellett. And, because Ellett used the loan proceeds to make the Fraudulent Transfers, Prospect was a creditor prior to the Fraudulent Transfers.

Third, the Trustee’s claims are timely. South Carolina’s three-year statute of limitations does not begin to run until the claim accrues. A claim under the Statute of Elizabeth does not accrue until the creditor seeks to collect its debt in full. That did not happen until (at the earliest) Ellett defaulted on its loan obligations in late 2018. Thus, this action is well-within the three-year statute of limitations because Prospect filed its state-law complaint on May 23, 2019, and the Debtors filed for bankruptcy on June 10, 2019. Defendants cannot start the three-year limitations clock based on Prospect’s decision in 2015 to slightly write down the value of the loan on its own books when that loan was not due until years later, and Prospect had no right to demand repayment from Ellett until the loan matured. Simply put, the fact that a creditor may

⁵ *Campbell v. Deans (In re J.R. Deans Co., Inc.)*, [249 B.R. 121, 130](#) (Bankr. D.S.C. 2000) (citing *Mathis v. Burton*, [319 S.C. 261, 264](#) (Ct. App. 1995)).

periodically adjust its estimate of fair value of a debt currently not due is irrelevant to the running of the statute of limitations. Indeed, the fact that the loan remained on accrual on Prospect's books demonstrates that Prospect believed the loan would be repaid.

Fourth, Prospect did not and could not "ratify" the Fraudulent Transfers because they were void *ab initio*, and transfers that are void cannot be ratified. The few cases that Defendants rely upon for the contrary position are from jurisdictions where fraudulent transfers are considered *voidable*, not *void*, and accordingly are of no persuasive value here. Moreover, ratification requires a knowing consent to the offending conduct, and Prospect certainly did not knowingly consent to Wellspring's mismanagement of the business and Ellett's failure to retain sufficient capital to repay its debts when they came due. And, in any event, Prospect could not ratify, at the time of the Fraudulent Transfers, a claim under the Statute of Elizabeth when that claim did not accrue until the time of nonpayment of the debt.

Finally, the Trustee, as assignee of Prospect's claims, more than sufficiently pleads a negligent misrepresentation claim. Defendants Carles and Johnson, as insiders who touted their unique knowledge and expertise, owed Prospect a duty of care when discussing the AcuSport purchase. They failed to exercise that duty of care, and their representations were false. Accordingly, they are liable for negligent misrepresentation.

For each of the reasons stated herein, the Trustee respectfully requests that the Court deny Defendants' motions in their entirety.

FACTUAL BACKGROUND

A. Ellett's first seventy-five years are a story of American entrepreneurship, careful management, and consistent success.

Ellett's history began in 1933, in the midst of the Great Depression. FAC ¶ 26. The company was established in Chapin, South Carolina, where it operated as a regional sporting

goods distributor. FAC ¶ 26. In 1957, Ellett began distributing hunting and shooting sports products and outdoor accessories throughout an expanded geographical area. The foray into hunting and shooting products and outdoor accessories marked the introduction of what quickly would become the company's core business. FAC ¶ 27. The company survived and flourished through the 1990s. FAC ¶ 29. As recently as 2015, Ellett was the fifth largest private company in South Carolina with over 350 employees nationwide, and 175 employees in South Carolina. FAC ¶ 32.

B. Wellspring Capital acquired Ellett and saddled it with debt while paying itself and the Transferee Defendants more than \$188 million in dividends.

Wellspring Capital, through its fund Wellspring IV, acquired Ellett in 2008 and formed SportCo as a holding company to hold United Sporting (Ellett's direct parent), Ellett, and Ellett's subsidiaries indirectly. FAC ¶ 30. Following the acquisition, Wellspring Capital served as the manager of SportCo pursuant to the terms of a management agreement. FAC ¶ 8.

On September 28, 2012, Ellett and its operating subsidiaries (the "**Borrowers**") entered into (i) a Third Amended and Restated Loan and Security Agreement and (ii) a Second Lien Loan and Security Agreement (the "**2012 Second Lien Loan Agreement**," and together with the Third Amended and Restated Loan and Security Agreement, the "**2012 Loan Agreements**"). FAC ¶ 35. Pursuant to the 2012 Loan Agreements, certain lenders, including Prospect and Summit Partners Credit Fund, LP and its respective related entities (collectively "**Summit**"),⁶ loaned \$280 million to the Borrowers (the "**2012 Loan**"). FAC ¶ 35. The proceeds from the 2012 Loan were wired to Ellett in South Carolina. FAC ¶ 35. SportCo and United Sporting, pursuant

⁶ The other lenders were Bank of America, Wells Fargo and Regions Bank. FAC ¶ 35 n.3.

to certain guaranty agreements, each dated September 28, 2012, guaranteed the amounts due under the 2012 Second Lien Loan Agreement.⁷ FAC ¶ 35.

The Debtors used approximately \$139.6 million of the loan proceeds to repay the Borrowers' existing debts. FAC ¶ 36. The Debtors, at the direction of Wellspring Capital, which controlled the Debtors' board of directors and SportCo's largest shareholder, Wellspring IV, used the remaining proceeds of the 2012 Loan to fund distributions totaling \$134,003,871.20 to the Transferee Defendants (the "**2012 Fraudulent Transfers**"). FAC ¶ 36. Specifically, the 2012 Second Lien Loan Agreement provided that on or after closing, the Transferee Defendants would receive a "one-time cash Distribution," which would be made by "Borrowers to [United Sporting] (for further distribution to SportCo and Wellspring and the other shareholders of SportCo)." FAC ¶ 36. The 2012 Fraudulent Transfers, however, were wired directly from Ellett to the Transferee Defendants. FAC ¶ 36. The 2012 Fraudulent Transfers were made without any consideration and occurred on October 1, 2012. FAC ¶ 36.

On March 7, 2013, Prospect, the Borrowers, and other lenders entered into a First Amendment to the Third Amended and Restated Loan and Security Agreement and Consent and a First Amended and Limited Consent (the "**2013 Loan Agreements**"). FAC ¶ 38. Pursuant to the 2013 Loan Agreements, Prospect provided an additional \$60 million to the Borrowers (the "**2013 Loan**"). SportCo and United Sporting, pursuant to the First Amended and Limited Consent, agreed to guarantee repayment of the 2013 Loan. FAC ¶ 38. The 2013 Loan similarly provided that the Transferee Defendants would receive a "one-time cash Distribution" (the "**2013 Fraudulent Transfers**"), which would be made "by Borrowers to [United Sporting] (for further

⁷ SportCo also guaranteed the amounts due under the Third Amended and Restated Loan and Security Agreement. FAC at ¶ 35 n.4.

distribution to SportCo and then to Wellspring and the other shareholders of SportCo).” FAC ¶ 39. The 2013 Fraudulent Transfers, however, went directly from Ellett to the Transferee Defendants. FAC ¶ 39. Ellett paid the distribution to the Transferee Defendants on March 7, 2013 and, as with the 2012 Fraudulent Transfers, the Debtors made the 2013 Fraudulent Transfers without receiving any consideration in exchange for the cash disbursement of \$54,860,549.74. FAC ¶ 40.

All told, the Fraudulent Transfers resulted in the transfer of \$188,864,420.94 to the Transferee Defendants. FAC ¶ 41.

C. The AcuSport Purchase drains Ellett of assets necessary to survive an economic downturn.

Once the Transferee Defendants had obtained the Fraudulent Transfers, Wellspring Capital had no incentive to, and did not, manage the Debtors loyally or with good faith and due care. FAC ¶ 43. As a result of this mismanagement, in early 2018, Wellspring Capital notified Prospect that the Borrowers would default on the interest payment due to Prospect in the amount of \$4.7 million in the second quarter of 2018. FAC ¶ 44. Because the Transferee Defendants had already received the Fraudulent Transfers and other cash distributions at the Debtors’ expense—effectively extracting all value out of the enterprise—and their equity in Ellett was by this time worthless, the Transferee Defendants had no financial incentive to address the Debtors’ insolvency and dire cash situation. FAC ¶ 44. Rather, Wellspring Capital’s primary concern was to keep the enterprise ostensibly afloat for as long as possible to continue collecting management fees at the expense of Ellett and its creditors. FAC ¶ 44.

In April 2018, Prospect agreed to amend its loan based upon reckless misrepresentations made by Wellspring Capital, Carles, and Johnson relating to a purchase of assets of AcuSport Corporation (“**AcuSport**”), another firearms distributor. FAC ¶¶ 45–46. These assets included a

distribution center, an office building, information technology resources, and inventory (the “**AcuSport Purchase**”). FAC ¶ 46.

To induce Prospect to consent to the AcuSport Purchase, and forego certain bargained-for remedies in the event of a payment default, Wellspring Capital, Carles, and Johnson recklessly, and without reasonable diligence or inquiry, misrepresented to Prospect that the AcuSport Purchase would result in: (1) the Debtors’ capturing 20% to 30% of AcuSport sales; (2) the Debtors acquiring \$14 million worth of AcuSport inventory at a substantial discount; and (3) an immediate realization of a \$7 million profit on the sale of the AcuSport inventory purchased in the AcuSport Purchase. FAC ¶¶ 46, 48.

The relevant communications spread over a period of months from 2017 to 2018, but ultimately formed a cohesive, continuous campaign. They began in the last quarter of 2017 with a string of emails that emphasized the Debtors’ financial crisis, that the AcuSport purchase presented the only way out of the Debtors’ financial difficulty, and that Carles and Johnson understood both the business of Ellett and the benefits of an AcuSport acquisition better than Prospect. For example, on October 27, 2017, Carles misrepresented in writing to Rich Carratu of Prospect that “the only way to optimize is to merge with Acusport.” FAC ¶ 49. Then, on November 12, 2017, Carles further dialed up the purported urgency and benefits of the AcuSport Purchase, writing to Carratu: “We need to make the merger happen or deal with the consequences which could be severe.” FAC ¶ 50.

Carles’ statements to this effect continued into the early portion of 2018, including communications where he shifted into profanity to express his belief that Prospect did not appreciate the benefits of the AcuSport transaction and the urgency of the Debtors’ financial situation. For instance, on February 20, 2018, Carles recklessly continued to tout the benefits of

pursuing the AcuSport Purchase, writing to Mr. Carratu that “waiting was a mistake.” FAC ¶ 54. He followed up with another email that evening: “You’re [sic] economics are going down and the risk of chapter is going up. Sounds like a tidy deal at year end [2017] made a lot of sense.” FAC ¶ 54.

In the ensuing months, Carles repeatedly slandered Carratu and Prospect as “dumb as f**k” and other variations on the same theme in numerous emails to Carratu (on which Carles copied other lenders and company management). FAC ¶ 53. But his bravado masked his utter failure to engage in reasonable inquiries and diligence to comply with the fiduciary duties that he owed to Prospect. FAC ¶ 53.

Defendant Johnson also made reckless misrepresentations about the value of AcuSport’s inventory that induced Prospect to agree to the AcuSport Purchase. For example, as further detailed in the FAC, on March 16, 2018, Johnson emailed Prospect touting supposed synergies and savings of consolidating three of Debtors’ facilities into the AcuSport facility. FAC ¶ 56. Carles then followed up by continuing to pressure Prospect into agreeing to the AcuSport Purchase. FAC ¶ 57. The next month, April 2018, Johnson and his subordinates wrote a series of emails on the alleged benefits of the AcuSport Purchase. FAC ¶¶ 58–59. Then, on April 27, 2018; Carles emailed Prospect, unequivocally stating the AcuSport Purchase would “make the business stronger.” FAC ¶ 60. Cumulatively, these statements gave the impression that Carles and Johnson were deeply knowledgeable of the current state of the Debtors’ finances and had analyzed the effect of the various actions to be taken. FAC ¶ 61. Yet, these statements were false, and no reasonable inquiry had been made. FAC ¶ 61.

On the basis of Carles’ and others’ representations, on April 30, 2018, Prospect agreed to forbear from exercising its remedies and instead defer two quarters of cash interest payments in

the aggregate amount of \$9.5 million. FAC ¶ 62. And, as part of closing the AcuSport Purchase, the Debtors incurred purchase costs of \$2 million in fees and \$5.4 million in closing, transaction, and restructuring costs, draining further liquidity from the Debtors. FAC ¶ 47.

This decision proved disastrous. For example, the AcuSport distribution center that the Debtors purchased contained only \$139,000 worth of inventory, meaning that they did not realize anywhere close to the promised quick \$7 million profit on inventory sales. FAC ¶ 63. Nor did Debtors capture 20% to 30% of AcuSport's sales. FAC ¶ 63. Worse yet, the AcuSport purchase wasted Debtors' few remaining cash assets, leaving them with insufficient borrowing capacity under their revolving credit facility to cope with even a slight downturn in the market. FAC ¶ 64. In other words, having already stripped the Debtors of all of their value and steered them into a catastrophic financial collapse, Defendants recklessly rammed through the AcuSport Purchase which ultimately killed the business. FAC ¶ 64.

At bottom, Wellspring Capital completely ruined Ellett. Ellett survived the Great Depression, serious recessions in the 1970s, 1990s and 2000s, and legislation banning certain of its products. FAC ¶ 34. But Ellett could not survive the disastrous tenure of Wellspring Capital. Wellspring Capital caused Ellett to make the Fraudulent Transfers, recklessly and grossly negligently mismanaged Ellett, and engaged in dereliction of its duties. All of these actions led to the dissipation of substantially all of Ellett's assets during some of the most historically profitable times for companies in the firearms industry. FAC ¶ 34.

D. Prospect files claims in South Carolina state court, the Debtors file for bankruptcy, and the claims become a part of the liquidation trust.

On May 23, 2019, Prospect filed an action in South Carolina state court alleging, among other things, fraudulent transfer and negligent misrepresentation. Summons & Complaint, *Prospect Capital Corp. v. Wellspring Capital Mgmt.*, No. 2019-CP-32-02045, [Dkt. No. 1](#).

Approximately three weeks later, on June 10, 2019, the Debtor's filed for bankruptcy. FAC ¶ 66. The Wellspring Defendants removed the South Carolina state court action to this Court on September 6, 2019. Notice of Removal, No. 19-80071, [Dkt. No. 1](#).

Contemporaneously, the Debtor's drafted a Plan of Liquidation, which was finalized on November 6, 2019. Exhibit 1 to Declaration of Daniel H. Levi, [Dkt. 91-2](#). Pursuant to Section VII(A)(4) of the Plan of Liquidation, the Debtors transferred certain causes of action, including those for fraudulent transfer asserted herein, to the Liquidation Trust. *Id.* at 55–56; FAC ¶ 6. In addition, pursuant to an assignment effective as of December 20, 2019, Prospect transferred to the Liquidation Trust the claims previously filed by Prospect in this action, including the claim for negligent misrepresentation asserted herein. FAC ¶ 7. Thereafter, the Trustee was substituted as plaintiff on January 10, 2020. Order Granting Motion to Substitute & Amend Complaint, No. 19-80071, [Dkt. 57](#). On that same date, the Trustee filed the FAC.

ARGUMENT

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the dismissal of an action if the complaint fails “to state a claim upon which relief can be granted.” [FED. R. CIV. P. 12\(b\)\(6\)](#). To survive a motion to dismiss, the complaint must state “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, [550 U.S. 544, 570](#) (2007). A complaint has “facial plausibility” where the pleading “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, [556 U.S. 662, 678](#) (2009).

Because there is substantial overlap between the Defendants’ briefs, this opposition primarily addresses the Wellspring Defendants’ brief, making reference to arguments exclusively found in other briefs individually, where appropriate.⁸

A. South Carolina law applies to the Trustee’s claim under § 544(b).

Defendants submit that a choice-of-law clause found in an amendment to the Loan Agreements controls this dispute. MTD at 17–21.⁹ Defendants are wrong. The choice-of-law clause is expressly limited to disputes between the parties, and Defendants are not parties to the Loan Agreements. Because the choice-of-law clause does not control, the question of what law applies is determined by conflict-of-laws rules. Pursuant to those rules, as explained below, South Carolina law is the “applicable law” to the Trustee’s § 544(b) claims.

1. The Loan Agreements’ choice-of-law clause does not control because the Transferee Defendants are not parties to those agreements.

Defendants’ argument that the choice-of-law clause of the Loan Agreements controls here fails under the express terms of the agreements. As an initial matter, the choice-of-law clause ***expressly limits*** its application to disputes between the parties and ***no defendant*** is a party to the Loan Agreements. Specifically, the relevant clause—which was added by an amendment to the Loan Agreements executed after both Fraudulent Transfers occurred—provides that:

This Agreement shall be governed by, and construed in accordance with, the law of the State of New York and the validity, interpretation, construction, and performance hereof shall be governed by and construed and enforced in accordance with, and ***any claim by any party hereto against any other party hereto*** (including any claims sounding in contract or tort law arising out of the subject matter hereof and any determinations with respect to post-judgment

⁸ Many defendants have joined the Wellspring Parties’ brief in some capacity. Charles E. Walker, Jr.’s Motion to Dismiss ([Dkt. 90](#)) (“**Walker MTD**”) at 6; Defendant Todd Boehly’s Motion to Dismiss and Joinder to the Wellspring Defendants’ Motion to Dismiss ([Dkt. 93](#)) (“**Boehly MTD**”) at 2; F. Hewitt Grant’s Motion to Dismiss and Joinder to the Wellspring Defendants’ Motion to Dismiss ([Dkt. 890](#)) (“**Grant MTD**”) at 1.

⁹ “MTD” refers to the Motion to Dismiss filed by the Wellspring Defendants and Alexander Carles’ ([Dkt. 91](#)); see also Kupchick MTD at 18–21.

interest) shall be determined in accordance with, the internal laws of the State of New York for contracts made and to be performed wholly within the State of New York (excluding the laws applicable to conflicts or choice of law that would require the application of the law of any other jurisdiction).

Exhibit 4 to Declaration of Daniel H. Levi, [Dkt. 91-5, ¶ 1\(b\)](#). The phrase “any claim by any party hereto against any other party hereto” could not be clearer. Simply put, the choice-of-law clause only applies to claims brought by the lenders against the borrowers or vice-versa. The clause does not apply to any claim brought by or against a third party. And it is “well-established” that, “[w]here a provision exists in an agreement expressly negating an intent to permit enforcement by third parties, . . . that provision is decisive.” *India.Com, Inc. v. Dalal*, [412 F.3d 315, 321–22](#) (2d Cir. 2005) (alterations in original). In short, the fact that Defendants are not parties to the Loan Agreements is dispositive.¹⁰

Moreover, Defendants’ are not third-party beneficiaries of the amendment to the Loan Agreements—executed *after* the transfers were made—containing the choice-of-law clause. Defendants’ only basis for claiming third-party beneficiary status is that they were investors in a shareholder of SportCo, which was a shareholder of United Sporting, which, in turn, was a shareholder of Ellett—the entity that actually signed the agreements.¹¹ That remote and indirect connection is insufficient.

¹⁰ The Loan Agreements were between Ellett Brothers, LLC, Evans Sports, Inc., Jerry’s Sports, Inc., Simmons Gun Specialists, Inc., Bonitz Brothers, Inc., and Outdoor Sports Headquarters, Inc., on the one hand and Prospect Capital Corporation, Summit Partners Credit Fund, L.P., and Summit Partners Credit Fund A-1, L.P., on the other. The defendants in the instant action were not parties to the agreements.

¹¹ Even without the clear limiting language in the choice-of-law provision, it does not control this dispute because fraudulent transfer claims are not governed by contractual choice-of-law provisions. And, of particular relevance here, this rule applies even where the fraudulent transfer is made pursuant to the underlying contract. *See In re Morse Tool, Inc.*, [108 B.R. 384, 387](#) (Bankr. D. Mass. 1989) (“First, a fraudulent conveyance suit is not a suit on a contract. The conveyance sometimes occurs pursuant to a contract, as did the alleged fraudulent conveyance in this case, but it need not.”).

First, Defendants’ tortured argument is in direct conflict with New York law (which governs this contract-interpretation issue). It is clear under New York law that “[a] benefit received through corporate ownership is insufficient to establish rights as a third-party beneficiary.” *Del Norte v. WorldBusiness Capital, Inc.*, No. 14 CIV. 10143 (CM), [2017 WL 4334005](#), at *12 (S.D.N.Y. Apr. 5, 2017) (applying New York law).¹² Courts have applied this rule to hold that the receipt of a dividend is an insufficient interest to justify third-party standing. For example, in *Dow Corning Corp. v. Chem. Design, Inc.* the court found that a “benefit deriving by way of [a subsidiary]’s operating at a profit and thus generating dividends to . . . its parent . . . is insufficient to establish third-party beneficiary status.” [3 F. Supp. 2d 361, 366](#) (W.D.N.Y.1998) (applying New York law). Defendants’ entire theory of third-party beneficiary standing rests on the receipt of a dividend—transferred through three tiers of corporate ownership—and thus, their argument that the underlying choice-of-law provisions control fails.

Second, in addition to the limiting language in the choice-of-law clause itself, the Loan Agreements contain other indicia of an intent to limit their application exclusively to the parties. Specifically, New York courts have held that, “[a]n inurement clause, when taken together with a prohibition of assignments, . . . suggest that the parties did not intend that third parties benefit from the contract.” *Piccoli A/S v. Calvin Klein Jeanswear Co.*, [19 F. Supp. 2d 157, 164](#) (S.D.N.Y. 1998) (applying New York law).¹³ Here, Section 13.1 of the Second Lien Loan and

¹² See also *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, [53 F. Supp. 3d 705, 728](#) (S.D.N.Y. 2014) (applying New York law) (“[A]ny argument that Mr. Restis is a third-party beneficiary of the . . . contracts simply by virtue of his corporate ownership interests appears misplaced.”); *Tradition Chile Agentes de Valores Ltda. v. ICAP Sec. USA LLC*, No. 09 CIV. 10343 WHP, [2010 WL 4739938](#), at *10 (S.D.N.Y. Nov. 5, 2010) (applying New York law) (“[E]ven though Tradition North America derives an incidental benefit from its subsidiaries, ‘a benefit received through corporate ownership is insufficient to establish rights as a third-party beneficiary.’”) (citation omitted); *Amusement Indus., Inc. v. Stern*, No. 07 CIV 11586 LAKGWG, [2010 WL 2976199](#), at *8 (S.D.N.Y. July 26, 2010) (applying New York law) (same).

¹³ See also *Nasdaq, Inc. v. Exch. Traded Managers Grp., LLC*, No. 17 CIV. 8252 (PAE), [2018 WL 3996932](#), at *10 (S.D.N.Y. Aug. 21, 2018) (“On the contrary, the agreement contains both non-assignment and inurement clauses,

Security Agreement provides that “[t]his Agreement shall be binding upon and inure to the benefit of Borrowers, Agent, Secured Parties, and their respective successors and permitted assigns, except that (i) no Borrower shall have the right to assign its rights or delegate its obligations under any Loan Documents.” Bruckerhoff Decl. Ex. 1 (Second Lien Loan and Security Agreement, dated September 28, 2012) § 13.1. In short, the presence of an inurement clause, in addition to the limitation on Borrowers’ ability to assign their rights, shows that Defendants were not intended third-party beneficiaries of the agreements.

Third, for one to be a third-party beneficiary of a contract, the agreement must indicate an “assumption by the contracting parties of a duty to compensate [the third-party beneficiary] if the benefit is lost.” *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 (2006). In other words “[a]n intended third party beneficiary will be found when it is appropriate to recognize **a right to performance** in the third party and the circumstances indicate that the promisee intends to give the third party the benefit of the promised performance.” *Lotz v. Charles Crosby & Son, Inc.*, No. 1:07-CV-1282 LEK/DRH, 2009 WL 2156916, at *3 (N.D.N.Y. July 15, 2009) (applying New York law) (emphasis added) (citation omitted). This rule is widely recognized by the authority cited by Defendants.¹⁴ Nonetheless, the Loan Agreements evince no such obligation. In fact, as explained above, under the inurement clause, they do just the opposite. See Bruckerhoff Decl. Ex. 1 (Second Lien Loan and Security Agreement, dated September 28, 2012)

see Index License Agreement § 11(F), (G), which together ‘suggest that the parties did not intend that third parties benefit from the contract.’”); *Stephenson v. Citco Grp. Ltd.*, 700 F. Supp. 2d 599, 611 (S.D.N.Y. 2010) (same); *Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 CIV. 1537 (MBM), 2003 WL 23018888, at *10 (S.D.N.Y. Dec. 22, 2003) (same).

¹⁴ See, e.g., MTD at 19 (“Under New York law, a nonparty to a contract can enforce the contract as a third-party beneficiary upon establishing ‘(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [the nonparty’s] benefit, and (3) that the benefit to them is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost.’” (emphasis added) (citing *Saratoga Schenectady Gastroenterology Assocs., P.C. v. Bette & Cring, LLC*, 921 N.Y.S.2d 393, 394 (N.Y. App. Div. 2011)).

§ 13.1. Accordingly, because the Loan Agreements do not impose an obligation on any lending party to compensate Defendants in the event of a default, they are—at most—incidental, not intended, third-party beneficiaries of the Loan Agreements.

Finally, the notion that shareholders are third-party beneficiaries of corporate contracts requires a complete disregard of the corporate form and, consequently, raises significant policy concerns. As the Delaware Chancery Court has recognized, “[t]he idea of shareholders having directly enforceable rights as third party beneficiaries to corporate contracts . . . should be resisted.” *Orban v. Field*, [1993 WL 547187](#), at *9 (Del. Ch. Dec. 30, 1993). In particular, “[o]ne of the consequences of the limited liability that shareholders enjoy is that the law treats corporations as legal persons not simply agents for shareholders.” *Id.* Refusing to recognize the formal distinctions that the law has read into the corporation-shareholder relationship would have profound consequences. For example, it would suggest that corporations are simply agents for shareholders, thereby opening the door to shareholder personal liability. Indeed, Defendants’ suggestion would be “inimical to our basic notion of a corporate identity” because “[a] corporate veil cannot be alternatively donned and stripped to suit the convenience of the shareholders.” *Numerica Sav. Bank, F.S.B. v. Mountain Lodge Inn, Corp.*, [134 N.H. 505, 512](#) (1991).

2. Under applicable conflict-of-laws rules, South Carolina law applies to the claim for fraudulent transfer.

i. Federal law provides the relevant conflict-of-laws rules.

Because this dispute is not controlled by the Loan Agreements’ choice-of-law clause, the question of what law applies is a question of federal law. A claim under § 544(b) incorporates “applicable law,” but it is a claim under federal law with a substantive federal law recovery scheme. *Tow v. Rafizadeh (In re Cyrus II P’ship)*, [413 B.R. 609, 614](#) (Bankr. S.D. Tex. 2008) (“Fraudulent conveyance claims pursuant to § 544(b) refer to applicable state law . . . **but are**

federal causes of action rooted in federal bankruptcy law and policy.” (emphasis added) (internal citations omitted)).¹⁵ Because the question posed by §544(b) of which “applicable law” to apply involves the interpretation of a federal statute, federal conflicts-of-law rules govern. See *id.* at 614 (“Because these federal causes of action involve important federal bankruptcy law and policy, the Court concludes that federal choice of law rules should apply.”); *Goodman v. H.I.G. Capital, LLC et al. (In re Gulf Fleet Holdings, Inc.)*, [491 B.R. 747, 763](#) (Bankr. W.D. La. 2013) (“[C]ourts have generally held that federal common law governs the choice-of-law for section 544(b) claims because these claims are ultimately federal causes of action grounded in important federal bankruptcy policy.”); see also *Berger v. AXA Network LLC*, [459 F.3d 804, 809–10](#) (7th Cir. 2006) (“[W]hen the underlying claim is a **federal** claim, [our task] is to fashion a **federal** choice of law rule. This principle is really nothing more than a corollary principle to the more general maxim that, **when state law is borrowed in a federal question suit, the choice of ‘which [state] law to select is itself a question of federal law.’**” (second emphasis added) (citation omitted)).

The Fourth Circuit’s decision in *Compliance Marine, Inc. v. Campbell (In re Merritt Dredging Co., Inc.)* does not change this result because that case did not involve the interpretation or application of a federal cause of action. See [839 F.2d 203, 205–06](#) (4th Cir. 1988) (stating that *Erie* and *Klaxon* make clear that state law rules should apply “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress”). Rather, because § 544(b) avoidance actions are federal-law claims that promote core policies of bankruptcy law, *Merritt Dredging* dictates that this Court “formulate a choice of law rule as a matter of independent

¹⁵ See also *Zazzali v. U.S. (In re DBSI, Inc.)*, [554 B.R. 234, 240](#) (D. Idaho 2015) (noting that “the Trustee’s § 544(b) actions under federal bankruptcy law are federal causes of action, not ‘state law claims’”), *aff’d*, [869 F.3d 1004](#) (9th Cir. 2017).

federal judgment.” *See id.* But, even if this Court looks to South Carolina’s conflict-of-laws paradigm, the result is the same: South Carolina law governs the Fraudulent Transfers.

ii. An action to recover a fraudulent transfer is a unique equitable claim, but one closest to a “tort” for conflict-of-laws purposes.

Courts applying federal conflict-of-laws rules use their “independent judgment” to determine the applicable law. *In re Morris*, [30 F.3d 1578, 1582](#) (7th Cir. 1994); *ECN Capital (Aviation) Corp. v. Airbus Helicopters SAS (In re CHC Grp. Ltd.)*, No. 3:17-CV-00075-C, [2017 WL 1380514](#), at *19 (Bankr. N.D. Tex. Mar. 28, 2017). In doing so, courts may look to the Restatement (Second) of Conflict of Laws, which sets forth a “most significant relationship” test for conflict-of-laws questions. *See Jackson Nat’l Life Ins. Co. v. Dobbins*, [761 F. App’x 389, 392](#) (5th Cir. 2019); *see also In re ms55, Inc.*, [420 B.R. 806, 820](#) n.6 (Bankr. D. Colo. 2009) (“Even courts applying the ‘independent’ federal choice of law analysis give considerable weight to the principles set forth in the Restatement (Second) of Conflict of Laws.”), *aff’d*, No. 10-CV-00042-PAB, [2011 WL 1084967](#) (D. Colo. Mar. 21, 2011). Fraudulent-transfer statutes are not expressly covered by the Restatement’s rules, but these rules nevertheless provide guidance as to the factors a court should consider in determining which state has the greatest interest in having its law apply. These factors include: “(a) the need of interstate and international systems, (b) the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (c) the protection of justified expectations, (d) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

Under South Carolina’s conflict-of-laws rules, courts generally classify a claim as either sounding in tort or contract. There is, however, no controlling decision dictating whether a

fraudulent transfer under the Statute of Elizabeth is a question of contract or tort (or other classification) for conflict-of-laws purposes.¹⁶ In fact, as one court recently noted, the Statute of Elizabeth, which itself is an equitable claim,¹⁷ does not fit neatly into South Carolina’s general conflict-of-laws rules. See *Ashmore for Wilson v. Dodds*, [262 F. Supp. 3d 341, 360](#) (D.S.C. 2017) (applying South Carolina law) (“Though there may be a good deal of uncertainty as to the precise choice of law principle to be drawn from [the South Carolina Supreme Court’s decision in] *Sheldon*, it seems clear that *Sheldon* does not adopt the view of the parties that a fraudulent transfer claim is essentially a tort and that the law to be applied is the law of the state where the harm occurs.”). But, as noted by Defendants,¹⁸ the weight of persuasive authority is that courts should “classif[y] fraudulent conveyance claims as torts for purposes of choice-of-law issues.” *SEC v. Infinity Grp. Co.*, [27 F. Supp. 2d 559, 564](#) (E.D. Pa. 1998) (collecting cases); see also *Montoya v. Akbari-Shahmirzadi (In re Akbari-Shahmirzadi)*, Nos. 11-15351-t11, 13-01035-t, [2016 WL 6783245](#), at *3 n.3 (Bankr. D.N.M. Nov. 14, 2016) (collecting cases). “Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred.” *Kirkland v. Sam’s E., Inc.*, [411 F. Supp. 2d 639, 641](#) (D.S.C. 2005).

iii. The injury occurred in South Carolina, and South Carolina has the greatest interests in having its law apply.

Under either federal or South Carolina conflict-of-laws rules, South Carolina law is the “applicable law” for the Trustee’s § 544(b) action for at least three independent reasons.

¹⁶ The question was certified to the South Carolina Supreme Court in July 2017. Bruckerhoff Decl. Ex. 2 (*Ashmore v. Dodds* Order, dated July 5, 2017). The case was dismissed before the South Carolina Supreme Court opined on the question. Bruckerhoff Decl. Ex. 3 (*Ashmore v. Dodds* Order of Dismissal, dated April 18, 2018).

¹⁷ *Oskin v. Johnson*, [400 S.C. 390, 397](#) (2012) (explaining that “[a]n action to set aside a conveyance under the Statute of Elizabeth is an equitable action”).

¹⁸ Kupchick MTD at 22–23.

First, the relevant injury is the harm suffered by the Debtors when they failed to retain sufficient assets to pay their debts, not any harm suffered indirectly by Prospect or Summit (or other creditors) as a result of the Debtors' insolvency.¹⁹ "In cases involving constructively fraudulent transfers, the initial injury is the degrading of the economic well-being of the transferor, which contributes to insolvency or an inability to pay debts as they become due." *MC Asset Recovery LLC v. Commerzbank AG, et al. (In re Mirant Corp.)*, No. 03-046590 DML, [2010 WL 8708772](#), at *21 (Bankr. N.D. Tex. Apr. 22, 2010); *see also In re Tanglewood Farms, Inc. of Elizabeth City*, [487 B.R. 705, 710](#) (Bankr. E.D.N.C. 2013) ("The purpose of fraudulent transfer law is the **preservation of the debtor's estate** for the benefit of its unsecured creditors." (emphasis added) (quoting *Harman v. First Am. Bank (In re Jeffrey Bigelow Design Grp., Inc.)*, [956 F.2d 479](#) (4th Cir. 1992))). "This injury occurs where the debtor has its principal place of business." *See In re Mirant Corp.*, [2010 WL 8708772](#), at *21.

Here, the "degrading of the economic well-being of" the Debtors occurred in South Carolina, where they maintained their principal places of business.²⁰ *Id.* ("[T]he real injury to creditors is the debtor's failure to pay their claims. Typically, the decision not to pay such claims and the failure to pay occurs at the place where the debtor has its principal place of business."); *see In re Gulf Fleet Holdings*, [491 B.R. at 765](#) (applying Louisiana law because "[t]he principal place of business of the debtor entities is Louisiana and the transfers challenged by the Trustee

¹⁹ It is "well established in South Carolina that in tort cases 'the law of the place where the injury was occasioned or inflicted governs in respect of the right of action.'" *Dawkins v. State*, [306 S.C. 391, 392](#) (1991); *Rauton v. Pullman Co.*, [191 S.E. 416, 419](#) (S.C. 1937); *see also Innovative Container Co., LLC v. Son Light Trucking, Inc.*, No. CIV.A. 6:05-280-HMH, [2006 WL 895021](#), at *2 (D.S.C. Apr. 3, 2006) (applying South Carolina law); *Wright v. Am. Flyers Airline Corp.*, [263 F. Supp. 865, 868-69](#) (D.S.C. 1967) (applying South Carolina law).

²⁰ Defendants' contrary suggestion that *Integrity Worldwide, Inc. v. Int'l Safety Access Corp.*, No. 14-cv-0246, [2015 WL 1297823](#), at *2 (D.S.C. Mar. 23, 2015), supports their position is simply wrong. MTD at 22. That case is wholly devoid of any discussion or analysis as to why the Court elected to apply South Carolina law to that dispute. To the contrary, at most, it provides conclusory support for the position that the Court must apply the law of the location where the claim "arose"—here, South Carolina. *See id.*

are centered in Louisiana”); *Kaiser Steel Corp. v. Jacobs (In re Kaiser Steel Corp.)*, [87 B.R. 154, 159–60](#) (Bankr. D. Colo. 1988) (applying California law to § 544(b) claim because, among other reasons, the debtor’s principal place of business was in California); *Tronox, Inc. v. Kerr-McGree Corp. (In re Tronox Inc.)*, [503 B.R. 239, 266](#) (Bankr. S.D.N.Y. 2013) (“There is no dispute that the applicable fraudulent conveyance law is the Uniform Fraudulent Transfer Act as adopted by Oklahoma, the State where Kerr–McGee’s and Tronox’s headquarters were located at all relevant times.”). The fact that the Debtors’ creditors were *indirectly* harmed as a result does not change the analysis. *See Rogers v. Lee*, [414 S.C. 225, 231](#) (Ct. App. 2015) (“South Carolina law clearly provides *lex loci delicti* is determined by the state in which the *injury occurred*, not where the results of the injury were felt or where the damages manifested themselves.” (emphasis in original)); *see also Campbell v. Deans et al. (In re J.R. Deans)*, [249 B.R. 121, 129](#) (Bankr. D.S.C. 2000) (holding that South Carolina law applied under § 544(b) without considering the residence or location of the debtor’s creditors).²¹

Second, the focus of fraudulent-transfer law is the conduct of the **debtor–transferor** and the effect of the **debtor’s transfer** on the **debtor’s estate**, not the conduct of debtors’ creditors. *In re Jeffrey Bigelow Design Grp., Inc.*, [956 F.2d at 484](#) (holding in a constructive fraudulent-transfer case that “the proper focus is on the net effect of the transfers on the debtor’s estate, the

²¹ The cases cited by Defendants (MTD at 22) do not support their argument that the law of the state where the creditor resides applies to fraudulent-transfer claims. *See Bank of Am., N.A. v. Corporex Companies, LLC*, [99 F. Supp. 3d 708, 712](#) (E.D. Ky. 2015) (applying Kentucky law because the claim was brought in Kentucky, and not applying the law of the state where the creditor, Bank of America, was located); *Rosa v. TCC Commc’ns, Inc.*, No. 15CV1665, [2017 WL 980338](#), at *7 (S.D.N.Y. Mar. 13, 2017) (ruling on issue of personal jurisdiction and finding specific jurisdiction over transferee in fraudulent-transfer action because, among other things, the transferor’s primary assets were in New York); *Terry v. Walker*, No. CIV.A. 304CV00064, [2006 WL 736861](#), at *7 (W.D. Va. Mar. 23, 2006) (considering a claim in which the law, unlike the Statute of Elizabeth, did not provide that transfers were void, and, in any event, not applying the law of state where a creditor resided); *In re Sverica Acquisition Corp., Inc.*, [179 B.R. 457, 470](#) (Bankr. E.D. Pa. 1995) (considering statute of limitations in Pennsylvania for a claim under the UFCA and not addressing conflict-of-laws issue).

funds available to the unsecured creditors”); *see also In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, [917 F.3d 85, 100](#) (2d Cir. 2019) (interpreting chapter 5 of the Bankruptcy Code and stating that “[t]he relevant conduct in these actions is the debtor’s fraudulent *transfer* of property, not the transferee’s *receipt* of property” (emphasis in original)). Indeed, at bottom, the question presented by his case is whether transfers made from South Carolina, by a South Carolina company, are void as fraudulent. South Carolina clearly has an interest in having its laws answer this question. *See Gardner v. Kirven*, [184 S.C. 37, 38](#) (1937) (“No rule is more clearly imbedded in the law of [South Carolina], than that a debtor must be just before he is generous.”).

By contrast, New York does not have an interest in ensuring that companies based in South Carolina maintain assets to pay their creditors. In fact, New York recently passed the Uniform Voidable Transfer Act, which provides that the law of the state where the debtor is located—not the law of the state where a creditor resides—controls for fraudulent transfer claims. *See* N.Y. Debt. & Cred. Law § 279; Uniform Voidable Transactions Law § 279, NY LEGIS 580 (McKinney 2019). To be sure, New York’s adoption of the UVTA provide a clear indication of New York’s position that it does **not** have an interest in having its law applied here. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (providing that court should consider “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue”).

Third, applying South Carolina law will ensure uniformity and predictability. *See In re Merritt Dredging Co., Inc.*, [839 F.2d at 207](#) (in case involving South Carolina’s Uniform Commercial Code, explaining that “the most significant relationship test best promotes the

UCC’s policies of uniformity and predictability”).²² Here, the Debtors did not pay their debts to either Prospect (based in New York) or Summit (based in Massachusetts). Under Defendants’ espoused approach, both the law of New York and the law of Massachusetts (and potentially other jurisdictions as well) would apply to the Trustee’s fraudulent-transfer claims. That approach is untenable. In fact, one could imagine scenarios in which a single fraudulent transfer by a debtor harmed hundreds of creditors across the United States. It would be impracticable, and frankly nonsensical, for a South Carolina court to try to apply multiple states’ laws to a single fraudulent transfer by a South Carolina based transferor. Conversely, application of the law of the debtor’s place of business to fraudulent-transfer claims such as this one would ensure predictability and uniformity. Notably, it is for this reason that the Uniform Law Commission, as part of the UVTA, stated that the law of the state where the transferor is located—which, for an entity, is where it maintains its principal place of business—governs fraudulent transfer claims. *See, e.g., N.C. Gen. Stat. Ann. § 39-23.9A(b)* (North Carolina UVTA) (“[A] claim for relief under this Article is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.”). This Court, applying its “independent judgment,” should adopt this rule for § 544(b) claims. *See* § 10 Governing Law., UVTA, cmt. 1 (“Basing choice of law on the location of the debtor is analogous to the rule set forth in U.C.C. § 9-301 (2014), which provides that the priority of a security interest in intangible property is generally governed by the local law of the jurisdiction in which the debtor is located.”).

²² The First Restatement of Conflicts of Law, which South Carolina has cited favorably, also “explains that ‘one of [its] chief ends’ is to ensure ‘that the rights and duties of parties arising from a legal situation shall not be substantially varied because of the forum in which an action is brought’”—i.e., it seeks to impose uniformity and predictability on the adjudicative process. *Wellin v. Wellin*, 211 F. Supp. 3d 793, 802 (D.S.C. 2016) (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS 12 Intro. Note (1934)) (applying South Carolina law).

Therefore, for all the foregoing reasons, South Carolina has the greatest interest in having its law apply. Thus, South Carolina law is the “applicable law” under § 544(b).

B. The Trustee sufficiently pleads constructive fraudulent-transfer claims under the Statute of Elizabeth.

Section 544 of the Bankruptcy Code “gives the Trustee the status of a creditor under state law and allows nonbankruptcy law to determine the rights that accrue as a result of that created status.” *In re J.R. Deans Co., Inc.*, [249 B.R. 121, 129](#) (Bankr. D.S.C. 2000). The Trustee has identified creditors with fraudulent-transfer claims under South Carolina law and has more than sufficiently pleaded such claims.

1. A transfer is void if it is made for no consideration and the debtor fails to retain sufficient property to pay its creditors.

South Carolina’s fraudulent transfer statute, the Statute of Elizabeth, provides that:

Every . . . conveyance of lands, tenements or hereditaments, goods and chattels or any of them . . . by writing or otherwise . . . which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken . . . to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

S. C. Code Ann. § 27–23–10. Pursuant to the Statute of Elizabeth, “[e]xisting creditors may avoid transfers under an actual fraudulent transfer theory or under a constructive fraud theory.” *In re J.R. Deans Co., Inc.*, [249 B.R. at 130](#). “Under the constructive theory, where a transfer was made without valuable consideration being exchanged, no actual intent to hinder or defraud creditors has to be proven.” *Id.*; *Windsor Properties, Inc. v. Dolphin Head Const. Co.*, [331 S.C. 466, 471](#) (1998). Instead, courts have held that in such situations, the transfer must be set aside if the creditor establishes that:

(1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary;²³ and (3) the grantor ***failed to retain sufficient property to pay the indebtedness to the plaintiff in full***—not merely at the time of the transfer, but in the final analysis ***when the creditor seeks to collect his debt***.

In re J.R. Deans Co., Inc., [249 B.R. at 30](#) (emphasis added) (citation omitted). Thus, “[t]he sufficiency of assets is not . . . measured at the time of the transfer, ***but rather at the time when the creditor is able to collect its debt in full***.” *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, [127 F. Supp. 3d 568, 593](#) n.5 (D.S.C. 2015) (applying South Carolina law) (emphasis added), *voluntarily dismissed sub nom. PCS Nitrogen Inc. v. Ross Dev. Corp. Rivers*, No. 16-1540 (L), [2018 WL 2111081](#) (4th Cir. Mar. 19, 2018); *Gardner*, [191 S.E. at 817](#) (“If in the final event the property of the debtor is not sufficient to pay his debts existing at the time of his voluntary conveyance, then such conveyance is null and void as to such debts.”); *see also Campbell v. Hanckel (In re Hanckel)*, [512 B.R. 539, 549](#) (Bankr. D.S.C. 2014), *order aff’d, appeal dismissed sub nom. In re Richardson Miles Hanckel, III*, No. 2:14-CV-2898, [2015 WL 7251714](#) (D.S.C. Mar. 10, 2015) (Duncan, J.); *Hovis v. Ducate (In re Ducate)*, [369 B.R. 251, 258](#) (Bankr. D.S.C. 2007) (Duncan, J.).

Here, in October 2012, Ellett voluntarily distributed \$134,003,871.20 to the Transferee Defendants. FAC ¶ 36–37. Thereafter, on or about March 7, 2013, Ellett voluntarily distributed another \$54,860,549.74 to the Transferee Defendants. FAC ¶ 39. Both transfers were for no consideration. FAC ¶¶ 37, 40. Prior to (and at the time of) the Fraudulent Transfers, Ellett owed debts to Prospect and Summit. FAC ¶¶ 35 & n.3, 38. Ellett defaulted on the 2012 and 2013 Loans in December 2018. FAC ¶ 66. Ellett did not and could not pay its debt in full. And

²³ “A conveyance made without valuable consideration is sometimes referred to as ‘voluntary.’” *Future Grp., II v. Nationsbank*, [324 S.C. 89, 96](#) n.5 (1996).

SportCo likewise lacked sufficient assets to satisfy its guaranty obligations. FAC ¶ 87. Instead of paying their creditors, Ellett, SportCo, and the other Debtors filed for bankruptcy.

In summary, (1) Ellett was in debt to Prospect and Summit prior to making the 2012 and 2013 Fraudulent Transfers, (2) the Fraudulent Transfers were voluntary and without consideration, and (3) Ellett failed to retain sufficient property to pay the indebtedness to Prospect and Summit at the time its debt was due. The Trustee, therefore, has stated a claim for fraudulent transfer.

2. Prospect and Summit were creditors at the time of the Fraudulent Transfers.

Defendants' contention that "Prospect became a creditor only because of the transactions, and not before" is belied by the facts. MTD at 24. A creditor is "[o]ne to whom a debt is owed." BLACK'S LAW DICTIONARY (11th ed. 2019); see [11 U.S.C. § 101\(10\)\(A\)](#) (providing that a "creditor" means an "entity that has a claim against the debtor"). The Trustee alleges that the 2012 Loan Agreements were signed on September 28, 2012, and that the 2012 Fraudulent Transfers occurred on October 1, 2012. FAC ¶¶ 35, 37, 73. Accordingly, Prospect and Summit each became a creditor the moment the 2012 Loan Agreements were signed. And, because the funds were transferred from Ellett (and/or SportCo) to the Transferee Defendants after the funds were distributed by the lenders, Prospect and Summit were each a creditor by the time the Fraudulent Transfers were made.²⁴ Moreover, even if Defendants' warped characterization of the facts is correct, Prospect and Summit were creditors prior to the 2013 Fraudulent Transfers, which occurred in March of 2013. FAC ¶¶ 36–39.

²⁴ See FAC ¶ 35 ("The proceeds from the 2012 Loan were wired to Ellett in South Carolina."); FAC ¶ 36 ("The 2012 Fraudulent Transfers, however, were wired directly from Ellett to the Transferee Defendants.").

Defendants misleadingly quote *In re Ducate* to support their erroneous contention that Prospect was not a creditor prior to the transactions. MTD at 2–3. In doing so, they omit the key fact of that case: the creditor was a subsequent creditor because its debt did not arise until years after the alleged fraudulent transfer. *In re Ducate*, [369 B.R. at 258–62](#). The *Ducate* court’s holding that a subsequent creditor cannot allege that a prior transfer was actually fraudulent—*i.e.*, made with the intent to defraud—as to it if it had notice of the transfer prior to extending credit makes sense. *Id.* But these are not the facts here. As set forth above, contrary to Defendants’ spurious recitation of the facts, Prospect and Summit were creditors of Ellett and SportCo prior to the Fraudulent Transfers. In fact, because the Fraudulent Transfers were funded by the loan proceeds, Prospect and Summit had to be creditors prior to the Fraudulent Transfers.

Accordingly, Plaintiff does not have to prove the distributions were actually fraudulent and Prospect’s knowledge of the transfers is not relevant. Moreover, as explained further below, Prospect and Summit did not have knowledge in 2012 or 2013 that Ellett would fail to retain sufficient property to pay its debts to them when due.

3. Prospect and Summit held unsecured claims at the time of the Debtors’ bankruptcy because they were under-secured.

Section 544(b) of the Bankruptcy Code requires a trustee establish the existence of a triggering creditor that holds an allowable, unsecured claim as of the petition date who has standing to bring a claim. [11 U.S.C. § 544\(b\)](#). This is exactly what the Trustee alleges here. Defendants, nevertheless, ignore the pleadings and the record in the Bankruptcy Case to argue that Prospect and Summit, which collectively lost tens of millions of dollars on their loans to Ellett, were somehow fully secured in June 2019. MTD at 3. Defendants’ argument is frivolous.

Defendants cite the following language found in an August 7, 2019 order of the Delaware Bankruptcy Court (the “**Bankruptcy Order**”): “the Prepetition Term Loan Obligations

constitute allowed, secured claims within the meaning of Section 502 and 506 of the Bankruptcy Code.” Exhibit 10 to Declaration of Daniel H. Levi, [Dkt. 91-11](#), ¶ F(ix). Defendants contend that this Bankruptcy Order shows that Prospect and Summit, the holders of the Prepetition Term Loan Obligations, did not hold unsecured claims. MTD at 3. But the Bankruptcy Order directly references § 506 of the Bankruptcy Code, which provides that:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, **and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.**

[11 U.S.C.A. § 506\(a\)\(1\)](#) (emphasis added). In other words, § 506(a) provides that an unsecured creditor's claim is bifurcated into a secured claim in an amount equal to the value of the collateral and an unsecured deficiency claim for the balance of the debt.

Thus, the Bankruptcy Order does no more than simply acknowledge that Prospect and Summit's claims were secured to the extent that they were actually backed by assets, but unsecured to the degree that those assets were insufficient to cover the amount of the Prepetition Term Loan Obligations. See also *In re 500 Fifth Ave. Assocs.*, [148 B.R. 1010, 1016](#) (Bankr. S.D.N.Y. 1993) (“Section 506(a) of the Bankruptcy Code provides that a lender's secured claim is limited to the value of its collateral; **any difference between the amount of the debt and the value of the collateral, that is, the deficiency claim, is deemed an unsecured claim**, even if under other applicable law the creditor's claim is nonrecourse.” (emphasis added)), *aff'd*, No. 93 CIV. 844 (LJF), [1993 WL 316183](#) (S.D.N.Y. May 21, 1993).

The Debtors' Plan of Liquidation further provides that all Prepetition Term Loan Claims²⁵ by Prospect and Summit are "Deficiency Claims" to the extent they are "not satisfied from the [Debtors'] Remaining Assets and the proceeds thereof." Exhibit 1 to Declaration of Daniel H. Levi, Dkt. 91-2, at 14, 55–56. Prospect and Summit were entitled to vote as part of the unsecured class (Class 4) under the Plan of Liquidation because their claims were impaired. *Id.* at 52–53. In fact, the Plan estimated that Prospect and Summit would only receive 14% of the amount of their claims from the liquidation of the Debtors' assets, demonstrating that they were woefully under-secured at the time of Debtors' bankruptcy. *Id.* at 41. Put simply, contrary to Defendants' arguments, Prospect and Summit were, on the petition date, and are now, unsecured creditors for purposes of § 544(b).

C. Defendants' affirmative defenses of limitations and ratification lack merit and cannot be decided on a motion to dismiss.

1. The statute of limitations did not begin to run until Ellett failed to pay its debts under the Loan Agreements.

The Trustee's claims are timely. "Under South Carolina law the applicable statute of limitations begins to run after two events occur." *In re Ducate*, 355 B.R. at 543. "First, a cause or right of action to institute and maintain a lawsuit ***must have accrued***." *Id.* (emphasis added). "Second, the aggrieved party must have discovered or be charged with knowledge, after the exercise of due diligence, sufficient to put the creditor on notice of the fraud." *Id.* Claims are timely filed under the Statute of Elizabeth if brought within three years after the ***later*** of these two events. *In re J.R. Deans*, 249 B.R. at 132. Thus, so long as the complaint was filed within three years of the accrual of Prospect's and Summit's claims, it is timely. *See id.*

²⁵ "Prepetition Term Loan Claims" are defined as "Claims on account of the Prepetition Term Loan Obligations." Exhibit B to Motion to Substitute Party & Amend Complaint, Dkt. 56-2, ¶ 84.

Prospect's and Summit's claims accrued (at the earliest) in late December 2018—well within the three-year statute of limitations. FAC ¶ 66. “The fundamental test . . . in determining whether a cause of action has accrued[] is whether the party asserting the claim can maintain an action to enforce it.” *McAlhany v. Carter et al.*, 415 S.C. 54, 67 (Ct. App. 2015) (citation omitted) (alterations in original), *aff'd*, No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017). “Stated differently, [a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.” *Id.* (citation omitted) (alteration in original). Prospect and Summit did not have the legal right to bring their claims until Debtors defaulted on their debt—*i.e.*, when the loan came due. *See, e.g., In re J.R. Deans*, 249 B.R. at 129–30. The Debtors defaulted on their loan repayments to Prospect and Summit no earlier than late December 2018. FAC ¶ 66. The Complaint was filed five months later on May 23, 2019. Exhibit B to Notice of Removal, Dkt. 1-2 (Summons & Complaint, *Prospect Capital Corp.*, No. 2019-CP-32-02045). Thus, the claims are timely irrespective of the application of the discovery rule.

As a result, Defendants' arguments regarding when Prospect and/or Summit discovered its claims are completely irrelevant here. Defendants, nevertheless, misapply the discovery rule. “Under the discovery rule, an action accrues when the injury is discovered or ‘reasonably ought to have been discovered.’” *Strong v. Univ. of S.C. Sch. of Med.*, 316 S.C. 189, 190–91 (1994) (citation omitted). Here, two events were required to happen for Prospect or Summit to sustain an “injury”: (1) Ellett had to make a transfer without consideration, and (2) Ellett then had to fail to retain sufficient property to pay its debts when due. Because the second event did not occur until December 2018 at the earliest, the discovery rule could not start to run before then. *See In re Ducate*, 355 B.R. at 543 (Bankr. D.S.C. 2006) (explaining that the statute of limitations began to run when the creditor knew about the transfer **after** the debtor defaulted on the loan).

Defendants’ contention that the statute of limitations can start to run prior to the actual accrual of the claim is dumbfounding.

Moreover, as a factual matter, the statements that allegedly indicate Prospect was aware of facts that put it on notice of its claim indicate only that Prospect believed, as of a certain date, that it **might** not be able collect the full amount of its loan when it came due in the future. Such facts are not enough to have compelled Prospect to assert a claim (and, in fact, as described above, any such claim would not have even accrued until the default). In its Form 10-K for the year ending on June 30, 2015, Prospect disclosed that, “in recognition of **recent** company performance and **current market conditions**, we decreased the fair value of our investment in USC [SportCo] to \$145,618[,000] as of June 30, 2015, a discount of \$12,620[,000] from its amortized cost.” Exhibit 6 to Declaration of Daniel H. Levi, [Dkt. 91-7, 152](#) (emphasis added). A partial write-down of roughly 8% years before the loans came due is not enough to trigger the accrual of a claim under the Statute of Elizabeth.²⁶ To the contrary, if Prospect had asserted a claim against the Transferee Defendants in July 2015, those Defendants would have had a compelling argument that they cannot be liable until Ellett actually failed to pay the debts when due. As stated above, based on the allegations in the FAC, the earliest that Prospect knew that Ellett would not be able to satisfy its debt was in 2018—well within the three-year statute of

²⁶ Walker submits that fraudulent transfer is a matter in equity and that “equity does not favor a negligent party.” Walker MTD at 8. He further submits that Prospect was negligent in failing to secure a personal guarantee from Walker and thus the fraudulent transfer claim must fail. Walker MTD at 9. This argument is made without support. And, in any event, it was not negligent for Prospect to make a loan without seeking a guarantee from the *shareholders* of a company when the *company* had a legal obligation to repay the loan. Walker also argues that “[t]he allegations of the First Amended Complaint only support the inference that Mr. Walker has cleaner hands than [the Trustee] received from his predecessors, and therefore his claims against Mr. Walker must fail.” Walker MTD at 10. The current record does not contain any allegation sounding in bad faith against Prospect that could reasonably trigger an unclean hands defense. See *Anderson v. Buonforte*, [365 S.C. 482, 493](#) (Ct. App. 2005).

limitations. And, at the very least, the discovery rule presents an issue of fact that should not be resolved at the pleading stage.²⁷

2. Prospect did not and could not ratify the fraudulent transfers.

Defendants spend a significant portion of their briefs arguing that Prospect ratified the transaction, thereby barring any claim for fraudulent transfer. MTD at 13–16. But Defendants’ ratification argument fails for three independent reasons: (1) a transaction that is void *ab initio* cannot be ratified; (2) ratification requires a “knowing sanction” of the fraudulent transfer, and neither Prospect, nor any other creditor, ratified Ellett’s failure to retain sufficient capital to pay its debts; and (3) ratification, even if cognizable as a defense—it is not—is generally a question reserved for the jury and cannot be decided here as a matter of law.

First, the Statute of Elizabeth expressly provides that a fraudulent transfer is “**utterly void**” and “of no effect.” S.C. Code § 27–23–10 (emphasis added). Based upon this rule, this Court has recognized that fraudulent transfers are “**incapable of ratification.**” *In re Amtron, Inc.*, 192 B.R. 130, 132 (Bankr. D.S.C. 1995) (emphasis added); *see also Carr v. Guerard*, 365 S.C. 151, 153–54 (2005); *Gardner*, 191 S.E. at 817 (“If in the final event the property of the debtor is not sufficient to pay his debts existing at the time of his voluntary conveyance, **then such conveyance is null and void** as to such debts.” (emphasis added); *Albertson v. Robinson*, 371 S.C. 311, 318 (Ct. App. 2006).²⁸ And South Carolina courts have further maintained that a transaction that is “void from its inception . . . cannot be ratified or confirmed and thereby made valid.” *Johns v. Johns*, 309 S.C. 199, 201 (Ct. App. 1992); *Lukich v. Lukich*, 368 S.C. 47, 52–53

²⁷ *Johnston v. Bowen*, 313 S.C. 61, 64 (1993) (whether a claimant knew or should have known that they had a cause of action is a question of fact for the jury); *Santee Portland Cement Co. v. Daniel Int’l Corp.*, 299 S.C. 269, 274 (1989) (application of discovery rule to a claim is a question of fact for jury), *overruled on other grounds by Atlas Food Sys. And Servs., Inc. v. Crane Nat’l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556 (1995).

²⁸ *See Durham v. Blackard*, 438 S.E.2d 259 (S.C.Ct.App.1993) (finding that fraudulent transfer was void); *First Citizens Bank and Trust Co. v. Scofield*, 335 S.E.2d 248 (S.C.Ct.App.1985) (same).

(Ct. App. 2006) (holding that “because a bigamous marriage **is void** at its inception and not merely voidable, **it cannot be ratified**” (emphasis added)), *aff’d*, [379 S.C. 589](#) (2008).²⁹ Simply put, because the fraudulent transfers are deemed “void” and of “no effect,” they could not have been ratified. S.C. Code § 27–23–10.

Defendants’ cited authority does nothing to change the above analysis because the cases come from jurisdictions that, unlike South Carolina, view fraudulent transfers as voidable, rather than void. *See Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, [503 B.R. 348, 383–85 n.175](#) (Bankr. S.D.N.Y. 2014) (citing *In re Adelpia Recovery Tr.*, [634 F.3d 678, 691](#) (2d Cir. 2011) (finding that, in the Second Circuit, unlike South Carolina, “a fraudulent transfer is not void, but voidable”)); compare *U.S. Bank Nat. Ass’n v. Verizon Commc’ns Inc.*, [479 B.R. 405, 408](#) (N.D. Tex. 2012) (“This motion for partial summary judgment deals with four of these causes of action. Motion at 1. Counts 1, 2, and 5 are to recover against Verizon and VFS for transfers alleged to be fraudulent under Texas Business and Commerce Code §§ 24.005, 24.006, and 24.008, and [11 U.S.C. §§ 544\(b\) and 550](#).”), with *In re Harris*, No. 13-36395, [2016 WL 6127515](#), at *3 (Bankr. S.D. Tex. Oct. 20, 2016) (noting that in the Second Circuit a “fraudulent transfer is not void, but voidable” and that “Texas law is in accord”) (citation omitted).

Second, even if the Fraudulent Transfers could have been ratified, ratification requires a knowing sanction of the relevant conduct, which did not occur here.³⁰ Prospect consented to a

²⁹ *See Ashe v. Union Cent. Life Ins. Co.*, [115 F. 234, 236](#) (C.C.D.S.C. 1902) (“When an agent assumes to act for his principal without written or parol authority to do so, the act is not void, but voidable, for the principal can ratify the act, and the ratification relates back to the performance of the act.”); *see also Hyman v. Ford Motor Co.*, [142 F. Supp. 2d 735, 748](#) (D.S.C. 2001) (same).

³⁰ “[R]atification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.” *Hodgin v. UTC Fire & Sec. Americas Corp.*, [885 F.3d 243, 252](#) (4th Cir. 2018); *see also In re Adelpia Recovery Tr.*, [634 F.3d 678, 691](#) (2d Cir. 2011) (“Ratification is the act of knowingly giving sanction or affirmance to an act which would otherwise be unauthorized and not binding.”). Notably, “a party ‘is not bound by a ratification made without knowledge of material facts involved in the original act when the [party] was unaware of such lack of knowledge.’” *Hodgin*, [885 F.3d at 252](#) (alteration in original) (citation omitted). Because

dividend recapitalization; it did *not* consent to Ellett’s failure to retain sufficient capital to pay its debts. And Prospect certainly did not consent to Wellspring Capital’s mismanagement of Ellett or Wellspring IV’s failure to return capital to the business after taking more than \$183 million in cash from the company. Nor did any other creditor. More to the point, Prospect did not and could not have ratified a fraudulent transfer when its claim to recover such a transfer had not yet accrued. As explained above, a claim under the Statute of Elizabeth accrues “when the creditor seeks to collect his debt.” *In re Ducate*, [369 B.R. at 258](#) (citation omitted). Here, all supposed ratification occurred well before Ellett failed to repay its debt, meaning that it occurred well before the claim existed.

Third, independent of the relative merit of Defendants’ ratification defense, ratification is a question of fact reserved for the jury and accordingly should not be decided on this motion to dismiss. *Barber v. Carolina Auto Sales*, [236 S.C. 594, 599](#) (1960) (“Whether or not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is usually a question of fact for the jury and not one of law for the court.”).

D. The Trustee pleads claims under § 550 against the Transferee Defendants and Wellspring Capital.

Section 550 of the Bankruptcy Code provides that “the trustee may recover . . . the property transferred, or . . . the value of such property, from—(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.” [11 U.S.C. § 550](#).

South Carolina law views Fraudulent Transfers as void, not voidable, there is no case law on ratification of fraudulent transfers in South Carolina.

Wellspring IV does not contest that it was an initial or subsequent transferee. The general partners of Wellspring IV,³¹ however, claim that they cannot be liable as transferees. But, as stated in the FAC, these entities are joint and severally liable as a matter of law for the debts of their respective limited partnerships. Del. Code §§, 15-306(a), 17-403(b); N.Y. Partnership Law § 121-303(a).³² Because the general partners are joint and severally liable, they can and should be joined in this action against the limited partnership Wellspring IV. *See id.* But, in the event that the Court determines the Trustee should file subsequent claims against the general partners if Wellspring IV fails to pay the judgment against it, then the Trustee respectfully requests that its claims against the general partners of Wellspring IV be dismissed without prejudice.

In addition to the Transferee Defendants, which are liable as initial or subsequent transferees, Wellspring Capital is liable under § 550 of the Bankruptcy Code as an “entity for whose benefit” the Fraudulent Transfers were made. The Fourth Circuit has explained that, in determining whether a company or person is “the entity for whose benefit such transfer was made,” “the **determinative** inquiry is whether [that entity] received **a benefit** from the transfer.” *Terry v. Meredith (In re Meredith)*, 527 F.3d 372, 377 (4th Cir. 2008) (first emphasis in original). In analyzing this question, a significant number of courts have held that the “**party who forces a debtor to make a transfer is almost always** ‘the entity for whose benefit such transfer was made.’” *In re Blast Fitness Grp., LLC*, 603 B.R. 219, 236 (Bankr. D. Mass. 2019) (emphasis

³¹ Although the FAC states that Wellspring IV is a New York LP, it appears to be a Delaware LP.

³² *See also Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)*, 440 B.R. 243, 268 (Bankr. S.D.N.Y. 2010) (applying Delaware law) (“Under applicable Delaware law, a general partner of a limited partnership is jointly and severally liable for all of the debts and obligations of the partnership.”); *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 A.D.2d 742, 744 (3d Dep’t 2002) (“Section 98 of the Limited Partnership Act and section 121–303(a) of the Revised Act impose traditional joint and several liability on a general partner and on a limited partner who also participates in the control of the business.”).

added); *see, e.g., Qwest Commc'ns Corp. v. Weisz*, [278 F. Supp. 2d 1188, 1192](#) (S.D. Cal. 2003) (same). For example, in *In re Lucas Dallas, Inc.*, the Ninth Circuit held that “[t]he party who forces a debtor to make a transfer **is almost always** ‘the entity for whose benefit such transfer was made,’ and thus is generally always subject to strict liability.” [185 B.R. 801, 809](#) (B.A.P. 9th Cir. 1995) (emphasis added).

Here, the Trustee alleges, among other things, that “[i]n 2012, and then again in 2013, Wellspring Capital, through its control over the Debtors, caused the Debtors to pay more than \$188 million in cash distributions to the Debtors’ owners, including more than \$183,169,466.94 to Wellspring IV, a fund controlled by Wellspring and the Debtors’ largest shareholder.” FAC ¶ 2; *see also* FAC ¶¶ 34, 36, 79. The Trustee further alleges that Wellspring Capital controlled the Debtors’ board of directors and received management fees from the Debtors. FAC ¶ 36. Accordingly, the Trustee plausibly alleges that Wellspring forced Debtors to make the transfers for its own benefit and is thus liable as the entity for whose benefit the transfers were made.

Courts have generally understood the trustee’s § 550 power as **broadly piercing** “through the form of the transaction” to recover from the party that “‘actually benefitted from the transfer.’” *In re Stephen S. Meredith, CPA, P.C.*, [527 F.3d 372, 375](#) (4th Cir.2008) (citing *In re Compton Corp.*, [831 F.2d 586, 595](#) (5th Cir.1987)). “Because the Bankruptcy Code does not specifically define the four categories of parties from whom the [T]rustee can recover, determination of a liable party is **necessarily fact-specific**.” *Anderson v. Bajaj et al. (In re Med. Mgmt. Grp.), LLC*, [534 B.R. 646, 652](#) (Bankr. D.S.C. 2015) (emphasis added). In exploring the contours of liability under § 550, courts have looked for objective indicia of both control and quantifiable gain. For example, in *In re Meredith* the Fourth Circuit held that the “mere fact that [defendant] was, for a brief period of time, the nominal owner of a business effectively

controlled by her husband does not demonstrate that she received any benefit from that ownership.” [527 F.3d at 376](#). The court accordingly found that she was not a “party for whose benefit such transfer was made,” precluding liability under § 550. The instant facts, however, are entirely different. Specifically, Wellspring IV is alleged to be the long-term controlling shareholder who received over \$183 million in dividends as a result of the fraudulent transfers that were orchestrated and executed at Wellspring Capital’s direction. FAC ¶¶ 2, 8, 73, 75, 83, 85. None of the concerns relating to “nominal” ownership or control that colored the Fourth Circuit’s reasoning in *Meredith* are implicated here. *See In re Stephen S. Meredith, CPA, P.C.*, [527 F.3d at 376–77](#).

At bottom, the extent of the benefit Wellspring Capital received from directing the Fraudulent Transfers to its investment fund is a fact issue that cannot be resolved on a motion to dismiss. The Trustee has more than sufficiently pleaded that Wellspring is liable under § 550. *See In re Med. Mgmt. Grp., LLC*, [534 B.R. at 652](#) (holding that under § 550 “determination of a liable party is *necessarily fact-specific*.” (emphasis added)).

E. The Trustee, as assignee of Prospect, sufficiently pleads a claim for negligent misrepresentation.

As insiders of Ellett with specialized knowledge of the firearms industry, Carles and Johnson owed Prospect a duty of care in discussing the AcuSport purchase. They failed to exercise that care by delivering false information, and thus causing Prospect to forego \$9.5 million in interest payments and suffer other damages. And they did so to further their own financial interests in the Debtors. Accordingly, Carles and Johnson are liable for negligent misrepresentation. Because these communications happened as part of Carles’ employment as a Managing Partner of Wellspring, and Wellspring itself was a manager of Ellett, Wellspring is

liable via the doctrine of respondeat superior. This is true under both South Carolina and New York law, and the Court accordingly need not decide which law applies.³³

1. Carles and Johnson owed Prospect a duty to exercise reasonable diligence in their communications concerning the AcuSport purchase, which they failed to do.

In determining whether there is an actionable negligent misrepresentation, South Carolina and New York law both look to whether there was a duty of care, falsity on the part of defendant, reasonable reliance by the plaintiff, and damages suffered by the plaintiff. *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, [296 F.3d 308, 312](#) (4th Cir. 2002) (applying South Carolina law); *Kimmell v. Schaefer*, [89 N.Y.2d 257, 263](#) (1996). “[I]f the defendant has a pecuniary interest in making the statement and he possesses expertise or special knowledge that would ordinarily make it reasonable for another to rely on his judgment or ability to make careful enquiry, the law places on him a duty of care with respect to representations made to plaintiff.” *Private Mortg. Inv. Servs.*, [296 F.3d at 315](#). *Kimmell*, [89 N.Y.2d at 264](#). Courts have similarly explained that “a duty to speak with care exists when ‘the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information.’” *Kimmell*, [89 N.Y.2d at 263](#) (alteration in original). Importantly, a duty to speak truthfully and with reasonable care exists where one provides projections as part of soliciting financial assistance for a business. *Kimmell v. Schaefer*, [224 A.D.2d 217, 217](#) (1st Dep’t 1996), *aff’d*, [89 N.Y.2d 257](#).

The New York appellate division decision in *Kimmell v. Schaefer* is instructive. That action arose out of an investment in a publicly traded company that was engaged in the

³³ The Wellspring Parties and Carles note that “New York and South Carolina negligent misrepresentation law is substantially similar so the Court need not resolve a choice of law issue.” MTD at 33.

development, manufacture, and sale of small-scale electrical generators. *Id.* Prior to the investment, defendant represented to plaintiffs that the project was “already achieving a sizable monthly cash flow that would increase over the next ten years.” *Id.* He further “enthusiastically vouch[ed] for the accuracy of the projections, and then followed up his oral assertions with even more optimistic prognostications, thereby succeeding in convincing each of the plaintiffs to acquire [a] 50%” interest. *Id.* Nonetheless, the investment proved to be “worthless from the start and never even attained the first month’s projections.” *Id.* The defendant was ultimately held liable for negligent misrepresentation because he “not only had superior information to that possessed by plaintiffs but he [could not] reasonably claim that he did nothing more than advance a guess on which he never expected plaintiffs to act.” *Id.* at 218.

So too here. Wellspring Capital, Carles, and Johnson recklessly, and without reasonable diligence or inquiry, told Prospect that the AcuSport Purchase would result in significant, specific, and quantifiable upside, including the Debtors capturing 20% to 30% of AcuSport sales. FAC ¶ 48. Carles similarly represented that “***Brad and I know the business a lot better*** and we think it must get done.” FAC ¶ 50 (emphasis added). They further, like the defendant in *Kimmell*, “enthusiastically vouched” for the accuracy of their assessment by, among other things, exclaiming: “What is the problem? There is no time for games. Acusport needs to file and we need to buy it. THIS IS FOR YOUR BENEFIT - THIS WILL HELP YOUR RECOVERY - THIS WILL MAKE THE BUSINESS STRONGER - UNDERSTAND?” FAC ¶ 60 (emphasis in original). Communications to this effect continued for months and, while they varied in tenor and tone, a few things remained clear: the situation was “SERIOUS,” Prospect needed to “ACT FAST,” and the AcuSport Purchase represented the only viable way to “PRESERVE

[Prospect's] PRINCIPAL.” FAC ¶ 57 (emphasis in original); *see also* ¶¶ 49, 50–51, 55, 57, 60.³⁴

In other words, by their own admission, Carles and Johnson had “superior knowledge,” repeatedly told Prospect that the only way to save the business was by endorsing the AcuSport purchase, and, through their consistent endorsement of that view, implied that they “kne[w]] facts which support[ed] that opinion.”³⁵ *Kimmell*, 224 A.D.2d at 218.

Moreover, Johnson and Carles, as employees of SportCo and Wellspring (SportCo's largest shareholder), respectively, had a direct pecuniary interest in making the negligent misrepresentations. As explained above, the operative statements began in the last quarter of 2017 and continued through the spring of 2018. FAC ¶¶ 45–60. This was a period of extreme financial pressure for the Borrowers. FAC ¶ 44. The negligent misrepresentations all relate to relieving the Borrowers from making interest payments to Prospect and allowing the Borrowers to make a quick profit by purchasing AcuSport. FAC ¶¶ 45–60. Accordingly, because the statements all benefited SportCo (and its largest shareholder, Wellspring), Carles and Johnson similarly had a pecuniary interest in making the statements as well. They are, consequently, liable for negligent misrepresentation. And, at the very least, the question of whether Carles and Johnson are liable for negligent misrepresentation is not properly decided on a Motion to Dismiss. *Kimmell*, 89 N.Y.2d at 264; *Slack v. James*, 364 S.C. 609, 619 (2005).

In response, Defendants submit that their “representations are all classic statements of inactionable opinion or forward-looking statements.” Johnson MTD at 14. But, the allegations in

³⁴ Defendants note that certain statements relate to transactions that were never consummated and question how they are relevant to this dispute. MTD at 38. They miss the point. The emails cited in the FAC, taken together, express that the Debtors desperately needed the AcuSport Purchase, coupled with relief from interest payments to Prospect, to put the business back on the right course.

³⁵ Accordingly, Defendant Johnson's submission that “Plaintiff's sole allegation with respect to duty is that Mr. Johnson purportedly owed fiduciary duties to Prospect, as a creditor, based on Ellett's and the other Borrowers' alleged state of insolvency” is simply inaccurate. Johnson MTD at 22

the FAC relate to presently existing *facts*, not *opinions*. For example, the representation that Debtors would acquire \$14 million worth of inventory, leading to a \$7 million profit is not a speculative promise of future reward; to the contrary, it is a comparison of a series of presently existing facts, including the price at which inventory could be acquired, its value on the open market, and the difference between the two values (*i.e.*, the profit which, here, was \$7 million). A representation that the Debtors would capture 20% to 30% of AcuSport sales and experience substantial synergies similarly depended on the comparison of presently existing facts, including the size and nature of each businesses' customer base, the types of products that both sold, the geographic reach of those sales, and any relevant overlap.

Moreover, contrary to Defendants' contention, "courts have repeatedly held that opinions are actionable in a negligence context." *King Cty., Wash. v. IKB Deutsche Industriebank AG*, [863 F. Supp. 2d 317, 322](#) (S.D.N.Y. 2012) (applying New York law); see *West Side Fed. Sav. & Loan Ass'n v. Hirschfeld*, [476 N.Y.S.2d 292, 295](#) (1st Dep't 1984) (holding "expressions of opinion have long been held to be [actionable] in New York" in situations "where one party does have superior knowledge").³⁶ Specifically, "even expressions of opinion and/or predictions of future events are actionable if deemed to be statements of material facts." *Kimmell*, [224 A.D.2d at 218](#). Accordingly, "where one party does have superior knowledge, the expression of an opinion implies that the declarant knows facts which support that opinion and that he knows nothing which contradicts the statement." *Id.* (citation omitted).³⁷ And, as explained above,

³⁶ Opinions are similarly actionable under South Carolina law. See *Private Mortg. Inv. Servs.*, [296 F.3d at 315](#) (4th Cir. 2002) (finding that one is liable for negligent misrepresentation where one negligently provides an opinion relating to value).

³⁷ In light of this clear rule, Defendants' extensive citation to *Hydro Inv'rs, Inc. v. Trafalgar Power Inc.*, [227 F.3d 8, 11](#) (2d Cir. 2000), is inapposite. It simply fails to recognize a rule firmly established in New York state case law. *King Cty., Wash. V. IKB Deutsche Industriebank AG*, [863 F. Supp. 2d 317, 322](#) (S.D.N.Y. 2012) ("New York courts have repeatedly held that opinions are actionable in a negligence context.").

Defendants repeatedly stated that they had unique insider knowledge and that they had no reason to believe their predictions were wrong.

Defendants further argue that the FAC “contains no factual allegations showing that any of the . . . representations were actually false or incorrect as of the date defendants allegedly made them.” Johnson MTD at 20. In so doing, they seek to impose a level of prescience that the law does not require at the pleading stage. Specifically, all that is required is that the plaintiff establish that it is “plausible” that the defendant’s statements “were false at the time they were made.” See *Probulk Carriers Ltd. v. Peraco Chartering USA LLC*, No. 11 Civ. 5686(RJS), [2012 WL 3095319](#), at *10 (S.D.N.Y. July 20, 2012).

The Trustee has done so here. Specifically, the Trustee alleges that Prospect was informed that the Debtors would capture 20% to 30% of AcuSport sales, and that the Debtors would acquire \$14 million worth of AcuSport inventory at a substantial discount, allowing for the immediate realization of a \$7 million profit on the sale of the AcuSport inventory. FAC ¶ 48. He further alleges that these representations were false. The “AcuSport distribution center the Borrowers purchased contained only \$139,000 worth of inventory.” FAC ¶ 63. Obviously, the difference between \$7 million in profit and \$139,000 in inventory (and a naturally much smaller profit) plausibly establishes that, for purposes of a motion to dismiss, Defendants’ statements were not true when they were made. Similarly, the Trustee’s allegation that the Debtors failed to realize the promised synergies gains further credence from the fact that they filed for bankruptcy less than a year after the AcuSport purchase. FAC ¶ 66.

2. Claims for negligent misrepresentation are not subject to Rule 9(b)’s heightened pleading standard.

In response to their clear liability for their obviously negligent statements, Defendants cling to a contrived technicality in the hopes of avoiding liability. Again, Defendants’ arguments

fail. “In evaluating whether a cause of action must be pled with particularity, a court should examine whether the claim requires an essential showing of fraud.” *Baltimore Cty. v. Cigna Healthcare*, [238 F. App’x 914, 921](#) (4th Cir. 2007). And, when faced with the question of whether a claim for fraudulent inducement under South Carolina law requires an essential showing of fraud, this court has found that it does not. *Smith v. Nationstar Mortg., LLC*, No. 2:15-CV-0888-RMG, [2015 WL 13759742](#), at *3 (D.S.C. Aug. 3, 2015) (applying South Carolina law).³⁸ The instant case does not merit a different conclusion.

Nonetheless, even if Rule 9(b) did apply to the instant claims for negligent misrepresentation (it does not), the allegations in the FAC satisfy this standard. In the District of South Carolina, to satisfy Rule 9(b), the complaint must allege the “who, what, when, where, and how of the alleged fraud.” *United States v. Family Med. Centers of S.C., LLC*, No. CV 3:14-382-MBS, [2016 WL 6601017](#), at *2 (D.S.C. Nov. 8, 2016). “Thus, while mere incantation of the word ‘fraud’ is clearly insufficient, Rule 9(b) does not require a dissertation.” *Morris v. Wachovia Sec., Inc.*, [277 F. Supp. 2d 622, 645](#) (E.D. Va. 2003). Moreover, “Rule 9(b) does not require omniscience; rather, the rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim.” *Knight Textile Corp. v. Knight*, No. CV 8:05-2145-HFF, [2006 WL 8444769](#), at *3 (D.S.C. Aug. 7, 2006). At bottom, “[t]he purpose of rule 9(b) is to provide a defendant with notice of the substance of the plaintiffs’ claims and to provide the district court with enough information to distinguish strike suits from legitimate claims.” *Chisolm v. Transouth Fin. Corp.*, [164 F.3d 623](#) (4th Cir. 1998).

³⁸ Courts have held that the same is true under New York law. *Silvercreek Mgmt., Inc. v. Citigroup, Inc.*, [248 F. Supp. 3d 428, 452–53](#) (S.D.N.Y. 2017) (“Given the absence of an answer from the Second Circuit in *Aetna*, the question of whether Rule 9(b) applies to claims of negligent misrepresentation is less than crystal clear. . . . This case-by-case approach, looking at whether a plaintiff’s claim ‘rel[ies] on a showing of fraud or mistake,’ has also counseled against the application of Rule 9(b).” (alteration in original)).

Here, the claims for negligent misrepresentation hinge on certain documented email communications that conclusively satisfy the questions of “who, what, when, where and how” sufficient to put Defendants “on notice as to the nature of the claim.” *Knight Textile Corp.*, [2006 WL 8444769](#), at *3. And, to the degree that Defendants submit that Carles and Wellspring Capital cannot be liable because no specific emails from those two parties are cited, they are simply wrong. MTD at 35. The complaint cites numerous email communications from Carles,³⁹ and Wellspring is liable under the theory of respondeat superior because Carles’ statements were made “within the scope of [his] employment” as a Managing Partner of Wellspring. *Watkins v. Hall*, No. 2015-001720, [2017 WL 4810799](#), at *1 (S.C. Ct. App. July 19, 2017) (“Under the doctrine of respondeat superior, an employer is vicariously liable for the injuries to a third party resulting from torts its employee commits within the scope of employment.”).

CONCLUSION

Defendants’ arguments are legally flawed and, even viewed in their most favorable light, simply raise factual issues that cannot be resolved at this stage of the case.⁴⁰ Accordingly, Plaintiff respectfully requests that the Court deny Defendants’ motions to dismiss in their entirety. In the alternative, Plaintiff respectfully requests leave to amend the FAC pursuant to [Federal Rule of Civil Procedure 15\(a\)\(2\)](#).

³⁹ FAC ¶¶ 49, 50, 51, 52, 53, 54.

⁴⁰ Plaintiff notes that Mr. Walker’s arguments relating to punitive damages and attorneys’ fees are premature and reserves a substantive response for the appropriate time later in these proceedings. Walker MTD at 13–14.

Dated: March 26, 2020

Respectfully submitted,

/s/ R. William Metzger, Jr.

R. William Metzger, Jr. #5026

Kevin K. Bell #5854

Mary McDonald Campolong #12658

ROBINSON GRAY STEPP & LAFFITTE, LLC

1310 Gadsden Street

Columbia, SC 29201

(803) 929-1400

bmetzger@robinsongray.com

P. Jason Collins (*Pro Hac Vice*)

Joshua J. Bruckerhoff (*Pro Hac Vice*)

W. Tyler Perry (*Pro Hac Vice*)

REID COLLINS & TSAI LLP

1301 S. Capital of Texas Highway, Suite 300

Austin, Texas 78746

(512) 647-6100

jcollins@reidcollins.com

jbruckerhoff@reidcollins.com

tperry@reidcollins.com

*Counsel for Ronald Friedman,
as trustee for the SportCo Creditors'
Liquidation Trust*

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In Re:	)	
	)	Adversary No. 19-80071-dd
Ronald Friedman, as trustee for the	)	
Sportco Creditors' Liquidation Trust,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Wellspring Capital Management, LLC,	)	CERTIFICATE OF SERVICE
Wellspring Capital Partners IV, L.P.,	)	
WCM Genpar IV, L.P., WCM Genpar IV	)	
GP, LLC, Alexander E. Carles, Bradley	)	
Johnson, F. Hewitt Grant, Charles E.	)	
Walker, Jr., Todd Boehly, Bernard	)	
Ziomek, and Andrew Kupchik,	)	
	)	
Defendants.	)	
	)	
	)	

This is to certify that I am a paralegal in the law firm of Robinson Gray Stepp & Laffitte, LLC, attorneys for Ronald Friedman, as trustee for the Sportco Creditors' Liquidation Trust; that I have this day caused to be served upon the persons named below the **Plaintiff's Omnibus Response to Defendants' Motion to Dismiss the First Amended Complaint and Declaration of Joshua J. Bruckerhoff in Support of Plaintiff's Omnibus Response to Defendants' Motion to Dismiss the First Amended Complaint** in the above captioned matter by placing a copy of same in the United States Mail, postage prepaid, in envelopes addressed as follows:

G. William McCarthy, Jr., Esquire
Daniel J. Reynolds, Jr., Esquire
W. Harrison Penn, Esquire
McCarthy Reynolds & Penn, LLC
1517 Laurel Street
Columbia, SC 29201

Keith Moss Babcock, Esquire
Lewis Babcock, LLP
P.O. Box 11208
Columbia, SC 29211

Lewis R. Clayton, Esquire
Elizabeth R. McColm, Esquire
Jacqueline P. Rubin, Esquire
Jacob A. Adlerstein, Esquire
Daniel H. Levi, Esquire
Paul Weiss Rifkind Wharton Garrison LLP
1285 Avenue of the Americas
New York, NY 10019

John S. Simmons, Esquire
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201

Daniel H.R. Laguardia, Esquire
George Bell Adams, III, Esquire
Shearman & Sterling LLP
535 Mission Street, 25th Floor
San Francisco, CA 94105

Lyle Roberts, Esquire
Shearman & Sterling LLP
401 9th Street, NW, Suite 800
Washington, DC

Mary M. Caskey, Esquire
Haynsworth Sinkler Boyd, P.A.
PO Box 11889
Columbia, SC 29211

Shaun C. Blake, Esquire
Rogers Lewis Jackson Mann & Quinn, LLC
1901 Main Street, Suite 1200
Columbia, SC 29211

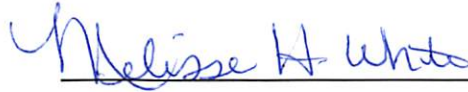
J.W. Nelson Chandler, Esquire
Chandler & Dudgen LLC
PO Box 547
Charleston, SC 29402

Philip David Anker, Esquire
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

John T. Lay, Esquire
Lindsay A. Joyner, Esquire
Gallivan, White & Boyd PA
1201 Main Street, Suite 1200
Columbia, SC 29201

Jonathan P. Whitcomb, Esquire
Scott M. Harrington, Esquire
One Atlantic Street
Stamford, CT 06901

Robinson Gray Stepp & Laffitte, LLC



Melissa H. White, Paralegal for
R. William Metzger, Jr. [5028]
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400

Columbia, South Carolina
March 26, 2020

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

RONALD FRIEDMAN, as trustee for the
SportCo Creditors' Liquidation Trust,

Plaintiff,

v.

Adversary No. 19-80071-dd

WELLSPRING CAPITAL MANAGEMENT,
LLC, WELLSPRING CAPITAL PARTNERS IV,
L.P., WCM GENPAR IV, L.P., WCM GENPAR
IV GP, LLC, ALEXANDER E. CARLES,
BRADLEY JOHNSON, F. HEWITT GRANT,
CHARLES E. WALKER, JR., TODD BOEHLI,
BERNARD ZIOMEK, and ANDREW KUPCHIK,

Defendants.

**DECLARATION OF JOSHUA J. BRUCKERHOFF IN SUPPORT OF PLAINTIFF'S
OMNIBUS RESPONSE TO DEFENDANTS MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT**

I, Joshua J. Bruckerhoff, hereby declare under penalty of perjury that the following is true and correct pursuant to [28 U.S.C. § 1746](#):

1. I am a partner at the law firm of Reid Collins & Tsai LLP, counsel for Plaintiff Ronald Friedman, Trustee for the SportCo Creditors' Liquidation Trust, in this action and have personal knowledge of the facts set forth in this Declaration.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Second Lien Loan and Security Agreement, dated September 28, 2012.

3. Attached hereto as **Exhibit 2** is a true and correct copy of the August 2, 2017 Order issued by the District Court in *Ashmore v. Dodds*, No. 8:15-cv-0561-AMQ, certifying a question to the South Carolina Supreme Court.

4. Attached hereto as **Exhibit 3** is a true and correct copy of an order issued by the South Carolina Supreme Court in *Ashmore v. Dodds*, No. 2017-001652, dismissing the case in light of a settlement.

Executed on the 26th day of March 2020.

/s/ Joshua J. Bruckerhoff
Joshua J. Bruckerhoff

EXHIBIT 1

THIS INSTRUMENT AND THE RIGHTS AND OBLIGATIONS EVIDENCED HEREBY ARE SUBORDINATE, IN THE MANNER AND TO THE EXTENT SET FORTH IN THAT CERTAIN INTERCREDITOR AND SUBORDINATION AGREEMENT (THE “SUBORDINATION AGREEMENT”) DATED AS OF SEPTEMBER 28, 2012 BETWEEN PROSPECT CAPITAL CORPORATION, AS SECOND PRIORITY AGENT FOR THE SECOND PRIORITY CREDITORS AND BANK OF AMERICA, N.A., AS SENIOR AGENT FOR THE SENIOR CREDITORS, TO THE INDEBTEDNESS (INCLUDING INTEREST) OWED BY ELLETT BROTHERS, LLC (“ELLETT”), THE OTHER BORROWERS FROM TIME TO TIME PARTY THERETO (TOGETHER WITH ELLETT, INDIVIDUALLY A “BORROWER” AND COLLECTIVELY THE “BORROWERS”), PURSUANT TO THAT CERTAIN THIRD AMENDED AND RESTATED LOAN AND SECURITY AGREEMENT, DATED AS OF SEPTEMBER 28, 2012, BY AND AMONG THE BORROWERS, THE LENDERS FROM TIME TO TIME PARTY THERETO AND BANK OF AMERICA, N.A., AS AGENT, AND THE INDEBTEDNESS OWED BY ANY GUARANTORS UNDER GUARANTIES WITH RESPECT THERETO, AS SUCH AGREEMENTS HAVE BEEN AND HEREAFTER MAY BE AMENDED, RESTATED, SUPPLEMENTED, EXTENDED, RENEWED, REFINANCED, REPLACED OR OTHERWISE MODIFIED AND TO ANY INDEBTEDNESS REFINANCING THE INDEBTEDNESS UNDER SUCH AGREEMENTS AS CONTEMPLATED BY THE SUBORDINATION AGREEMENT; AND EACH HOLDER OF THIS INSTRUMENT, BY ITS ACCEPTANCE HEREOF, IRREVOCABLY AGREES TO BE BOUND BY THE PROVISIONS OF THE SUBORDINATION AGREEMENT.

ELLETT BROTHERS, LLC,
EVANS SPORTS, INC.,
JERRY’S SPORTS, INC.,
SIMMONS GUN SPECIALTIES, INC.,
BONITZ BROTHERS, INC.
and
OUTDOOR SPORTS HEADQUARTERS, INC.,

as Borrowers

SECOND LIEN LOAN AND SECURITY AGREEMENT

Dated: September 28, 2012

THE FINANCIAL INSTITUTIONS
PARTY HERETO FROM TIME TO TIME, as Lenders
and
PROSPECT CAPITAL CORPORATION, as Agent

TABLE OF CONTENTS

	Page
SECTION 1. CREDIT FACILITY	1
1.1 Term Loan.....	1
1.2 Notes	2
SECTION 2. INTEREST, FEES AND CHARGES	2
2.1 Interest.....	2
2.2 Fees	3
2.3 Computation of Interest and Fees	3
2.4 Reimbursement Obligations.....	3
2.5 Bank Charges	4
2.6 Increased Costs; Capital Adequacy	5
2.7 Maximum Interest.....	5
2.8 Mitigation.....	7
SECTION 3. RESERVED.....	7
SECTION 4. PAYMENTS	7
4.1 General Payment Provisions	7
4.2 Reserved.....	7
4.3 Mandatory and Optional Prepayments.....	7
4.4 Pro Rata Treatment and Payments.....	9
4.5 Marshaling; Payments Set Aside	9
4.6 Allocation of Payments.....	10
4.7 Application of Payments and Collateral Proceeds.....	10
4.8 Reserved.....	11
4.9 Payments Free of Taxes	11
4.10 Lender Tax Information.....	12
4.11 Nature and Extent of Each Borrower's Liability	13
SECTION 5. RESERVED.....	16
SECTION 6. COLLATERAL	16
6.1 Grant of Security Interest.....	16
6.2 Lien on Deposit Accounts.....	17

TABLE OF CONTENTS (continued)

	Page
6.3 Real Estate Collateral.....	17
6.4 Other Collateral.....	17
6.5 No Assumption of Liability	18
6.6 Lien Perfection; Further Assurances.....	18
6.7 Foreign Subsidiary Stock.....	18
SECTION 7. COLLATERAL ADMINISTRATION.....	19
7.1 General Provisions	19
7.2 Administration of Accounts.....	21
7.3 Administration of Inventory	21
7.4 Administration of Equipment	22
7.5 Reserved.....	22
7.6 Administration of Deposit Accounts	22
SECTION 8. REPRESENTATIONS AND WARRANTIES.....	23
8.1 General Representations and Warranties	23
8.2 Survival of Representations and Warranties.....	28
SECTION 9. COVENANTS AND CONTINUING AGREEMENTS.....	29
9.1 Affirmative Covenants.....	29
9.2 Negative Covenants	33
9.3 Financial Covenants.....	40
SECTION 10. CONDITIONS PRECEDENT	41
10.1 Conditions Precedent to Initial Credit Extension.....	41
10.2 Inapplicability of Conditions	44
SECTION 11. EVENTS OF DEFAULT; RIGHTS AND REMEDIES ON DEFAULT.....	44
11.1 Events of Default	44
11.2 Acceleration of Obligations	46
11.3 Other Remedies.....	47
11.4 Setoff.....	48
11.5 Remedies Cumulative; No Waiver	49
SECTION 12. AGENT	49

TABLE OF CONTENTS
(continued)

	Page
12.1 Appointment, Authority and Duties of Agent.....	49
12.2 Agreements Regarding Collateral.....	51
12.3 Reliance By Agent	51
12.4 Action Upon Default.....	52
12.5 Ratable Sharing.....	52
12.6 Indemnification of Agent Indemnitees	53
12.7 Limitation on Responsibilities of Agent	54
12.8 Successor Agent and Co-Agents.....	54
12.9 Consents, Amendments and Waivers	55
12.10 Due Diligence and Non-Reliance	56
12.11 Representations and Warranties of Lenders	57
12.12 Several Obligations	57
12.13 Individual Capacities	57
12.14 No Third Party Beneficiaries	57
12.15 Notice of Transfer	57
12.16 Remittance of Payments and Collections	57
SECTION 13. BENEFIT OF AGREEMENT; ASSIGNMENTS AND PARTICIPATIONS	58
13.1 Successors and Assigns.....	58
13.2 Participations.....	58
13.3 Assignments.....	59
SECTION 14. MISCELLANEOUS	60
14.1 Power of Attorney.....	60
14.2 General Indemnity	61
14.3 Survival of All Indemnities.....	62
14.4 Modification of Agreement.....	62
14.5 Severability	62
14.6 Cumulative Effect; Conflict of Terms	63
14.7 Execution in Counterparts.....	63
14.8 Consent	63

TABLE OF CONTENTS
(continued)

	Page
14.9 Notices	63
14.10 Performance of Borrowers' Obligations.....	64
14.11 Credit Inquiries	65
14.12 Time of Essence	65
14.13 Indulgences Not Waivers.....	65
14.14 Entire Agreement; Appendix A, Exhibits and Schedules.....	65
14.15 Interpretation.....	65
14.16 Obligations of Lenders Several.....	65
14.17 Advertising and Publicity	66
14.18 Confidentiality	66
14.19 Patriot Act Notice	67
14.20 Governing Law; Consent to Forum	67
14.21 Waivers by Borrowers	67
14.22 Binding Effect; Further Assurances.....	68

LIST OF APPENDICES, EXHIBITS AND SCHEDULES

Appendix A	General Definitions
Exhibit A	Form of Note
Exhibit B	Form of Compliance Certificate
Exhibit C	Form of Assignment and Acceptance
Exhibit D	Form of Notice
Schedule 7.1.1	Borrowers' Business Locations
Schedule 7.1.2	Insurance
Schedule 7.6	Deposit Accounts
Schedule 8.1.1	Jurisdictions in which Borrowers and each Subsidiary is Authorized to do Business
Schedule 8.1.4	Capital Structure of Borrowers
Schedule 8.1.5	Corporate Names
Schedule 8.1.12	Surety Obligations
Schedule 8.1.13	Tax Identification Numbers of Borrowers and Subsidiaries
Schedule 8.1.15	Patents, Trademarks, Copyrights and Licenses
Schedule 8.1.18	Contracts Restricting Borrowers' Right to Incur Debts
Schedule 8.1.19	Litigation
Schedule 8.1.21	Capitalized and Operating Leases
Schedule 8.1.22	Pension Plans
Schedule 8.1.24	Labor Contracts
Schedule 8.1.28	Disregarded Subsidiaries
Schedule 9.2.5	Permitted Liens
Schedule 9.2.8	Restrictions on Upstream Payments

SECOND LIEN LOAN AND SECURITY AGREEMENT

THIS SECOND LIEN LOAN AND SECURITY AGREEMENT is made on September 28, 2012, by and among **ELLETT BROTHERS, LLC** (“**EB**”), a South Carolina limited liability company, **EVANS SPORTS, INC.** (“**Evans**”), a South Carolina corporation, **JERRY’S SPORTS, INC.** (“**Jerry**”), a Delaware corporation, **SIMMONS GUN SPECIALTIES, INC.** (“**Simmons**”), a Delaware corporation, **BONITZ BROTHERS, INC.** (“**Bonitz**”), a Delaware corporation, **OUTDOOR SPORTS HEADQUARTERS, INC.** (“**Outdoor**”), a Delaware corporation, each with its chief executive office and principal place of business at 267 Columbia Avenue, Chapin, South Carolina; the various financial institutions listed on the signature pages hereof and their respective successors and permitted assigns which become “Lenders” as provided herein; and **PROSPECT CAPITAL CORPORATION**, in its capacity as collateral and administrative agent for Lenders pursuant to **Section 12** hereof (together with its successors in such capacity, “**Agent**”). Capitalized terms used in this Agreement have the meanings assigned to them in Appendix A, General Definitions.

Recitals:

Each Borrower has requested that Lenders enter into this Agreement to provide funds to the Borrowers to be used solely for payment of a portion of the Wellspring Debt, payment of the Closing Date Distribution (as such terms are defined herein) and payment of transaction fees and expenses in connection therewith. In order to utilize the financial powers of each Borrower in the most efficient and economical manner, and in order to facilitate the financing of each Borrower’s needs, Lenders are making loans to Borrowers hereunder on a combined basis and in accordance with the provisions hereinafter set forth.

Each Borrower has agreed to guarantee the obligations of each of the other Borrowers under this Agreement and each of the other Loan Documents.

NOW, THEREFORE, for good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the parties hereto hereby agree as follows:

SECTION 1. CREDIT FACILITY

1.1 Term Loan.

1.1.1 **Making of Term Loan.** Subject to the terms and conditions hereof and in reliance upon the representations and warranties set forth herein and in the other Loan Documents, each Lender severally agrees to make available to the Borrowers on the Closing Date a principal amount equal to such Lender’s Commitment Percentage of the aggregate principal amount of the Term Loans in an original amount equal to \$170,000,000 on the Closing Date, for the purposes hereinafter set forth. Amounts borrowed under this **Section 1.1** which are repaid or prepaid may not be reborrowed.

1.1.2 **Repayment of Term Loan.** The Borrowers shall repay to the Lenders the aggregate outstanding principal balance of the Term Loans on the Maturity Date.

1.1.3 Use of Proceeds. Proceeds of the Term Loans shall be used by Borrowers solely for one or more of the following purposes: (i) to make a one-time Distribution to Holdings (for further Distribution to SportCo) to repay a portion of the Wellspring Debt on the Closing Date; (ii) to pay the Closing Date Distribution on the Closing Date, and (iii) to pay the fees and transaction expenses associated with the closing of the Transactions described herein. In no event may any Term Loan proceeds be used by Borrowers to make a contribution to the equity of any Subsidiary which is not a Borrower, to purchase or to carry, or to reduce, retire or refinance any Debt incurred to purchase or carry any Margin Stock or for any related purpose that violates the provisions of Regulations T, U or X of the Board of Governors.

1.2 Notes.

The Borrower's obligation to repay to each Lender such Lender's Commitment Percentage of the Term Loans shall be evidenced by a Note made payable to such Lender in substantially the form of **Exhibit A**.

SECTION 2. INTEREST, FEES AND CHARGES

2.1 Interest.

2.1.1 Interest Rate. Subject to **Section 2.1.3** and **Section 2.7**, interest shall accrue on the outstanding principal balance of the Term Loans from the Closing Date and until the principal amount of the Term Loans has been repaid in full at a rate per annum equal to the greater of (x) the LIBOR Rate plus eleven percent (11.00%) and (y) twelve and three-quarters percent (12.75%). Any determination of the interest rate by the Agent shall be conclusive and binding on the Borrowers in the absence of manifest error.

2.1.2 Interest Payments. The Borrowers shall pay to the Lenders accrued but unpaid interest in cash (i) in arrears on each Interest Payment Date, (ii) on the principal amount paid or prepaid on the date of any principal payment or prepayment of the Term Loans made pursuant to **Section 4.3** and (iii) on the Maturity Date.

2.1.3 Default Rate of Interest. Borrowers shall pay interest at a rate per annum equal to the Default Rate (i) with respect to any portion of the Obligations (and, to the extent permitted by Applicable Law, all past due interest) that is not paid on the due date thereof (whether due at stated maturity, on demand, upon acceleration or otherwise) until paid in full; and (ii) with respect to all of the Obligations (and, to the extent permitted by Applicable Law, all past due interest) upon the earlier to occur of (x) Borrowers' receipt of notice from Agent or Required Lenders' of the election to charge the Default Rate based upon the existence of any Default or Event of Default (which notice Agent may elect to send and shall send at the direction of Required Lenders), whether or not acceleration or demand for payment of the Obligations has been made or (y) the commencement by or against Borrower of an Insolvency Proceeding whether or not under the circumstances described in clauses (i) or (ii) hereof. To the fullest extent permitted by Applicable Law, the Default Rate shall apply and accrue on any judgment entered with respect to any of the Obligations and to the unpaid principal amount of the Obligations during any Insolvency Proceeding of a Borrower. Borrowers acknowledge that the cost and expense to Agent and each Lender attendant upon the occurrence of an Event of Default

are difficult to ascertain or estimate and that the Default Rate is a fair and reasonable estimate to compensate Agent and Lender for such added cost and expense. Interest accrued at the Default Rate shall be due and payable on demand.

2.2 Fees.

Pursuant to the Structuring Fee Letters, Borrowers shall pay to each Lender or its designee for its own account a structuring fee of two and one quarter percent (2.25%) of the aggregate principal amount of the Term Loans advanced by such Lender on the Closing Date. Such fee shall be fully earned by the Lenders on the date hereof and shall not be subject to rebate, refund or proration. Such fee shall be deemed to be compensation for services and shall not be deemed to be interest or any other charge for the use, forbearance or detention of money.

2.3 Computation of Interest and Fees.

All fees and other charges provided for in this Agreement that are calculated as a per annum percentage of any amount and all interest shall be calculated daily and shall be computed on the actual number of days elapsed over a year of three hundred and sixty (360) days. Subject to **Section 4.7**, for purposes of computing interest and other charges hereunder, all payments received by a Lender shall be deemed applied by such Lender on account of the Obligations on the Business Day that such Lender receives such payments in immediately available funds.

2.4 Reimbursement Obligations.

2.4.1 Borrowers shall reimburse Agent, Summit and Prospect, for so long as either is an Original Lender for, (and, with respect during any period that an Event of Default then exists, each Lender) or, at the request of Agent (or, if applicable, such Lender); pay directly, all reasonable legal, accounting, appraisal and other reasonable fees and out-of-pocket expenses incurred by Agent, such Original Lender or, if applicable, any other Lender in connection with (i) the negotiation and preparation of any of the Loan Documents, any amendment or modification thereto, any waiver of any Default or Event of Default thereunder, or any restructuring or forbearance with respect thereto; (ii) the administration of the Loan Documents and the transactions contemplated thereby, to the extent that such fees and expenses are expressly provided for in this Agreement or any of the other Loan Documents; (iii) action taken to perfect or maintain the perfection or priority of any of Agent's Liens with respect to any of the Collateral; (iv) any effort to verify, protect, preserve, or restore any of the Collateral or to collect, sell, liquidate or otherwise dispose of or realize upon any of the Collateral; (v) any litigation, contest, dispute, suit, proceeding or action (whether instituted by or against Agent, any Lender, any Obligor or any other Person) in any way arising out of or relating to any of the Collateral (or the validity, perfection or priority of any of Agent's Liens thereon), any of the Loan Documents or the validity, allowance or amount of any of the Obligations; (vi) the protection or enforcement of any rights or remedies of Agent or any Lender in any Insolvency Proceeding; (vii) any other action taken by Agent or any Lender to enforce any of the rights or remedies of Agent or such Lender against any Obligor or any Account Debtors to enforce collection of any of the Obligations or payments with respect to any of the Collateral; and (viii) the engagement by Agent of professionals to determine the value of Inventory. In addition to the foregoing, the Borrowers agree to pay to the Agent the allocated, reasonable and documented costs, fees and

expenses of internal counsel in connection with any amendment, waiver or consent delivered hereunder (but in any event not to exceed \$5,000 for any single amendment, waiver or consent), in addition to any other applicable fee that may be payable in connection with any such amendment, waiver or consent. All amounts chargeable to Borrowers under this **Section 2.4** shall constitute Obligations that are secured by all of the Collateral and shall be payable on demand to Agent. Borrowers shall also reimburse Agent for expenses incurred by Agent in its administration of any of the Collateral to the extent and in the manner provided in **Section 7** hereof or in any of the other Loan Documents. The foregoing shall be in addition to, and shall not be construed to limit, any other provision of any of the Loan Documents regarding the reimbursement by Borrowers of costs, expenses or liabilities suffered or incurred by Agent or any Lender.

2.4.2 If at any time Agent or (with the consent of Agent) any Lender shall indemnify any Person against losses or damages that such Person may suffer or incur in its dealings or transactions with Borrowers, or shall guarantee any liability or obligation of a Borrower to such Person, or otherwise shall provide assurances of a Borrower's payment or performance under any agreement with such Person related to or arising in connection with this Agreement, including indemnities, guaranties or other assurances of payment or performance given by Agent or any Lender with respect to any thereof, then the Contingent Obligation of Agent or any Lender providing any such indemnity, guaranty or other assurance of payment or performance, together with any payment made or liability incurred by Agent or any Lender in connection therewith, shall constitute Obligations that are secured by the Collateral and Borrowers shall repay, on demand, any amount so paid or any liability incurred by Agent or any Lender in connection with any such indemnity, guaranty or assurance. Nothing herein shall be construed to impose upon Agent or any Lender any obligation to provide any such indemnity, guaranty or assurance. The foregoing agreement of Borrowers shall apply whether or not such indemnity, guaranty or assurance is in writing or oral and regardless of a Borrower's knowledge of the existence thereof, and shall be in addition to any provision of the Loan Documents regarding reimbursement by Borrowers of costs, expenses or liabilities suffered or incurred by Agent or any Lender. To the extent that Agent or any Lender agrees to provide any such indemnity, guaranty or other assurance of payment or performance for the benefit of Borrower under this **Section 2.4**, such party agrees to use reasonable efforts to timely notify Borrowers of such agreement; provided, however, that the failure to so notify Borrowers shall in no manner impair Borrowers' reimbursement obligations hereunder.

2.5 Bank Charges.

Borrowers shall pay to Agent, **on demand**, any and all fees, costs or expenses which Agent or any Lender pays to a bank or other similar institution (including any fees paid by Agent or any Lender to any Participant) arising out of or in connection with the depositing for collection by Agent or any Lender of any Payment Item received or delivered to Agent or any Lender on account of the Obligations. Borrowers acknowledge and agree that Agent may charge such costs, fees and expenses to Borrowers based upon Agent's good faith estimate of such costs, fees and expenses as they are incurred by Agent or any Lender.

2.6 Increased Costs; Capital Adequacy. To the extent applicable to a Lender:

2.6.1 Change in Law. If any Change in Law shall:

i. impose, modify or deem applicable any reserve, liquidity, special deposit, compulsory loan, insurance charge or similar requirement against assets of, deposits with or for the account of, or credit extended or participated in by, any Lender;

ii. subject any Lender to any Tax with respect to any Term Loan or Loan Document, or change the basis of taxation of payments to such Lender in respect thereof (except for Indemnified Taxes or Other Taxes covered by **Section 4.9** and the imposition of, or any change in the rate of, any Excluded Tax payable by such Lender); or

iii. impose on any Lender any other condition, cost or expense affecting any Term Loan or Loan Document;

and the result thereof shall be to increase the cost to such Lender of making or maintaining any Term Loan, or to reduce the amount of any sum received or receivable by such Lender hereunder (whether of principal, interest or any other amount) then, upon request of such Lender, Borrowers will pay to such Lender such additional amount or amounts as will compensate such Lender for such additional costs incurred or reduction suffered. A certificate as to the amount of such increased cost, submitted to Borrowers by such Lender, shall be final, conclusive and binding for all purposes, absent manifest error.

2.6.2 Capital Adequacy. If any Lender determines that any Change in Law affecting such Lender or any Lending Office of such Lender or such Lender's holding company, if any, regarding capital requirements has or would have the effect of reducing the rate of return on such Lender's or holding company's capital as a consequence of this Agreement, or such Lender's Term Loans, to a level below that which such Lender or holding company could have achieved but for such Change in Law (taking into consideration such Lender's and holding company's policies with respect to capital adequacy), then, subject to **Section 2.8**, from time to time Borrowers will pay to such Lender such additional amount or amounts as will compensate it or its holding company for any such reduction suffered.

2.6.3 Compensation. Failure or delay on the part of any Lender to demand compensation pursuant to this Section shall not constitute a waiver of its right to demand such compensation, but Borrowers shall not be required to compensate a Lender for any increased costs incurred or reductions suffered more than nine months prior to the date that such Lender notifies EB of the Change in Law giving rise to such increased costs or reductions and of such Lender's intention to claim compensation therefor (except that, if the Change in Law giving rise to such increased costs or reductions is retroactive, then the nine-month period referred to above shall be extended to include the period of retroactive effect thereof). For purposes of this **Section 2.6**, all references to a Lender shall be deemed to include any bank holding company or bank parent of such Lender.

2.7 Maximum Interest.

Regardless of any provision contained in any of the Loan Documents, in no contingency or event whatsoever shall the aggregate of all amounts that are contracted for, charged or received by Agent and Lenders pursuant to the terms of this Agreement or any of the other Loan Documents and that are deemed interest under Applicable Law exceed the highest rate permissible under any Applicable Law. No agreements, conditions, provisions or stipulations contained in this Agreement or any of the other Loan Documents or the exercise by Agent of the right to accelerate the payment or the maturity of all or any portion of the Obligations, or the exercise of any option whatsoever contained in any of the Loan Documents, or the prepayment by Borrowers of any of the Obligations, or the occurrence of any contingency whatsoever, shall entitle Agent or any Lender to charge or receive in any event, interest or any charges, amounts, premiums or fees deemed interest by Applicable Law (such interest, charges, amounts, premiums and fees referred to herein collectively as “Interest”) in excess of the Maximum Rate and in no event shall Borrowers be obligated to pay Interest exceeding such Maximum Rate, and all agreements, conditions or stipulations, if any, which may in any event or contingency whatsoever operate to bind, obligate or compel Borrowers to pay Interest exceeding the Maximum Rate shall be without binding force or effect, at law or in equity, to the extent only of the excess of Interest over such Maximum Rate. If any Interest is charged or received in excess of the Maximum Rate (“Excess”), each Borrower acknowledges and stipulates that any such charge or receipt shall be the result of an accident and bona fide error, and such Excess, to the extent received, shall be applied to the Obligations, and the balance, if any, returned to Borrowers, it being the intent of the parties hereto not to enter into a usurious or otherwise illegal relationship. The right to accelerate the maturity of any of the Obligations does not include the right to accelerate any Interest that has not otherwise accrued on the date of such acceleration, and Agent and Lenders do not intend to collect any unearned Interest in the event of any such acceleration. Borrowers recognize that, with fluctuations in the rates of interest set forth in **Section 2.1.1** of this Agreement or in any Term Loan, and the Maximum Rate, such an unintentional result could inadvertently occur. All monies paid to Agent or any Lender hereunder or under any of the other Loan Documents, whether at maturity or by prepayment, shall be subject to any rebate of unearned Interest as and to the extent required by Applicable Law. By the execution of this Agreement, each Borrower covenants that (i) the credit or return of any Excess shall constitute the acceptance by Borrowers of such Excess, and (ii) such Borrower shall not seek or pursue any other remedy, legal or equitable, against Agent or any Lender, based in whole or in part upon contracting for, charging or receiving any Interest in excess of the Maximum Rate. For the purpose of determining whether or not any Excess has been contracted for, charged or received by Agent or any Lender, all Interest at any time contracted for, charged or received from Borrowers in connection with any of the Loan Documents shall, to the extent permitted by Applicable Law, be amortized, prorated, allocated and spread in equal parts throughout the full term of the Obligations. Borrowers, Agent and Lenders shall, to the maximum extent permitted under Applicable Law, (i) characterize any non-principal payment as an expense, fee or premium rather than as Interest and (ii) exclude voluntary prepayments and the effects thereof. The provisions of this **Section 2.7** shall be deemed to be incorporated into every Loan Document (whether or not any provision of this Section is referred to therein). All such Loan Documents and communications relating to any Interest owed by Borrowers and all figures set forth therein shall, for the sole purpose of computing the extent of Obligations, be automatically recomputed by Borrowers, and by any

court considering the same, to give effect to the adjustments or credits required by this **Section 2.7**.

2.8 Mitigation.

To the extent applicable to any Lender party hereto, if such Lender requests compensation under **Sections 2.6**, or if Borrowers are required to pay additional amounts with respect to such Lender under **Section 4.9**, then such Lender shall use reasonable efforts to designate a different Lending Office or to assign its rights and obligations hereunder to another of its offices, branches or Affiliates, if, in the judgment of such Lender, such designation or assignment (a) would eliminate the need for such notice or reduce amounts payable or to be withheld in the future, as applicable; and (b) would not subject such Lender to any unreimbursed cost or expense and would not otherwise be disadvantageous to it or unlawful. Borrowers shall pay all reasonable costs and expenses incurred by any Lender in connection with any such designation or assignment.

SECTION 3. BORROWERS' REPRESENTATIVE

3.1 Appointment.

Each Borrower hereby irrevocably appoints EB, and EB agrees to act under this Agreement, as the agent and representative of itself and each other Borrower for all purposes under this Agreement, including receiving notices and communications to Borrowers (or any of them) from Agent. Agent may rely, and shall be fully protected in relying, on any reports, information or any other notice or communication made or given by EB, whether in its own name, on behalf of any Borrower or on behalf of "Borrowers," and Agent shall not have any obligation to make any inquiry or request any confirmation from or on behalf of any other Borrower as to the binding effect on such Borrower of any such report, information, notice or communication, nor shall the joint and several character of Borrowers' liability for the Obligations be affected.

SECTION 4. PAYMENTS

4.1 General Payment Provisions.

All payments (including all prepayments) of principal of and interest on the Term Loans and other Obligations that are payable to Agent or any Lender shall be made to Agent or Lenders, as applicable, in Dollars without any offset or counterclaim and free and clear of (and without deduction for) any present or future Taxes, except as otherwise provided in **Section 4.9**, and in immediately available funds to each Lending Office not later than 12:00 noon (New York City time) on the due date (and payment made after such time on the due date to be deemed to have been made on the next succeeding Business Day). All payments to Lenders shall be made on a Pro Rata basis. If any payment hereunder becomes due and payable on a day other than a Business Day, such payment shall be extended to the next succeeding Business Day, and, with respect to payments of principal, interest thereon shall be payable at the then applicable rate during such extension.

4.2 Reserved.

4.3 Mandatory and Optional Prepayments.

4.3.1 Prepayment in Full. On or after September 28, 2013, upon not less than ten (10) days' prior written notice to the Agent and the Lenders, which notice shall be irrevocable and shall be delivered no later than 2:00 p.m. (New York City time), the Borrowers shall have the right to prepay the outstanding principal balance of the Term Loans in full, together with accrued but unpaid interest thereon and all other amounts then owing under the Loan Documents, plus the amount of any applicable Prepayment Premium.

4.3.2 Partial Prepayments. On or after September 28, 2013, upon not less than ten (10) days' prior written notice to the Agent and the Lenders, which notice shall be irrevocable and shall be delivered no later than 2:00 p.m. (New York City time), the Borrowers shall have the right to prepay a portion of the outstanding principal balance of the Term Loans, together with accrued but unpaid interest thereon and all other amounts then owing under the Loan Documents, plus the amount of any applicable Prepayment Premium; provided that each partial prepayment of the Term Loans shall be in a minimum principal amount of \$1,000,000 and integral multiples of \$500,000 in excess thereof.

4.3.3 Excess Cash Flow. No later than the date which is ten (10) Business Days after the date on which annual financial statements of the Borrowers are delivered or required to be delivered pursuant to **Section 9.1.3(i)**, beginning with the Fiscal Year ending December 31, 2013, the Borrowers (x) shall deliver to the Agent and the Lenders a written calculation of Excess Cash Flow for the applicable Fiscal Year, certified by a Senior Officer of the Borrowers, and (y) shall prepay the Term Loans in an amount equal to fifty percent (50%) of Excess Cash Flow for such Fiscal Year.

4.3.4 Issuances of Equity. Immediately upon receipt by any Obligor of the proceeds of any Equity Issuance, such Obligor shall prepay the Term Loans in an aggregate amount equal to 100% of the net cash proceeds of such Equity Issuance plus the amount of any applicable Prepayment Premium.

4.3.5 Change of Control. Immediately upon and as a condition to the consummation of the occurrence of a Change of Control, the Borrowers shall prepay the outstanding principal balance of the Term Loans, together with accrued but unpaid interest thereon and all other amounts then owing under the Loan Documents, plus the amount of any applicable Prepayment Premium.

4.3.6 No Implied Consent. The provisions of this **Section 4.3** shall not operate as, or be deemed to constitute, the consent of the Agent or any Lender to any transaction or action to the extent that such transaction or action giving rise to any prepayment is not otherwise permitted by the terms of the Loan Documents.

4.3.7 Reserved.

4.3.8 Proceeds of Sale, Loss, Destruction or Condemnation of Collateral.

Except as provided in **Section 9.2.10**, if any Obligor or any of their respective Subsidiaries sells any of the Collateral, or if a casualty occurs with respect to any of the Collateral, such Obligor or Subsidiary shall, unless otherwise agreed by Lenders, pay to each Lender its Pro Rata share, as and when received by such Obligor or such Subsidiary and as a mandatory prepayment of the Term Loans, as herein provided, of a sum equal to (x) the proceeds (including insurance payments and condemnation awards but net of costs and taxes incurred in connection with such sale or event) ("Sale Proceeds") received by such Obligor or such Subsidiary from such sale or casualty, minus (y) the amount of such proceeds actually paid to the First Priority Lenders to reduce First Priority Debt in accordance with the terms of the First Priority Loan Documents.

4.3.9 Proceeds from Issuance of Additional Debt.

If any Obligor or any of their respective Subsidiaries issues any Debt for Money Borrowed (other than Debt permitted under **Section 9.2.3**), such Obligor or such Subsidiary shall pay to each Lender its Pro Rata share, when and as received by such Obligor or Subsidiary and as a mandatory prepayment of the Obligations, a sum equal to (x) 100% of the net cash proceeds to such Obligor of the issuance of such Debt, minus (y) the amount of such proceeds actually paid to the First Priority Lenders to reduce First Priority Debt in accordance with the terms of the First Priority Loan Documents.

4.3.10 Payment Restrictions.

(i) Notwithstanding anything herein to the contrary, no prepayment of principal pursuant to **Section 4.3.3** shall be required to be made, and such failure shall not constitute a Default or an Event of Default, if and to the extent, any such payment is prohibited by the terms of the First Priority Loan Agreement or the Subordination Agreement, unless the First Priority Agent shall have consented in writing to such payment prior to the making thereof.

(ii) If at any time subsequent to the imposition of a blockage on any such payments or prepayments pursuant to clause (i) immediately above, such payments and prepayments are no longer prohibited, the Borrower shall immediately pay such previously blocked payments and prepayments in the maximum amount then permitted under the First Priority Loan Agreement and the Subordination Agreement.

4.4 Pro Rata Treatment and Payments.

4.4.1 Subject to **Section 4.6**, each payment or prepayment made hereunder (other than any voluntary prepayment made pursuant to **Section 4.3.2**) shall be applied, first, to the payment of any fees, costs or expenses then due and owing by the Borrowers to the Agent and the Lenders, second, to the payment of accrued but unpaid interest on the outstanding principal balance of the Term Loans, and third, to the payment of unpaid principal.

4.4.2 Subject to **Section 4.4**, any partial prepayments made pursuant to **Section 4.3.2** shall be paid Pro Rata to each Lender.

4.5 Marshaling; Payments Set Aside.

4.5.1 Marshaling. None of Agent or any Lender shall be under any obligation to marshal any assets in favor of a Borrower or any other Obligor or against or in payment of any or all of the Obligations. To the extent that Borrowers make a payment or payments to Agent or Lenders or any of such Persons receives payment from the proceeds of any Collateral or exercises its right of setoff, and such payment or payments or the proceeds of such enforcement or setoff or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside or required to be repaid to a trustee, receiver or any other Person, then to the extent of any loss by Agent or Lenders, the Obligations or part thereof originally intended to be satisfied, and all Liens, rights and remedies therefor, shall be revived and continued in full force and effect as if such payment or proceeds had not been made or received and any such enforcement or setoff had not occurred. The provisions of the immediately preceding sentence of this **Section 4.5** shall survive the Full Payment of all Obligations.

4.5.2 Erroneous Allocation. Agent shall not be liable for any allocation or distribution of payments made by it in good faith and, if any such allocation or distribution is subsequently determined to have been made in error, the sole recourse of any Lender to whom payment was due but not made shall be to recover from the other Lenders any payment in excess of the amount to which such other Lenders are determined to be entitled (and such other Lenders hereby agree to return to such Lender any such erroneous payments received by them).

4.6 Allocation of Payments

Upon the occurrence and during the continuance of an Event of Default, the Agent may, and at the direction of the Required Lenders shall, require that any amounts collected or received by the Agent or any Lender on account of the Obligations shall be applied by the Lenders in accordance with clauses “FIRST” through “SIXTH” below. Notwithstanding any other provision of this Agreement to the contrary, upon the acceleration of the Obligations in accordance with **Section 11.2**, all amounts collected or received by the Agent or any Lender on account of the Obligations or in respect of the Collateral shall be applied by the Lenders as follows:

FIRST, to the payment of all costs and expenses of the Agent (including fees, expenses and disbursements of one counsel and one consultancy firm for all Lenders) in connection with enforcing the rights of the Agent and/or the Lenders under the Loan Documents, exercising any remedies under the Loan Documents or otherwise with respect to the Obligations, including repayment of any protective advances made by the Agent with respect to the Collateral under or pursuant to the terms of the Security Documents;

SECOND, to the payment of any outstanding fees owing to the Agent;

THIRD, to the payment of all costs and expenses of the Lenders (including fees, expenses and disbursements of one counsel and one consultancy firm) in connection with enforcing its rights under the Loan Documents or otherwise with respect to the Obligations owing to such Lender;

FOURTH, to the payment of all of the Obligations consisting of outstanding fees owing to the Lenders and any accrued but unpaid interest;

FIFTH, to the payment of the outstanding principal amount of the Obligations;

SIXTH, to all other Obligations and other obligations which shall have become due and payable under the Loan Documents or otherwise and not repaid pursuant to clauses “FIRST” through “FIFTH” above; and

SEVENTH, the payment of the surplus, if any, to the Borrowers or to whomsoever a court of competent jurisdiction shall determine to be entitled thereto.

In carrying out the foregoing, (i) amounts received shall be applied in the numerical order provided until exhausted prior to application to the next succeeding category and (ii) each Lender shall receive a pro rata portion of such amount, based on the value of the aggregate amount of Term Loans held by each such Lender, available to be applied pursuant to clauses “FOURTH”, “FIFTH” and “SIXTH” above.

4.7 Application of Payments and Collateral Proceeds.

All payments received by a Lender by 2:00 p.m., New York, New York time, on any Business Day shall be deemed received on that Business Day. All payments received by a Lender after 2:00 p.m., New York, New York time, on any Business Day shall be deemed received on the following Business Day. Each Borrower irrevocably waives the right to direct the application of any and all payments and Collateral proceeds at any time or times hereafter received by Agent or any Lender from or on behalf of such Borrower, and such Borrower does hereby irrevocably agree that Agent shall have the continuing exclusive right to apply and reapply any and all such payments and Collateral proceeds received at any time or times hereafter by Agent or its agent against the Obligations, in such manner as Agent may deem advisable.

4.8 Reserved.

4.9 Payments Free of Taxes.

4.9.1 Payments Free of Taxes. All payments by Obligor of Obligations shall be free and clear of and without reduction for any Taxes, except as otherwise provided in this **Section 4.9.1**. If Applicable Law requires any Obligor or Lender to withhold or deduct any Tax (including backup withholding or withholding Tax), Obligor or Lender shall timely pay the full amount withheld or deducted to the relevant Governmental Authority in accordance with Applicable Law and the withholding or deduction shall be based on information provided pursuant to **Section 4.10**. If the withholding or deduction is made on account of Indemnified Taxes or Other Taxes, the sum payable by Borrowers shall be increased so that Agent or Lender, as applicable, receives an amount equal to the sum it would have received if no such withholding or deduction (including deductions applicable to additional sums payable under this Section) had been made. Without limiting the foregoing, Borrowers shall timely pay all Other Taxes to the relevant Governmental Authorities.

4.9.2 Payment. Borrowers shall indemnify, hold harmless and reimburse (within 10 days after demand therefor) Agent and Lenders for any Indemnified Taxes or Other

Taxes (including those attributable to amounts payable under this Section) withheld or deducted by any Obligor or Lender, or paid by any Lender, with respect to any Obligations or Loan Documents, whether or not such Taxes were properly asserted by the relevant Governmental Authority, and including all penalties, interest and reasonable expenses relating thereto, as well as any amount that a Lender fails to pay indefeasibly to Agent under **Section 4.10**. A certificate as to the amount of any such payment or liability delivered to EB by a Lender shall be conclusive, absent manifest error. As soon as practicable after any payment of Taxes by a Borrower, EB shall deliver to the affected Lender a receipt from the Governmental Authority or other evidence of payment satisfactory to such Lender.

4.9.3 Refunds. If a Lender shall become aware that it is entitled to claim a refund from a Governmental Authority in respect of Indemnified Taxes or Other Taxes as to which it has been indemnified by Borrowers or with respect to which Borrowers have paid additional amounts pursuant to this **Section 4**, it promptly shall notify Borrowers of the availability of such refund claim and shall make a timely claim to such taxation authority for such refund at Borrowers' expense. If a Lender receives a refund (including pursuant to a claim for refund made pursuant to the preceding sentence) in respect of any Indemnified Taxes or Other Taxes as to which it has been indemnified by Borrowers or with respect to which Borrowers have paid additional amounts pursuant to this **Section 4**, it shall within 30 days from the date of such receipt pay over the amount of such refund to Borrowers, net of all reasonable out-of-pocket expenses of such Lender and without interest (other than interest paid by the relevant taxation authority with respect to such refund); provided that Borrowers, upon the request of such Lender, agree to repay the amount paid over to Borrowers (plus penalties, interest or other reasonable charges) to such Lender in the event such Lender is required to repay such refund to such taxation authority. Notwithstanding anything to the contrary in this Section, in no event will the indemnified party be required to pay any amount to an indemnifying party pursuant to this Section the payment of which would place the indemnified party in a less favorable net after-Tax position than the indemnified party would have been in if the Tax subject to indemnification and giving rise to such refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This paragraph shall not be construed to require any indemnified party to make available its Tax returns (or any other information relating to its Taxes that it deems confidential) to the indemnifying party or any other Person.

4.10 Lender Tax Information.

4.10.1 Status of Lenders. Each Lender shall deliver documentation and information to Agent and EB, at the times and in form required by Applicable Law or reasonably requested by Agent or EB, sufficient to permit Agent or Borrowers to determine (a) whether or not payments made with respect to Obligations are subject to Taxes, (b) if applicable, the required rate of withholding or deduction, and (c) such Lender's entitlement to any available exemption from, or reduction of, applicable Taxes for such payments or otherwise to establish such Lender's status for withholding tax purposes in the applicable jurisdiction.

4.10.2 Documentation. If any Foreign Lender is entitled to any exemption from or reduction of withholding tax for payments with respect to the Obligations, it shall deliver to EB, on or prior to the date on which it becomes a Lender hereunder (and from time to time

thereafter upon request by EB, but only if such Foreign Lender is legally entitled to do so), (a) IRS Form W-8BEN claiming eligibility for benefits of an income tax treaty to which the United States is a party; (b) IRS Form W-8ECI; (c) IRS Form W-8IMY and all required supporting documentation; (d) in the case of a Foreign Lender claiming the benefits of the exemption for portfolio interest under section 881(c) of the Code, IRS Form W-8BEN and a certificate showing such Foreign Lender is not (i) a “bank” within the meaning of section 881(c)(3)(A) of the Code, (ii) a “10 percent shareholder” of any Obligor within the meaning of section 881(c)(3)(B) of the Code, or (iii) a “controlled foreign corporation” described in section 881(c)(3)(C) of the Code; or (e) any other form prescribed by Applicable Law as a basis for claiming exemption from or a reduction in withholding tax, together with such supplementary documentation necessary to allow Borrowers to determine the withholding or deduction required to be made. Each Foreign Lender shall deliver such forms promptly upon the obsolescence, expiration, or invalidity of any form previously delivered by such Foreign Lender.

4.10.3 FATCA. If a payment made to a Lender under any Loan Document would be subject to U.S. federal withholding Tax imposed by FATCA if such Lender were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Code, as applicable), such Lender shall deliver to EB at the time or times prescribed by law and at such time or times reasonably requested by EB or Agent such documentation prescribed by Applicable Law (including as prescribed by Section 1471(b)(3)(C)(i) of the Code) and such additional documentation reasonably requested by EB as may be necessary for Borrowers to comply with their obligations under FATCA and to determine that such Lender has complied with such Lender’s obligations under FATCA or to determine the amount to deduct and withhold from such payment. Solely for purposes of this **Section 4.10.3**, “FATCA” shall include any amendments made to FATCA after the date of this Agreement.

4.10.4 Lender Obligations. Each Lender shall promptly notify Borrowers and Agent of any change in circumstances that would change any claimed Tax exemption or reduction. Each Lender shall indemnify, hold harmless and reimburse (within 10 days after demand therefor) Borrowers and Agent for any Taxes, losses, claims, liabilities, penalties, interest and expenses (including reasonable attorneys’ fees) incurred by or asserted against a Borrower or Agent by any Governmental Authority due to such Lender’s failure to deliver, or inaccuracy or deficiency in, any documentation required to be delivered by it pursuant to this Section. Each Lender authorizes Agent to set off any amounts due to Agent under this Section against any amounts payable to such Lender under any Loan Document.

4.11 Nature and Extent of Each Borrower’s Liability.

4.11.1 Joint and Several Liability. Each Borrower agrees that it is jointly and severally liable for, and absolutely and unconditionally guarantees to Agent and Lenders the prompt payment and performance of, all Obligations and all agreements under the Loan Documents. Each Borrower agrees that its guaranty obligations hereunder constitute a continuing guaranty of payment and not of collection, that such obligations shall not be discharged until the Full Payment of all Obligations, and that such obligations are absolute and unconditional, irrespective of (a) the genuineness, validity, regularity, enforceability, subordination or any future modification of, or change in, any Obligations or Loan Document, or

any other document, instrument or agreement to which any Obligor is or may become a party or be bound; (b) the absence of any action to enforce this Agreement (including this Section) or any other Loan Document, or any waiver, consent or indulgence of any kind by Agent or any Lender with respect thereto; (c) the existence, value or condition of, or failure to perfect a Lien or to preserve rights against, any security or guaranty for the Obligations or any action, or the absence of any action, by Agent or any Lender in respect thereof (including the release of any security or guaranty); (d) the insolvency of any Obligor; (e) any election by Agent or any Lender in an Insolvency Proceeding for the application of Section 1111(b)(2) of the Bankruptcy Code; (f) any borrowing or grant of a Lien by any other Borrower, as debtor-in-possession under Section 364 of the Bankruptcy Code or otherwise; (g) the disallowance of any claims of Agent or any Lender against any Obligor for the repayment of any Obligations under Section 502 of the Bankruptcy Code or otherwise; or (h) any other action or circumstances that might otherwise constitute a legal or equitable discharge or defense of a surety or guarantor, except the Full Payment of all Obligations.

4.11.2 Waivers.

(i) Each Borrower expressly waives all rights that it may have now or in the future under any Applicable Law, in equity or otherwise, to compel Agent or Lenders to marshal assets or to proceed against any Obligor, other Person or security for the payment or performance of any Obligations before, or as a condition to, proceeding against such Borrower. Each Borrower waives all defenses available to a surety, guarantor or accommodation co-obligor other than the Full Payment of all Obligations and waives, to the maximum extent permitted by Applicable Law, any right to revoke any guaranty of any Obligations as long as it is a Borrower. It is agreed among each Borrower, Agent and Lenders that the provisions of this **Section 4.11** are of the essence of the transaction contemplated by the Loan Documents and that, but for such provisions, Agent and Lenders would decline to make Term Loans. Each Borrower acknowledges that its guaranty pursuant to this Section is necessary to the conduct and promotion of its business, and can be expected to benefit such business.

(ii) Agent and Lenders may, in their discretion, pursue such rights and remedies as they deem appropriate, including realization upon Collateral or any Real Estate by judicial foreclosure or nonjudicial sale or enforcement, without affecting any rights and remedies under this **Section 4.11**. If, in taking any action in connection with the exercise of any rights or remedies, Agent or any Lender shall forfeit any other rights or remedies, including the right to enter a deficiency judgment against any Borrower or other Person, whether because of any Applicable Laws pertaining to “election of remedies” or otherwise, each Borrower consents to such action and, to the fullest extent permitted by Applicable Law, waives any claim based upon it, even if the action may result in loss of any rights of subrogation that any Borrower might otherwise have had. Any election of remedies that results in denial or impairment of the right of Agent or any Lender to seek a deficiency judgment against any Borrower shall not impair any other Borrower’s obligation to pay the full amount of the Obligations.

To the fullest extent permitted by Applicable Law, each Borrower waives all rights and defenses arising out of an election of remedies, such as nonjudicial foreclosure with respect to any security for the Obligations, even though that election of remedies destroys such Borrower's rights of subrogation against any other Person. Agent may bid all or a portion of the Obligations at any foreclosure, trustee or other sale, including any private sale, and the amount of such bid need not be paid by Agent but shall be credited against the Obligations. The amount of the successful bid at any such sale, whether Agent or any other Person is the successful bidder, shall be conclusively deemed to be the fair market value of the Collateral, and the difference between such bid amount and the remaining balance of the Obligations shall be conclusively deemed to be the amount of the Obligations guaranteed under this **Section 4.11**, notwithstanding that any present or future law or court decision may have the effect of reducing the amount of any deficiency claim to which Agent or any Lender might otherwise be entitled but for such bidding at any such sale.

4.11.3 Extent of Liability; Contribution.

(i) Notwithstanding anything herein to the contrary, each Borrower's liability under this **Section 4.11** shall be limited to the greater of (i) all amounts for which such Borrower is primarily liable, as described below, and (ii) such Borrower's Allocable Amount.

(ii) If any Borrower makes a payment under this **Section 4.11** of any Obligations (other than amounts for which such Borrower is primarily liable) (a "Guarantor Payment") that, taking into account all other Guarantor Payments previously or concurrently made by any other Borrower, exceeds the amount that such Borrower would otherwise have paid if each Borrower had paid the aggregate Obligations satisfied by such Guarantor Payments in the same proportion that such Borrower's Allocable Amount bore to the total Allocable Amounts of all Borrowers, then such Borrower shall be entitled to receive contribution and indemnification payments from, and to be reimbursed by, each other Borrower for the amount of such excess, pro rata based upon their respective Allocable Amounts in effect immediately prior to such Guarantor Payment. The "Allocable Amount" for any Borrower shall be the maximum amount that could then be recovered from such Borrower under this **Section 4.11** without rendering such payment voidable under Section 548 of the Bankruptcy Code or under any applicable state fraudulent transfer or conveyance act, or similar statute or common law.

(iii) Nothing contained in this **Section 4.11** shall limit the liability of any Borrower to pay Loans made directly or indirectly to that Borrower (including Loans advanced to any other Borrower and then re-loaned or otherwise transferred to, or for the benefit of, such Borrower), LC Obligations relating to Letters of Credit issued to support such Borrower's business, and all accrued interest, fees, expenses and other related Obligations with respect thereto, for which such Borrower shall be primarily liable for all purposes hereunder. Agent

and Lenders shall have the right, at any time in their discretion, to condition Revolver Loans and Letters of Credit upon a separate calculation of borrowing availability for each Borrower and to restrict the disbursement and use of such Loans and Letters of Credit to such Borrower.

4.11.4 Joint Enterprise. Each Borrower has requested that Agent and Lenders make this credit facility available to Borrowers on a combined basis, in order to facilitate the Transactions most efficiently and economically. Borrowers' business is a mutual and collective enterprise, and the successful operation of each Borrower is dependent upon the successful performance of the integrated group. Borrowers believe that consolidation of their credit facility will enhance the borrowing power of each Borrower and ease administration of the facility, all to their mutual advantage. Borrowers acknowledge that Agent's and Lenders' willingness to extend credit and to administer the Collateral on a combined basis hereunder is done solely as an accommodation to Borrowers and at Borrowers' request.

4.11.5 Subordination. Each Borrower hereby subordinates any claims, including any rights at law or in equity to payment, subrogation, reimbursement, exoneration, contribution, indemnification or set off, that it may have at any time against any other Obligor, howsoever arising, to the Full Payment of all Obligations.

SECTION 5. RESERVED

SECTION 6. COLLATERAL

6.1 Grant of Security Interest.

To secure the prompt payment and performance of all of the Obligations, each Borrower hereby grants to Agent, for the benefit of itself as Agent and for the benefit of the Secured Parties, a continuing security interest in and Lien upon all personal Property of such Borrower, whether now owned or existing or hereafter created, acquired or arising and wheresoever located, including:

- (i) all Accounts;
- (ii) all Goods, including all Inventory and Equipment and fixtures;
- (iii) all Instruments;
- (iv) all Chattel Paper, including Electronic Chattel Paper and Tangible Chattel Paper;
- (v) all Documents;
- (vi) all General Intangibles, including all Intellectual Property, Payment Intangibles and all Software;
- (vii) all Deposit Accounts;

(viii) all Investment Property (but excluding any portion thereof that constitutes Margin Stock unless otherwise expressly provided in any Security Documents);

(ix) all Letter-of-Credit Rights;

(x) all monies now or at any time or times hereafter in the possession or under the control of Agent or a Lender or a bailee or Affiliate of Agent or a Lender, including any Cash Collateral;

(xi) all Supporting Obligations;

(xii) all Commercial Tort Claims, including those shown on **Schedule 8.1.19**;

(xiii) all accessions to, substitutions for and all replacements, products and cash and non-cash proceeds of the foregoing, including proceeds of and unearned premiums with respect to insurance policies insuring any of the Collateral and claims against any Person for loss of, damage to or destruction of any of the Collateral; and

(xiv) all books and records (including customer lists, files, correspondence, tapes, computer programs (to the extent permitted), print-outs, and other computer materials and records) of such Borrower pertaining to any of the foregoing;

provided, however, that “Collateral” shall not include any Excluded Property; and provided further, that if any property shall cease to be Excluded Property, such property shall be deemed at all times from and after the date hereof to constitute Collateral.

6.2 Lien on Deposit Accounts.

6.2.1 Deposit Accounts. As additional security for the payment and performance of the Obligations, each Borrower hereby grants to Agent, for the benefit of itself as Agent and for the benefit of the Secured Parties, a continuing security interest in and Lien upon, and hereby collaterally assigns to Agent, all of such Borrower’s right, title and interest in and to each Deposit Account of such Borrower (including each Dominion Account) and in and to any deposits or other sums at any time credited to each such Deposit Account (other than the Deposit Accounts which are excluded from the requirements set forth in **Section 7.6** (such accounts, the “Excluded Accounts”)), including any sums in any blocked account or any special lockbox account and in the accounts in which sums are deposited.

6.2.2 Cash Collateral. Each Borrower hereby grants to Agent, as security for the Obligations, a security interest in all Cash Collateral held from time to time and all proceeds thereof, whether held in a Cash Collateral Account or otherwise. Agent may apply Cash Collateral to the payment of Obligations as they become due, in such order as Agent may elect. Each Cash Collateral Account and all Cash Collateral shall, (i) prior to the Payment in Full of the

First Priority Debt, be under the dominion and control of the Agent and First Priority Agent in accordance with the Subordination Agreement, and (ii) from and after the Payment in Full of the First Priority Debt, be under the sole dominion and control of Agent, and no Borrower or other Person shall have any right to any Cash Collateral, until the Full Payment of all Obligations.

6.3 Real Estate Collateral.

The Obligations shall be secured by Mortgages upon the Real Estate located at 267 Columbia Avenue, Chapin, South Carolina and 786 Wilson Road, Newberry, South Carolina. The Mortgages shall be duly recorded, at Borrowers' expense, in each office where such recording is required to constitute a fully perfected Lien on the Real Estate covered thereby. If any Borrower acquires Real Estate having a fair market value in excess of \$500,000 hereafter, Borrowers shall, within ninety (90) days (or such longer period as the Agent shall approve in its sole discretion), execute, deliver and record a Mortgage sufficient to create (i) prior to the Payment in Full of the First Priority Debt, a second priority (subject to Permitted Liens) Lien in favor of Agent on such Real Estate, and (ii) after the Payment in Full of the First Priority Debt, a first priority (subject to Permitted Liens) Lien in favor of Agent on such Real Estate, and in each case shall deliver all Related Real Estate Documents to Agent; provided, that with respect to any Real Estate having a fair market value less than \$1,000,000 but greater than \$500,000, such actions shall only be required at the request of Agent.

6.4 Other Collateral.

6.4.1 In addition to the items of Property referred to in this **Section 6**, the Obligations shall also be secured by all of the other items of Property from time to time described in any of the Security Documents as security for any of the Obligations.

6.4.2 Borrowers shall promptly notify Agent in writing if, after the Closing Date, any Borrower obtains any interest in any Collateral consisting of material Chattel Paper, Documents, Instruments, Intellectual Property, Investment Property or Letter-of-Credit Rights and, upon Agent's request, shall promptly take such actions as Agent deems appropriate to effect Agent's duly perfected Lien upon such Collateral, including obtaining any appropriate possession, control agreement or Landlord Agreement; provided that if such interest is acquired (i) prior to the Payment in Full of the First Priority Debt, such Lien shall be a second priority Lien and, (ii) after the Payment in Full of the First Priority Debt, such Lien shall be a first priority Lien. If any Collateral is in the possession of a third party, at Agent's request, Borrowers shall use commercially reasonable efforts to obtain an acknowledgment that such third party holds the Collateral for the benefit of Agent; provided, further, that until Payment in Full of the First Priority Debt, the Agent shall not require, and Borrowers shall not deliver to Agent, possessory collateral.

6.5 No Assumption of Liability.

The security interest granted pursuant to this Agreement is granted as security only and shall not subject Agent or any Lender to, or in any way alter or modify, any obligation or liability of a Borrower with respect to or arising out of the Collateral.

6.6 Lien Perfection; Further Assurances.

Promptly, but in any event within ten (10) Business Days after receipt of Agent's written request therefor, Borrowers shall execute or cause to be executed and deliver to Agent such instruments, assignments, title certificates or other documents as are necessary under the UCC or other Applicable Law (including any motor vehicle certificates of title act) to perfect (or continue the perfection of) Agent's Lien upon the Collateral, and shall take such other action as may be requested by Agent to give effect to or carry out the intent and purposes of this Agreement. Borrower shall give Agent prompt written notice at any time it commences a material Commercial Tort Claim against any Person and shall promptly amend **Schedule 8.1.19** to include such claim, and shall execute such documents as are necessary under the UCC to grant to Agent and perfect Agent's Lien in such Commercial Tort Claim. Unless prohibited by Applicable Law, each Borrower hereby irrevocably authorizes Agent to execute and file in any jurisdiction any financing statement or amendment thereto on such Borrower's behalf, including financing statements that indicate the Collateral (i) as all assets or all personal property of Borrower or words to similar effect or (ii) as being of an equal or lesser scope, or with greater or lesser detail, than as set forth in this **Section 6**. Each Borrower also hereby ratifies its authorization for Agent to have filed in any jurisdiction any like financing statements or amendments thereto if filed prior to the date hereof. The parties agree that a carbon, photographic or other reproduction of this Agreement shall be sufficient as a financing statement and may be filed in any appropriate office in lieu thereof.

6.7 Foreign Subsidiary Stock.

Notwithstanding anything to the contrary set forth in **Section 6.1** above, the types or items of Collateral described in such Section shall include (i) only 65% of the voting stock of any Foreign Subsidiary to the extent that a pledge of more than 65% of the voting Equity Interests of such Foreign Subsidiary could result in material incremental income tax liability as a result of the application of Section 956 of the Code, taking into account actual or anticipated repatriation of funds, foreign tax credits and other relevant factors, and (ii) 100% of the non-voting stock of any Foreign Subsidiary.

SECTION 7. COLLATERAL ADMINISTRATION

7.1 Reserved.

7.1.1 Reserved.

7.1.2 Insurance of Collateral; Condemnation Proceeds.

(i) Borrowers shall maintain and pay for insurance upon all Collateral, wherever located, covering (i) casualty and hazard risks with respect to its Inventory and Equipment in such amounts and with such insurance companies as are reasonably satisfactory to Agent, and (ii) casualty and hazard insurance with respect to all of its Properties other than the Inventory and Equipment and theft, malicious mischief, and such other risks in such amounts and with such insurance companies as are consistent and in accordance with industry practice for

companies in the same or similar industry and of the size and owning Properties comparable to Borrowers; provided, however, that notwithstanding any industry standard, any amount of self-insurance must be reasonably satisfactory to Agent. **Schedule 7.1.2** describes all insurance of such Borrower in effect on the date hereof. All proceeds payable under each such policy shall be paid in accordance with **Section 4.3.8**. Each Borrower shall deliver the originals or certified copies of such policies to Agent with satisfactory lender's loss payable endorsements reasonably satisfactory to Agent naming Agent as sole loss payee, assignee or additional insured, as appropriate. Each policy of insurance or endorsement shall contain a clause requiring the insurer to give not less than thirty (30) days prior written notice to Agent in the event of cancellation of the policy for any reason whatsoever and a clause specifying that the interest of Agent shall not be impaired or invalidated by any act or neglect of a Borrower or the owner of the Property or by the occupation of the premises for purposes more hazardous than are permitted by said policy. If a Borrower fails to provide and pay for such insurance, Agent may, at its option, but shall not be required to, procure the same and charge Borrowers therefor. Each Borrower agrees to deliver to Agent, promptly as rendered, true copies of all reports made in any reporting forms to insurance companies. For so long as no Event of Default exists, each Borrower shall have the right to settle, adjust and compromise any claim with respect to any insurance maintained by such Borrower; provided, however, that all proceeds thereof are applied in the manner specified in this Agreement, and Agent agrees promptly to provide any necessary endorsement to any checks or drafts issued in payment of any such claim. Subject to the Subordination Agreement, at any time that an Event of Default exists, only Agent shall be authorized to settle, adjust and compromise such claims, and Agent shall have all rights and remedies with respect to such policies of insurance as are provided for in this Agreement and the other Loan Documents.

(ii) Any proceeds of insurance referred to in this **Section 7.1.2** and any condemnation awards that are paid to Lenders in connection with a condemnation of any of the Collateral shall be applied first to the payment of the Term Loans and then to any other Obligations outstanding.

7.1.3 Protection of Collateral. All expenses of protecting, storing, warehousing, insuring, handling, maintaining and shipping any Collateral, all Taxes imposed under any Applicable Law on any of the Collateral or in respect of the sale thereof, and all other payments required to be made by Agent to any Person to realize upon any Collateral shall be borne and paid by Borrowers. Agent shall not be liable or responsible in any way for the safekeeping of any of the Collateral or for any loss or damage thereto (except for reasonable care in the custody thereof while any Collateral is in Agent's actual possession) or for any diminution in the value thereof, or for any act or default of any warehouseman, carrier, forwarding agency, or other Person whomsoever, but the same shall be at Borrowers' sole risk. If any Tax, assessments or other charges by any Governmental Authority is or may be imposed, or if any claim shall be made which, in Agent's or any Lender's reasonable judgment, may possibly create a valid Lien on the Collateral, Agent or any Lender may without notice to Borrowers pay such

Taxes, assessments or other charges, and each Borrower hereby indemnifies and holds Agent and each Lender harmless in respect thereof. Agent or Lender will not pay any Taxes, assessments or charges to the extent that any applicable Borrower has Properly Contested such Taxes, assessments or charges. The amount of any payment by Agent or Lender under this **Section 7.1.3** shall be paid in cash on demand.

7.1.4 **Defense of Title to Collateral.** Each Borrower shall at all times defend such Borrower's title to the Collateral and Agent's Liens therein against all Persons and all claims and demands whatsoever other than Permitted Liens.

7.2 **Reserved.**

7.3 **Reserved.**

7.4 **Account Verification.** After Payment in Full of the First Priority Debt, and whether or not a Default or an Event of Default exists, Agent shall have the right at any time, in the name of Agent, any designee of Agent, or a Borrower to verify the validity, amount or any other matter relating to any Accounts of such Borrower by mail, telephone, telegraph or otherwise. Each Borrower shall cooperate fully with Agent in an effort to facilitate and promptly conclude any such verification process.

7.5 **Reserved.**

7.6 **Administration of Deposit Accounts.**

Schedule 7.6 sets forth all Deposit Accounts maintained by Borrowers, including all Dominion Accounts. Each Borrower shall take all actions necessary to establish Agent's control of each such Deposit Account (other than an account exclusively used for payroll, payroll taxes or employee benefits, or an account containing not more than \$200,000 at any time; provided, however, that amounts on deposit in all such accounts do not exceed \$500,000 in the aggregate at any time and provided further that Office Accounts may contain amounts on deposit up to \$1,000,000 in the aggregate for a period of up to three (3) consecutive Business Days, so long as all amounts contained in Office Accounts that exceed \$200,000 in the aggregate are used to repay Revolver Loans (as defined in the First Priority Loan Agreement) at the end of such period). Each Borrower shall be the sole account holder of each Deposit Account and shall not allow any other Person (other than Agent and, prior to Full Payment of the First Priority Debt, First Priority Agent) to have control over a Deposit Account or any Property deposited therein. Each Borrower shall promptly notify Agent of any opening or closing of a Deposit Account and, with the consent of Agent, will amend **Schedule 7.6** to reflect same.

SECTION 8. REPRESENTATIONS AND WARRANTIES

8.1 General Representations and Warranties.

To induce Agent and Lenders to enter into this Agreement and to make the Term Loans, each Borrower warrants and represents to Agent and Lenders that:

8.1.1 Organization and Qualification. Each Borrower and its Subsidiaries is an entity duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization. Each Borrower and its Subsidiaries is duly qualified and is authorized to do business and is in good standing as a foreign corporation in each state or jurisdiction listed on **Schedule 8.1.1** hereto and in all other states and jurisdictions where the character of its Properties or the nature of its activities make such qualification necessary, except where failure to be so qualified would not have a Material Adverse Effect.

8.1.2 Power and Authority. Each Borrower and its Subsidiaries is duly authorized and empowered to enter into, execute, deliver and perform this Agreement and each of the other Loan Documents to which it is a party. The execution, delivery and performance of this Agreement and each of the other Loan Documents have been duly authorized by all necessary action and do not and will not (i) require any consent or approval of any of the holders of the Equity Interests of such Borrower or any Subsidiary; (ii) contravene such Borrower's or any Subsidiary's Organization Documents; (iii) violate, or cause such Borrower or any Subsidiary to be in default under, any provision of any Applicable Law, order, writ, judgment, injunction, decree, determination or award in effect having applicability to such Borrower or any Subsidiary; (iv) result in a breach of or constitute a default under any indenture or loan or credit agreement or any other Material Contract to which such Borrower or any Subsidiary is a party or by which it or its Properties may be bound or affected; or (v) result in, or require, the creation or imposition of any Lien (other than Permitted Liens) upon or with respect to any of the Properties now owned or hereafter acquired by such Borrower or any Subsidiary.

8.1.3 Legally Enforceable Agreement. This Agreement is, and each of the other Loan Documents when delivered under this Agreement will be, a legal, valid and binding obligation of each Borrower and its Subsidiaries signatories thereto enforceable against each of them in accordance with the respective terms of such Loan Documents, except as the enforceability thereof may be limited by bankruptcy, insolvency or other similar laws of general application affecting the enforcement of creditors' rights or general equitable principals, whether applied in law or equity.

8.1.4 Capital Structure. As of the date hereof, **Schedule 8.1.4** hereto states (i) the correct name of each Subsidiary, its jurisdiction of incorporation and the percentage of its Equity Interests having voting powers owned by each Person, (ii) the name of each Borrower's corporate Affiliates and the nature of the affiliation and (iii) the number of authorized and issued Equity Interests (and treasury shares) of such Borrower and each Subsidiary. Each Borrower has good title to all of the shares it purports to own of the Equity Interests of each of its Subsidiaries, free and clear in each case of any Lien other than Permitted Liens. All such Equity Interests have been duly issued and are fully paid and non-assessable. Except as set forth on **Schedule 8.1.4**, no Borrower has made, or obligated itself to make, any Distribution. Except as set forth on **Schedule 8.1.4**, no Borrower has issued any options to purchase, or any rights or warrants to subscribe for, or any commitments or agreements to issue or sell, or any Equity Interests or obligations convertible into, or any powers of attorney relating to, shares of the capital stock of such Borrower or any of its Subsidiaries. Except as set forth on **Schedule 8.1.4** hereto, there are no outstanding agreements or instruments binding upon the holders of a Borrower's Equity

Interests relating to the ownership of its Equity Interests. No Lender is an Affiliate of a Borrower.

8.1.5 Corporate Names. During the 5-year period preceding the date of this Agreement and as of the Closing Date, no Borrower nor any Subsidiary has been known as or used any corporate, fictitious or trade names except those listed on **Schedule 8.1.5** hereto. Except as set forth on **Schedule 8.1.5**, neither Borrowers nor any Subsidiary since 2007 has been the surviving corporation of a merger or consolidation or acquired all or substantially all of the assets of any Person.

8.1.6 Business Locations; Agent for Process. As of the date hereof, the chief executive office and other places of business of each Borrower and each Subsidiary are as listed on **Schedule 7.1.1** hereto. During the 5-year period preceding the date of this Agreement, neither of Borrowers nor any Subsidiary has had an office, place of business or agent for service of process other than as listed on **Schedule 7.1.1**. Except as shown on **Schedule 7.1.1** on the date hereof, no Inventory of a Borrower or any Subsidiary is stored with a bailee, warehouseman or similar Person, nor is any Inventory consigned to any Person.

8.1.7 Title to Properties; Priority of Liens. Each Borrower and each of its Subsidiaries has good and marketable title to and fee simple ownership of, or valid and subsisting leasehold interests in, all of its Real Estate, and good title to all of its personal Property, including all Property reflected in the financial statements referred to in **Section 8.1.9** or delivered pursuant to **Section 9.1.3**, in each case free and clear of all Liens except Permitted Liens. Each Borrower has paid or discharged, and has caused each Subsidiary to pay and discharge, all lawful claims which, if unpaid, could reasonably be expected to become a Lien against any Properties of such Borrower or such Subsidiary that is not a Permitted Lien, except to the extent such claim is being Properly Contested. The Liens granted to Agent pursuant to this Agreement and the other Security Documents are second priority Liens, subject only to those Permitted Liens which are expressly permitted by the terms of this Agreement to have priority over the Liens of Agent.

8.1.8 Reserved.

8.1.9 Financial Statements.

(i) The audited Consolidated balance sheets of Borrowers and such other Persons described therein (including the accounts of all Subsidiaries of Borrowers for the respective periods during which a Subsidiary relationship existed) as of December 31, 2011 and the unaudited interim balance sheets of Borrowers and such other Persons described therein (including the accounts of all Subsidiaries of Borrowers for the respective periods during which a Subsidiary relationship existed) as of August 31, 2012, and the related statements of income, changes in stockholder's equity, and changes in financial position for the periods ended on such date, have been prepared in accordance with GAAP, and present fairly the financial positions of Borrowers and such Persons at such dates and the results of Borrowers' operations for such period.

(ii) Since December 31, 2011, there has been no material adverse change in the condition, financial or otherwise, of EB and its Consolidated Subsidiaries and no material change in the aggregate value of Equipment and Real Estate owned by EB and its Consolidated Subsidiaries.

8.1.10 Full Disclosure. Neither this Agreement nor any other written statement furnished by a Borrower to Agent or any Lender for purposes of or in connection with this Agreement or the other Loan Documents contains or omits any material fact necessary to make the statements contained herein or therein not materially misleading as of the date as of which such information is dated in light of the circumstances under which such information was provided. There is no fact or circumstance in existence on the date hereof which Borrowers have failed to disclose to Agent in writing that could reasonably be expected to have a Material Adverse Effect.

8.1.11 Solvent Financial Condition. Each Borrower and each of its Subsidiaries is now Solvent and, after giving effect to the Term Loans to be made hereunder, the First Priority Debt to be borrowed on the date hereof and the consummation of the Transactions, each Borrower and each of its Subsidiaries will be Solvent.

8.1.12 Surety Obligations. Except as set forth on **Schedule 8.1.12**, no Borrower nor any of their Subsidiaries are obligated as surety or indemnitor under any surety or similar bond or other contract issued or entered into any agreement to assure payment, performance or completion of performance of any undertaking or obligation of any Person.

8.1.13 Taxes. The FEIN of each Borrower and each of its Subsidiaries is as shown on **Schedule 8.1.13** hereto. Each Borrower and each of its Subsidiaries has filed all federal, state and other material tax returns and other reports it is required by law to file and, to the knowledge of Borrowers, has paid, or made provision for the payment of, all Taxes upon it, its income and Properties as and when such Taxes are due and payable, except to the extent being Properly Contested. To the knowledge of each Borrower, the provision for Taxes on the books of such Borrower and each of its Subsidiaries are adequate for all years not closed by applicable statutes, and for its current Fiscal Year.

8.1.14 Brokers. There are no claims against a Borrower or amounts owing or to be owed by a Borrower for brokerage commissions, finder's fees or investment banking fees in connection with the transactions contemplated by this Agreement or any of the other Loan Documents.

8.1.15 Intellectual Property. Each Borrower and each of its Subsidiaries each owns or has the lawful right to use all Intellectual Property necessary for the present and planned future conduct of its business without, to its knowledge, any conflict with the rights of others; except as set forth on **Schedule 8.1.15**, there is no objection to, or pending or threatened Intellectual Property Claim with respect to, such Borrower's or any of its Subsidiary's right to use any such Intellectual Property and such Borrower is not aware of any grounds for challenge or objection thereto; and, except as may be disclosed on **Schedule 8.1.15**, neither Borrower nor any of its Subsidiaries pays any royalty or other compensation to any Person for the right to use any Intellectual Property (other than with respect to off-the-shelf or prepackaged software). All

such patents, trademarks, service marks, tradenames, copyrights, licenses and other similar rights are listed on **Schedule 8.1.15** hereto, to the extent they are registered under any Applicable Law or are otherwise material to a Borrower's or any of its Subsidiaries' business.

8.1.16 Governmental Approvals. Each Borrower and each of its Subsidiaries has, and is in good standing with respect to, all Governmental Approvals necessary to continue to conduct its business as heretofore or proposed to be conducted by it and to own or lease and operate its Properties as now owned or leased by it.

8.1.17 Compliance with Laws. Each Borrower and each of its Subsidiaries is and its Properties, business operations and leaseholds are in compliance in all material respects with, the provisions of all Applicable Laws (including Anti-Terrorism Laws) and there have been no citations, notices or orders of noncompliance issued to such Borrower or any of the Subsidiaries under any such law, rule or regulation. Each Borrower is in compliance in all material respects with all Environmental Laws applicable to it and Properties owned by it. No Borrower or Subsidiary has received any material Environmental Notice. No Borrower or Subsidiary has any liability with respect to any Environmental Release, environmental pollution or hazardous material on any Real Estate now (or to the knowledge of the Borrower any previously) owned, leased or operated by it that could reasonably be expected to have a Material Adverse Effect. Each Borrower has established and maintains an adequate monitoring system to insure that it remains in compliance with all Applicable Laws.

8.1.18 Burdensome Contracts. Neither Borrower nor any of its Subsidiaries is a party or subject to any contract, agreement, or charter or other corporate restriction, which has or could be reasonably expected to have a Material Adverse Effect. Neither Borrower nor any of its Subsidiaries is a party or subject to any Restrictive Agreements, except as set forth on **Schedule 8.1.18**. No such Restrictive Agreement prohibits the execution, delivery or performance of any Loan Document by an Obligor.

8.1.19 Litigation. Except as set forth on **Schedule 8.1.19** hereto, there are no actions, suits, proceedings or investigations pending or, to the knowledge of a Borrower, threatened on the date hereof against or affecting such Borrower or any of the Subsidiaries, or the business, operations, Properties, prospects, profits or condition of such Borrower or any of the Subsidiaries. Except as shown on such Schedule, neither Borrower nor any of its Subsidiaries has any interest in a Commercial Tort Claim (other than, as long as no Default or Event of Default exists, a Commercial Tort Claim for less than \$115,000). Neither such Borrower nor any of its Subsidiaries is in default on the date hereof with respect to any order, writ, injunction, judgment, decree or rule of any court, Governmental Authority or arbitration board or tribunal.

8.1.20 No Defaults. No event has occurred and no condition exists which would, upon or after the execution and delivery of this Agreement or such Borrower's performance hereunder, constitute a Default or an Event of Default. Neither Borrower nor any of its Subsidiaries is in default, and no event has occurred and no condition exists which constitutes or which with the passage of time or the giving of notice or both would constitute a default, under any Material Contract or in the payment of any Debt of such Borrower or a Subsidiary to any Person for Money Borrowed.

8.1.21 Leases. **Schedule 8.1.21** hereto is a complete listing of each capitalized and operating lease of each Borrower and its Subsidiaries on the date hereof. Each Borrower and each of its Subsidiaries is in substantial compliance with all of the terms of each of its respective capitalized and operating leases and there is no current basis upon which the lessors under any such leases could terminate same prior to the scheduled maturity or stated termination date thereof or declare such Borrower or any of its Subsidiaries in default thereunder.

8.1.22 Pension Plans. Except as disclosed on **Schedule 8.1.22** hereto, neither any Obligor nor any of its Subsidiaries maintains, sponsors, contributes to, is required to maintain or contribute to or has any liability, whether contingent or otherwise, with respect to any Plan. Each Obligor and each of its Subsidiaries are in compliance with the requirements of ERISA and the regulations promulgated thereunder with respect to each Plan in all material respects. 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 knowledge of the Obligors, nothing has occurred which would prevent, or cause the loss of, such qualification. No fact or situation that is reasonably likely to result in a material adverse change in the financial condition of an Obligor or any of the Subsidiaries exists in connection with any Plan. No Obligor nor any of its respective Subsidiaries has any withdrawal liability in connection with a Multiemployer Plan. No employee benefit plan (as defined in Section 3(3) of ERISA) maintained by an Obligor or a Subsidiary provides health or medical coverage, life insurance coverage, disability benefit coverage or coverage for any other welfare benefit to any former employee, officer, director or independent contractor of any Obligor or ERISA Affiliate, except for continuation coverage required by Section 4980B of the Code, Sections 601 to 608 of ERISA or any similar Applicable Law. Except as could not reasonably be expected to have a Material Adverse Effect, (i) no ERISA Event has occurred or is reasonably expected to occur; (ii) each Obligor and each ERISA Affiliate has met all applicable requirements under the Pension Funding Rules in respect of each Pension Plan, and no waiver of the minimum funding standards under the Pension Funding Rules has been applied for or obtained; (iii) as of the most recent valuation date for any Pension Plan, the funding target attainment percentage (as defined in Section 430(d)(2) of the Code) is 80% or higher and neither any Obligor nor any ERISA Affiliate knows of any facts or circumstances that could reasonably be expected to cause the funding target attainment percentage for any such plan to drop below 80% as of the most recent valuation date; (iv) neither any Obligor nor any ERISA Affiliate has incurred any liability to the PBGC other than for the payment of premiums, and there are no premium payments which have become due that are unpaid; (v) no Obligor or 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); (vi) no Obligor or ERISA Affiliate has incurred, or reasonably expects to incur, any liability (and no event has occurred which, with the giving of notice under Section 4219 of ERISA, would result in such liability) under Section 4201 or 4243 of ERISA with respect to a Multiemployer Plan; and (vii) no Obligor or ERISA Affiliate has engaged in a transaction that could be subject to Section 4069 or 4212(c) of ERISA.

8.1.23 Trade Relations. There exists no actual or threatened termination, cancellation or limitation of, or any materially adverse modification or change in, the business

relationship between a Borrower and any customer or any group of customers whose purchases individually or in the aggregate are material to the business of such Borrower, or with any material supplier or group of suppliers, and there exists no condition or state of facts or circumstances which is reasonably likely to have a Material Adverse Effect or prevent such Borrower from conducting such business after the consummation of the transactions contemplated by this Agreement in the same manner as it has heretofore been conducted.

8.1.24 Labor Relations. Except as described on **Schedule 8.1.24** hereto, neither Borrower nor any of its Subsidiaries is a party to any collective bargaining agreement on the date hereof. On the date hereof, there are no material grievances, disputes or controversies with any union or any other organization of such Borrower's or any of its Subsidiary's employees, or any threats of strikes, work stoppages or any asserted pending demands for collective bargaining by any union or organization.

8.1.25 Not a Regulated Entity. No Obligor is (i) an "investment company" or a "person directly or indirectly controlled by or acting on behalf of an investment company" within the meaning of the Investment Company Act of 1940 or (ii) subject to regulation under any other Applicable Law regarding its authority to incur Debt.

8.1.26 Margin Stock. No Borrower nor any of its Subsidiaries is engaged, principally or as one of its important activities, in the business of extending credit for the purpose of purchasing or carrying any Margin Stock.

8.1.27 Projections. All financial and business projections heretofore delivered to Agent and Lenders by Borrowers have been prepared by Borrowers in good faith and are based on reasonable assumptions.

8.1.28 Disregarded Subsidiaries. As of the Closing Date, each Subsidiary listed on **Schedule 8.1.28** is a Disregarded Subsidiary.

8.2 Survival of Representations and Warranties.

All representations and warranties of each Borrower contained in this Agreement or any of the other Loan Documents shall survive the execution, delivery and acceptance thereof by Agent, Lenders and the parties thereto and the closing of the transactions described therein or related thereto.

SECTION 9. COVENANTS AND CONTINUING AGREEMENTS

9.1 Affirmative Covenants.

Until Full Payment of the Obligations, each Borrower covenants that, unless the Required Lenders have otherwise consented in writing, it shall and shall cause each Subsidiary to:

9.1.1 Visits and Inspections. Permit representatives of Agent and Prospect and Summit, as long as either shall be an Original Lender, from time to time, as often as may be reasonably requested, but only during normal business hours and (except when a Default or an Event of Default exists) upon reasonable prior notice to such Borrower, to visit and inspect the

Properties of such Borrower and each Subsidiary, conduct appraisals of a Borrower's Properties, inspect, audit and make extracts from each Borrower's and each of its respective Subsidiary's books and records, and discuss with its officers, its employees and its independent accountants, Borrower's and each Subsidiary's business, financial condition, business prospects and results of operations. Representatives of Borrowers (including Borrowers' accountants) shall be authorized to accompany Agent on any such visit or inspection, but such authorization shall in no manner be deemed to be a requirement or condition of Agent's visits or inspections, and to the extent any of Borrowers' representatives accompany Agent on any visit or audit, such Persons shall in no manner hinder or delay the audits or inspections of Agent. Representatives of each Lender shall be authorized to accompany Agent on each such visit and inspection and to participate with Agent therein, but at their own expense, unless a Default or Event of Default exists. Neither Agent nor any Lender shall have any duty to make any such inspection and shall not incur any liability by reason of its failure to conduct or delay in conducting any such inspection.

9.1.2 Notices. Notify Agent and Lenders in writing, promptly after Borrower's obtaining knowledge thereof: (i) of the commencement of any litigation or Intellectual Property Claim affecting any Obligor or any of its Properties, whether or not the claims asserted in such litigation or Intellectual Property Claim are considered by such Borrower to be covered by insurance, and of the institution of any administrative proceeding; (ii) of any labor dispute to which any Obligor may become a party, any strikes or walkouts relating to any of its plants or other facilities, and the expiration of any labor contract to which it is a party or by which it is bound; (iii) of any default by any Obligor under, or termination of, any Material Contract or any note, indenture, loan agreement, mortgage, lease, deed, guaranty or other similar agreement relating to any Debt of such Obligor exceeding \$1,150,000; (iv) of the existence of any Default or Event of Default; (v) of any judgment against any Obligor in an amount exceeding \$862,500; (vi) of any violation or asserted violation by such Borrower of any Applicable Law (including ERISA, OSHA, FLSA, Anti-Terrorism Laws or any Environmental Laws), the adverse resolution of which could reasonably be expected to have a Material Adverse Effect or result in liability of such Borrower in an amount in excess of \$1,150,000 or result in the loss of any federal firearms license; (vii) of any Environmental Release or receipt of any Environmental Notice by an Obligor or on any Property owned or occupied by an Obligor if such Environmental Release or matters disclosed in such Environmental Notice could reasonably be expected to have a Material Adverse Effect or result in liability of such Borrower in an amount in excess of \$1,000,000; (viii) of the discharge of Borrower's independent accountants or any withdrawal or resignation by such independent accountants from their acting in such capacity; and (ix) the occurrence of any ERISA Event which could reasonably be expected to have a Material Adverse Effect or result in liability of such Borrower in an amount in excess of \$1,150,000. In addition, each Borrower shall give Agent at least ten (10) Business Days' prior written notice of any Obligor's opening of any new office or place of business.

9.1.3 Financial and Other Information. Keep adequate records and books of account with respect to its business activities in which proper entries are made in accordance with GAAP reflecting all its financial transactions; and cause to be prepared and to be furnished to Agent and Lenders the following (all to be prepared in accordance with GAAP applied on a consistent basis, unless Borrower's certified public accountants concur in any change therein,

such change is disclosed to Agent and is consistent with GAAP and, if required by Lenders, the financial covenants set forth in **Section 9.3** are amended in a manner requested by Lenders to take into account the effects of such change):

(i) as soon as available, and in any event within ninety (90) days after the close of each Fiscal Year, the unqualified audited balance sheet of Borrowers and their Subsidiaries as of the end of such Fiscal Year and the related statements of income, shareholders' equity and cash flow, on a Consolidated (and certified without material qualification) basis, by a firm of independent certified public accountants of recognized national standing selected by Borrowers but reasonably acceptable to Agent (except for a qualification for a change in accounting principles with which the accountant concurs), and setting forth in each case in comparative form the corresponding Consolidated figures for the preceding Fiscal Year and the corresponding budgeted figures for such Fiscal Year as set forth in the budget most recently delivered pursuant to **Section 9.1.5**;

(ii) as soon as available, and in any event within thirty (30) days after the end of each Fiscal Quarter, unaudited balance sheet of Borrowers and their Subsidiaries as of the end of such Fiscal Quarter and the related unaudited statements of income and cash flow for such Fiscal Quarter and for the portion of Borrowers' Fiscal Year then elapsed, on a Consolidated basis, setting forth in each case in comparative form the corresponding figures for the preceding Fiscal Year and the corresponding budgeted figures for such Fiscal Year as set forth in the budget most recently delivered pursuant to **Section 9.1.5** and certified by the principal financial officer of Borrowers as prepared in accordance with GAAP and fairly presenting the Consolidated financial position and results of operations of Borrowers and their Subsidiaries for such Fiscal Quarter and period subject only to changes from audit and year-end adjustments and except that such statements need not contain notes; and

(iii) as soon as available, and in any event within thirty (30) days after the end of each month, the unaudited balance sheet of Borrowers and their Subsidiaries as of the end of such month and the related unaudited statements of income and cash flow for such month and for the portion of Borrowers' Fiscal Year then elapsed, on a Consolidated basis, setting forth in each case in comparative form the corresponding figures for the preceding Fiscal Year and the corresponding budgeted figures for such Fiscal Year as set forth in the budget most recently delivered pursuant to **Section 9.1.5** and certified by the principal financial officer of Borrowers as prepared in accordance with GAAP and fairly presenting the Consolidated financial position and results of operations of Borrowers and their Subsidiaries for such month and period subject only to changes from audit and year-end adjustments and except that such statements need not contain notes.

Concurrently with the delivery of the financial statements described in clauses (i) and (ii) of this **Section 9.1.3**, or more frequently if requested by Agent or any Lender during any period that a Default or Event of Default exists, each Borrower shall cause to be prepared and furnished

to Agent and Lenders a Compliance Certificate executed by the chief financial officer of such Borrower, which Compliance Certificate shall include a schedule of the calculations used in determining, as of the immediately preceding Fiscal Quarter end, the calculation of Consolidated Fixed Charge Coverage Ratio and Consolidated Total Leverage Ratio for such Fiscal Quarter.

Promptly after the sending, receipt or filing thereof, each Borrower shall also provide to Agent copies of any annual report to be filed in accordance with ERISA in connection with each Plan and copies of any correspondence between such Borrower and any Governmental Authority regarding any Pension Plan or Multiemployer Plan, and such other data and information (financial and otherwise) as Agent, from time to time, may reasonably request, bearing upon or related to the Collateral or such Borrower's and each of its Subsidiaries' financial condition or results of operations including, without limitation, the most recent Borrowing Base Certificate delivered to First Priority Agent, to be provided to Lenders within ten (10) Business Days of Agent's or an Original Lender's request therefore.

9.1.4 Landlord and Storage Agreements. Provide Agent with copies of all existing agreements, and promptly after execution thereof provide Agent with copies of all agreements entered into after the Closing Date, between such Borrower and any landlord, warehouseman or bailee which owns any premises at which any Collateral may, from time to time, be kept.

9.1.5 Projections. No later than January 31 of each Fiscal Year of Borrowers, deliver to each Lender the Projections of Borrowers for the forthcoming Fiscal Year, on a month by month basis.

9.1.6 Taxes. Pay and discharge all Taxes prior to the date on which such Taxes become delinquent or penalties attach thereto, except and to the extent only that such Taxes are being Properly Contested.

9.1.7 Compliance with Laws. Comply in all material respects with all Applicable Law, including ERISA, all Environmental Laws, FLSA, OSHA, Anti-Terrorism Laws and all laws, statutes, regulations and ordinances regarding the collection, payment and deposit of Taxes, and obtain and keep in force any and all Governmental Approvals necessary to the ownership of its Properties or to the conduct of its business. Without limiting the generality of the foregoing, Borrowers and their Subsidiaries shall comply in all material respects with all Environmental Laws applicable to the ownership, lease or use of its Property now or hereafter owned, leased or operated by a Borrower or any of its Subsidiaries, will promptly pay or cause to be paid all costs and expenses incurred in connection with such compliance, and will keep or cause to be kept all such Property free and clear of any Liens imposed pursuant to such Environmental Laws. Neither Borrower nor any of its Subsidiaries will generate, use, treat, store, release or dispose of, or permit the generation, use, treatment, storage, release or disposal of Hazardous Materials on any Real Estate now or hereafter owned, leased or operated by such Borrower or any of its Subsidiaries, or transport or permit the transportation of Hazardous Materials to or from any such Real Estate, except in each case for Hazardous Materials generated, used, treated, stored, released or disposed of at any such Real Estate in compliance with all applicable Environmental Laws and reasonably required in connection with the

operation, use and maintenance of the business or operations of such Borrower or its Subsidiaries.

9.1.8 Insurance. In addition to the insurance required herein with respect to the Collateral, maintain with financially sound and reputable insurers, insurance with respect to its Properties and business against such casualties and contingencies of such type (including product liability, workers' compensation, larceny, embezzlement, or other criminal misappropriation insurance) and in such amounts as is customary in the business of such Borrower or such Subsidiary.

9.1.9 Intellectual Property. (i) Promptly after applying for or otherwise acquiring any material Intellectual Property (other than off-the-shelf or prepackaged software), deliver to Lender, in form and substance acceptable to Lender and in recordable form, all documents necessary for Lender to perfect its Lien on such material Intellectual Property; (ii) keep each License (other than any such License that failure to so keep could not reasonably be expected to have a Material Adverse Effect) affecting any Collateral (including the manufacture, distribution or disposition of Inventory) or any other material Property of Borrowers and Subsidiaries in full force and effect; pay all Royalties when due; and notify Agent of any default or breach asserted by any Person to have occurred under any License; and (iii) preserve or renew all of its Intellectual Property, the non-preservation of which could reasonably be expected to have a Material Adverse Effect.

9.1.10 Board Information Rights. Permit each Original Lender to appoint by written notice to the Borrowers one individual from time to time (the "Observer") to represent such Lender and attend all meetings of the Governing Body of EB and SportCo, through which EB or SportCo shall transact, or cause to be transacted, all of the business of EB or SportCo. The Observer shall not have the right to vote on any matter presented to the Governing Body of any Obligor or any committee thereof. Each Obligor shall give the Observer written notice of each meeting thereof at the same time and in the same manner as it notifies the members of its Governing Body of such meetings as set forth in the Organization Documents of such Obligor, and each such Obligor shall permit the Observer to attend as an observer all meetings thereof. Each Obligor shall deliver, or cause to be delivered, to the Observer all materials and other information given to the members of its Governing Body in connection with such meetings at the same time such materials and information are given to such members. The Obligors shall pay the reasonable costs and expenses of the Observer incurred in connection with attending such meetings. Any action to be taken by the Obligors in connection with this Agreement or any other Loan Document shall be taken by the Governing Body in accordance with the terms of its Organization Documents and this Agreement. If a matter is to be discussed or otherwise arises at any meeting of a Governing Body which, in the reasonable good faith judgment of such Governing Body, is not appropriate to be discussed in the presence of any Observer in order to preserve an attorney-client privilege, then such matter may be discussed without any Observer being present, so long as each Observer is given notice of the occurrence of such judgment by such Governing Body and that each Observer is being excused.

9.1.11 Treasury Management. Maintain all treasury management services with Bank of America or other financial institutions reasonably acceptable to Agent, including but not limited to services for the maintenance of all operating and Deposit Accounts (other than

the Excluded Accounts), lockbox administration, funds transfer and information reporting services, each in form and substance reasonably satisfactory to Agent.

9.1.12 Future Loan Parties.

(i) Promptly notify Agent and each Lender if any Disregarded Subsidiary acquires assets in excess of \$100,000, and cause such Disregarded Subsidiary to either become a party to this agreement as a Borrower or to guaranty the Obligations in a manner reasonably satisfactory to Agent, and to execute and deliver such documents, instruments and agreements and to take such other actions as Agent shall reasonably require to evidence and perfect a Lien in favor of Agent (for the benefit of Secured Parties) on all assets (other than Real Estate for which a Mortgage is not required pursuant to **Section 6.3**) of such Disregarded Subsidiary that would be required to be pledged as Collateral, including delivery of such legal opinions, in form and substance reasonably satisfactory to Agent, as it shall deem appropriate.

(ii) Promptly notify Agent upon any Person becoming a Subsidiary and, if such Person (i) is not a Foreign Subsidiary and (ii) is not a Disregarded Subsidiary, cause it to either become a party to this agreement as a Borrower or to guaranty the Obligations in a manner reasonably satisfactory to Agent, and to execute and deliver such documents, instruments and agreements and to take such other actions as Agent shall require to evidence and perfect a Lien in favor of Agent (for the benefit of Secured Parties) on all assets (other than Real Estate having a fair market value of less than \$500,000) of such Person that would be required to be pledged as Collateral, including delivery of such legal opinions, in form and substance reasonably satisfactory to Agent, as it shall deem appropriate.

9.1.13 Maintenance of Existence, etc. (i) Preserve, renew and maintain in full force and effect its legal existence and good standing under the Applicable Laws of the jurisdiction of its organization, except in a transaction permitted by **Section 9.2.1** or **9.2.10** and (ii) take all reasonable action to maintain all rights, privileges, permits, and franchises necessary or desirable in the normal conduct of its business, except to the extent that failure to do so could not reasonably be expected to have a Material Adverse Effect.

9.1.14 Post-Closing Matters. Execute and deliver the documents and complete the tasks set forth on **Schedule 9.1.14**, in each case within the time limits specified on such schedule, as may be extended by the Agent in its sole discretion.

9.2 Negative Covenants.

Until Full Payment of all Obligations, each Obligor covenants that unless the Required Lenders have otherwise consented in writing, it shall not and shall not permit any Subsidiary to:

9.2.1 Fundamental Changes. (i) Merge, reorganize, consolidate or amalgamate with any Person, or liquidate, wind up its affairs or dissolve itself, except for (a) mergers or consolidations of any Obligor into an Obligor, any Subsidiary into an Obligor

(with such Obligor being the survivor thereof) or any Disregarded Subsidiary into another Disregarded Subsidiary; provided, however, that the survivor of any merger or consolidation involving a Borrower shall be a Borrower and (b) dissolutions of any Disregarded Subsidiary so long as the assets thereof are contributed to a Borrower; (ii) change any Borrower's name or conduct business under any new fictitious name; or (iii) change any Borrower's state of incorporation or formation, FEIN or organizational identification number.

9.2.2 Loans. Make any loans or other advances of money to any Person other than (i) loans or other advances to an officer or employee of such Borrower, a Subsidiary or an Affiliate; provided, that the aggregate amount of all such loans and advances under this clause (i) shall not exceed \$230,000 at any time outstanding, (ii) loans or other advances to an officer or employee of such Borrower or a Subsidiary for salary, travel advances, advances against commissions and other similar advances in the Ordinary Course of Business and (iii) so long as no Default or Event of Default exists, loans from a Borrower to another Borrower pursuant to an intercompany note that is pledged to the Agent or, prior to Payment in Full of the First Priority Debt, the First Priority Agent.

9.2.3 Permitted Debt. Create, incur, assume, guarantee or suffer to exist any Debt, except:

(i) the Obligations;

(ii) accounts payable by such Borrower or a Subsidiary to trade creditors incurred in the Ordinary Course of Business and paid when due, unless the same are being Properly Contested;

(iii) obligations to pay Rentals permitted by **Section 9.2.14**;

(iv) Purchase Money Debt owing by a Borrower; provided, however, that the aggregate amount of all such Purchase Money Debt owing by Borrowers on any date does not exceed \$4,600,000;

(v) Debt for accrued payroll, Taxes and other operating expenses (other than for Money Borrowed) incurred in the Ordinary Course of Business of such Borrower or such Subsidiary, including Cash Management Obligations (as defined in the First Priority Loan Agreement on the date hereof), in each case so long as payment thereof is not past due and payable unless such Debt (other than Debt for accrued payroll) is being Properly Contested;

(vi) Debt for Money Borrowed by such Borrower (other than the Obligations), but only to the extent that such Debt is (a) outstanding on the date of this Agreement, (b) identified on **Schedule 9.2.3** and (c) not to be satisfied on the Closing Date from the proceeds of the Term Loans;

(vii) Permitted Contingent Obligations;

(viii) Debt owing by such Borrower to the other Borrower;

(ix) the First Priority Debt; provided, however, that (a) such Debt shall at all times be subject to the terms of the Subordination Agreement, and (b) no First Priority Debt may be held by any Obligor, Wellspring, or any of their respective Affiliates;

(x) Debt that is not included in any of the preceding paragraphs of this **Section 9.2.3**, is not secured by a Lien (unless such Lien is a Permitted Lien) and does not exceed at any time, in the aggregate, the sum of \$8,000,000 as to all Borrowers and their Subsidiaries.

Notwithstanding the foregoing, no Obligor shall, nor shall it permit any other Obligor or any Subsidiary to, at any time, (x) create or incur any Debt that, pursuant the terms of the documentation governing such Debt (including any intercreditor arrangement), is subordinated in any manner (including, in right of payment or as a result of lien subordination) to any other Debt of any Obligor unless such Debt is also contractually subordinated in right of payment to the Obligations or (y) enter into any arrangements (or agreements or waivers, amendments or modifications thereof) or take any other action (or permit such action to be taken) or cooperate with any other party in taking any action which would or would purport to subordinate in right of payment any Debt of any Obligor to any Debt of any other Obligor including, for this purpose, the granting of subordinated participations in any such Debt unless such subordinated participation is also subordinated in right of payment to the Obligations. Notwithstanding anything herein to the contrary, the First Priority Debt shall be deemed to be incurred pursuant to clause (ix) above.

9.2.4 Affiliate Transactions. Enter into, or be a party to any transaction with any Affiliate, except: (i) the transactions contemplated by the Loan Documents; (ii) payment of reasonable compensation to officers and employees for services actually rendered to such Borrower or its Subsidiaries, and loans and advances permitted by **Section 9.2.2**; (iii) payments to Wellspring of fees and expenses in accordance with the Expense Reimbursement Agreement as in effect on the Closing Date; provided, however, that (a) both before and after giving effect to such payments, no Default or Event of Default shall have occurred and be continuing, and (b) such payments shall not exceed \$862,500 per annum plus any amount of such payments that were prohibited from being paid pursuant to the preceding subsection (a); (iv) payment of customary directors' fees and indemnities; (v) transactions with Affiliates in the Ordinary Course of Business and pursuant to the reasonable requirements of a Borrower's or its Subsidiary's business and upon fair and reasonable terms that are no less favorable to such Borrower or such Subsidiary than such Borrower or such Subsidiary would obtain in a comparable arm's length transaction with a Person not an Affiliate or stockholder of such Borrower or such Subsidiary provided, that any such transaction in an amount equal to or greater than \$2,000,000 that involves an Affiliate (other than Bullseye Holding Company LLC and its Subsidiaries) shall require a fairness opinion from an independent third party valuation firm reasonably acceptable to the Agent and the Required Lenders; and (vi) the Transactions.

9.2.5 Limitation on Liens. Create or suffer to exist any Lien upon any of its Property, income or profits, whether now owned or hereafter acquired, except the following (collectively, "Permitted Liens"):

- (i) Liens at any time granted in favor of Agent;
- (ii) Liens for Taxes (excluding any Lien imposed pursuant to any of the provisions of ERISA) not yet due or being Properly Contested;
- (iii) statutory Liens (excluding any Lien imposed pursuant to any of the provisions of ERISA) arising in the Ordinary Course of Business of such Borrower or a Subsidiary, but only if and for so long as (x) payment in respect of any such Lien is not at the time required or the Debt secured by any such Liens is being Properly Contested and (y) such Liens do not materially detract from the value of the Property of such Borrower or such Subsidiary and do not materially impair the use thereof in the operation of Borrower's or such Subsidiary's business;
- (iv) Purchase Money Liens to secure any Purchase Money Debt to the extent the Debt secured by such Liens is permitted pursuant to **Section 9.2.3(iv)** hereof;
- (v) Liens securing Debt of a Subsidiary of such Borrower that is owing to such Borrower or to another Subsidiary of such Borrower;
- (vi) Liens arising by virtue of the rendition, entry or issuance against such Borrower or any Subsidiary, or any Property of such Borrower or any Subsidiary, of any judgment, writ, order, or decree so long as each such Lien (a) is in existence for less than twenty (20) consecutive days after it first arises or is being Properly Contested and (b) is at all times junior in priority to any Liens in favor of Agent;
- (vii) Liens incurred or deposits made in the Ordinary Course of Business to secure the performance of tenders, bids, leases, contracts (other than for the repayment of Money Borrowed), statutory obligations and other similar obligations or arising as a result of progress payments under government contracts; provided, however, that, to the extent any such Liens attach to any of the Collateral, such Liens are at all times subordinate and junior to the Liens upon the Collateral in favor of Agent on terms acceptable to Agent in its sole discretion;
- (viii) easements, rights-of-way, restrictions, covenants or other agreements of record and other similar charges or encumbrances on Real Estate of such Borrower or a Subsidiary that do not secure any monetary obligation and do not interfere in any material respect with the ordinary conduct of the business of such Borrower or such Subsidiary;
- (ix) normal and customary rights of setoff upon deposits of cash in favor of banks and other depository institutions and Liens of a collection bank arising under the UCC on Payment Items in the course of collection;

(x) Liens in existence immediately prior to the Closing Date that are satisfied in full and released on the Closing Date as a result of the application of Borrower's cash on hand at the Closing Date or the proceeds of Term Loans to be made on the Closing Date;

(xi) such other Liens as appear on **Schedule 9.2.5** hereto, to the extent provided therein;

(xii) such other Liens as Agent and Lenders in their sole discretion may hereafter approve in writing;

(xiii) Leases and subleases granted by a Borrower to other Persons not materially interfering with the conduct of such Borrower's business or affecting adversely any Liens granted to Agent;

(xiv) statutory and common law landlords' liens under leases to which such Borrower or any of its Subsidiaries is a party and for which Agent has received a Landlord Agreement;

(xv) subject to the terms of the Subordination Agreement, Liens on the Collateral in favor of the First Priority Agent securing the First Priority Debt until Full Payment of the First Priority Debt.

The foregoing negative pledge shall not apply to any Margin Stock to the extent that the application of such negative pledge to such Margin Stock would require filings or other actions by Agent or any Lender under such regulations or otherwise result in a violation of such regulations.

9.2.6 Restrictions on Payment of Certain Debt. Make any payments (whether voluntary or mandatory, or a prepayment, redemption, retirement, defeasance or acquisition) with respect to any (i) Subordinated Debt; and (ii) Money Borrowed (other than the Obligations and the First Priority Debt) prior to its due date under the agreements evidencing such Debt as in effect on the Closing Date (or as amended thereafter with the consent of Agent).

9.2.7 Distributions. Declare or make any Distributions, or set apart assets for a sinking or other analogous fund for the purpose of making Distributions, except for (i) Upstream Payments, (ii) the payment by EB to each of its members of income taxes then being assessed against such member on items of ordinary income and expense and net capital gain allocated to such member by EB in accordance with the terms of the operating agreement of EB, and (iii) the Closing Date Distribution and the Distribution to Holdings (for further Distribution to SportCo) to repay the Wellspring Debt in full on the Closing Date, which Distributions under this subclause (iii) shall be excluded from all calculations of Consolidated Fixed Charge Coverage Ratio.

9.2.8 Upstream Payments. Create or suffer to exist any encumbrance or restriction on the ability of a Subsidiary to make any Upstream Payment, except for encumbrances or restrictions (i) pursuant to the Loan Documents and the First Priority Debt

Documents, (ii) existing under Applicable Law and (iii) identified and fully disclosed in **Schedule 9.2.8**.

9.2.9 Holding Companies.

(i) SportCo. Borrowers shall cause SportCo to refrain from any business or activity other than (a) the ownership of all outstanding Equity Interests in Holdings, (b) maintaining its corporate existence, (c) participating in tax, accounting and other administrative activities as the parent of Holdings, (d) the execution and delivery of the Loan Documents to which it is a party and the performance of its obligations thereunder, (e) providing a guaranty of the First Priority Debt, and (f) activities incidental to the businesses or activities described in clauses (a) through (e) of this Section.

(ii) Holdings. Borrowers shall cause Holdings to refrain from any business or activity other than (a) the ownership of all outstanding Equity Interests in EB, (b) maintaining its corporate existence, (c) participating in tax, accounting and other administrative activities as the parent of EB, (d) the execution and delivery of the Loan Documents to which it is a party and the performance of its obligations thereunder, (e) providing a guaranty of the First Priority Debt, and (f) activities incidental to the businesses or activities described in clauses (a) through (e) of this Section.

9.2.10 Disposition of Assets. Sell, assign, lease, consign or otherwise dispose of any of its Properties or any interest therein, to or in favor of any Person, except (i) sales or leases of Properties consisting of Real Estate owned by Borrowers or their Subsidiaries, (ii) sales of Inventory in the Ordinary Course of Business, (iii) sales or leases of Properties (other than Real Estate and Accounts) not to exceed \$1,000,000 in the aggregate in any Fiscal Year of EB, (iv) sale and leaseback transactions of Properties owned by Borrowers or their Subsidiaries (other than sale and leaseback transactions involving Affiliates of Borrowers or their Subsidiaries as purchasers or lessors) and (v) other dispositions expressly authorized by other provisions of the Loan Documents.

9.2.11 Subsidiaries. Form or acquire any Subsidiary after the Closing Date or permit any existing Subsidiary to issue any additional Equity Interests, unless otherwise in compliance with **Section 9.1.12**.

9.2.12 Bill-and-Hold Sales and Consignments. Make a sale to any customer on a bill-and-hold, guaranteed sale, sale and return, sale on approval or consignment basis, or any sale on a repurchase or return basis.

9.2.13 Restricted Investments. Make or maintain any Restricted Investment.

9.2.14 Leases. Other than pursuant to (x) a sale and leaseback transaction permitted in **Section 9.2.10**, and (y) those certain leases set forth on **Schedule 9.2.14**, become a lessee under (i) any operating lease (other than an operating lease under which a Borrower or any of the Subsidiaries is lessor) of Property if, as to Borrowers and all of their Subsidiaries, the

aggregate Rentals payable during any current or future period of 12 consecutive months under the operating lease in question and all other operating leases under which Borrowers or any of their Subsidiaries are then a lessee would exceed \$1,725,000 or (ii) any capitalized lease (other than a capitalized lease under which a Borrower or any of the Subsidiaries is lessor) of Property if, as to Borrowers and all of their Subsidiaries, the aggregate value of capitalized leases (as stated on the Consolidated balance sheet of Borrowers) under which Borrowers or any of their Subsidiaries are then a lessee would exceed \$862,500.

9.2.15 Tax Consolidation. File or consent to the filing of any consolidated income tax return with any Person other than Holdings or SportCo.

9.2.16 Accounting Changes. Make any significant change in accounting treatment or reporting practices, except as may be required by GAAP, or establish a fiscal year different from the Fiscal Year.

9.2.17 Organization Documents. Amend, modify or otherwise change any of the terms or provisions in any of its Organization Documents as in effect on the date hereof, except for changes that do not affect in any way Borrower's or such Subsidiary's rights and obligations to enter into and perform the Loan Documents to which it is a party and to pay all of the Obligations and that do not otherwise have a Material Adverse Effect.

9.2.18 Restrictive Agreements. Enter into or become a party to any Restrictive Agreement; provided, however, that (i) the foregoing shall not apply to Restrictive Agreements existing on the date hereof and identified on **Schedule 8.1.18** (but shall apply to any amendment or modification expanding the scope of any restriction or condition contained in any such Restrictive Agreement), (ii) the foregoing shall not apply to liens, restrictions or conditions imposed by any Restrictive Agreement relating to secured Debt permitted by this Agreement if such liens, restrictions or conditions apply only to the Properties securing such Debt and (iii) the foregoing shall not apply to customary provisions in leases and other contracts restricting the assignment thereof.

9.2.19 Hedging Agreements. Enter into any Hedging Agreement, other than Hedging Agreements entered into to hedge or mitigate risks to which such Borrower or any of its Subsidiaries is exposed in the conduct of its business or the management of its liabilities and not for any speculative purpose.

9.2.20 Conduct of Business. Engage in any business other than the business engaged in by it on the Closing Date and any business or activities which are substantially similar, related or incidental thereto.

9.2.21 Amendments to First Priority Loan Documents. Amend, supplement or otherwise modify the First Priority Loan Documents to the extent expressly prohibited by the Subordination Agreement.

9.2.22 Pension Plans and Retirement Medical Plans. (a) Create or allow to be created (a) any new Pension Plan or (b) any employee benefit plan as defined in Section 3(3) of ERISA) which provides health or medical coverage, life insurance coverage, disability benefit

coverage or coverage for any other welfare benefit to any former employee, officer, director or independent contractor of any Obligor or ERISA Affiliate, except for continuation coverage required by Section 4980B of the Code, Section 601 to 608 of ERISA or any Applicable Law.

9.3 Financial Covenants.

9.3.1 Fixed Charge Coverage Ratio. Until Full Payment of all Obligations, Borrowers shall maintain a Consolidated Fixed Charge Coverage Ratio of not less than 1.00 to 1.00, in each case as tested at the end of each Fiscal Quarter for the immediately preceding four Fiscal Quarters.

9.3.2 Total Leverage Ratio. Until Full Payment of all Obligations, Borrowers shall maintain a Consolidated Total Leverage Ratio of not greater than 6.75 to 1.00, in each case as tested at the end of each Fiscal Quarter for the immediately preceding four Fiscal Quarters.

9.3.3 Cure Rights. Notwithstanding anything to the contrary contained herein, in the event that the Borrowers fail to comply with the financial covenants set forth in **Section 9.3.1** or **9.3.2**, as the case may be, for any Fiscal Quarter, until the date that is fifteen (15) Business Days after the date on which a Compliance Certificate for such Fiscal Quarter is required to be delivered pursuant to **Section 9.1.3(ii)**, EB shall have the right to cure such failure by issuing Capital Stock (other than Disqualified Capital Stock) to its equity holders for cash (the “Cure Right” and the proceeds of any exercise of the Cure Right, the “Cure Proceeds”), pursuant to an irrevocable written notice delivered to the Agent, and, upon receipt by the Borrowers of such Cure Proceeds within such fifteen (15) Business Day period, the financial covenants set forth in **Section 9.3.1** or **9.3.2**, as the case may be, shall be recalculated giving effect to the following pro forma adjustment:

(i) Adjusted EBITDA shall be increased, solely for the purpose of calculating the financial covenants set forth in **Section 9.3.1** or **9.3.2**, as the case may be, and not for any other purpose under this Agreement, by an amount equal to one hundred percent (100%) of the amount of the Cure Proceeds for the Fiscal Quarter with respect to which the Cure Right is exercised and each of the following three (3) Fiscal Quarters; and

(ii) If, after giving effect to the foregoing recalculations, the Obligors shall then be in compliance with the financial covenants set forth in **Section 9.3.1** or **9.3.2**, as the case may be, the Obligors shall be deemed to have complied with such financial covenants, as of the relevant date of determination with the same effect as though there had been no failure to comply therewith at such date, and any Event of Default arising from such failure of the Borrowers to comply with the financial covenants set forth in **Section 9.3.1** or **9.3.2**, as the case may be, without any further action by any party hereto, be cured and deemed not to have occurred or be continuing hereunder.

Notwithstanding anything herein to the contrary, (A) the Cure Right may not be exercised in any consecutive Fiscal Quarters; (B) the Cure Right may be exercised no more than two (2)

times during any Fiscal Year and no more than five (5) times during the term of this Agreement; (C) the aggregate amount of Cure Proceeds shall be no greater than the amount required for purposes of complying with the financial covenant that is not being met in **Section 9.3.1** or **9.3.2**, as the case may be, (D) (x) prior to the Full Payment of the First Priority Debt, one hundred percent (100%) of Cure Proceeds shall be applied by the Borrower to pay the First Priority Debt, and thereafter, one hundred percent (100%) of the Cure Proceeds shall be applied by the Borrower to pay to each Lender its Pro Rata share, as and when received by such Borrower and as a mandatory prepayment of the Term Loans (and no Prepayment Premium shall be payable in respect thereof); provided, that the Consolidated Funded Debt of the Obligors shall not be reduced by the amount of such prepayment for either the Fiscal Quarter with respect to which the Cure Right is exercised or the following three (3) Fiscal Quarters for any purpose under this Agreement; and (E) upon the Agent's receipt of a notice from Holdings or the Borrower that it intends to exercise the Cure Right, neither the Agent nor any Lender shall exercise the right to accelerate the Loans and neither the Agent nor any Lender shall exercise any right to foreclose on or take possession of the Collateral solely on the basis of an Event of Default having occurred and being continuing on account of a failure to comply with the financial covenants set forth in **Section 9.3.1** or **9.3.2**, as the case may be, until the expiration of the fifteen (15) Business Day period referred to in the first sentence of this **Section 9.3.3** (unless prior to the expiration thereof, (x) the application of the Cure Right cured such Event of Default in accordance with the foregoing provision, or (y) any Obligor notifies the Agent or the Lenders that the Obligors do not intend to exercise such right).

SECTION 10. CONDITIONS PRECEDENT

10.1 Conditions Precedent to Initial Credit Extension.

Lenders shall not be required to fund the Term Loans, or otherwise extend credit to Borrowers, unless each of the following conditions has been satisfied:

10.1.1 Loan Documents. Each of the Loan Documents (other than the Loan Documents delivered prior to the date hereof) shall have been duly executed and delivered to Agent and the Lenders by each of the signatories thereto and accepted by Agent and Lenders and each Obligor shall be in compliance with all of the terms thereof (including all representations and warranties).

10.1.2 Minimum EBITDA; Senior Leverage Ratio; Total Leverage Ratio. The Agent and the Lenders shall have received satisfactory evidence, including a certificate of a Senior Officer of the Borrowers, that (a) the Adjusted EBITDA of the Obligors for the twelve (12) Fiscal Month period ended August 31, 2012, is not less than \$53,000,000; (b) the Consolidated Senior Leverage Ratio as of the Closing Date (calculated on a pro forma basis) for the twelve (12) Fiscal Month period ending on August 31, 2012, is not greater than 2.25 to 1.00; and (c) the Consolidated Total Leverage Ratio as of the Closing Date (calculated on a pro forma basis) for the twelve (12) month period ending on August 31, 2012, is not greater than 5.25 to 1.00.

10.1.3 UCC Financing Statements and Lien Searches. Agent and the Lenders shall have received copies of all filings to be made to perfect the Liens of Agent in the Collateral,

as well as UCC and Lien searches and other evidence in form and substance satisfactory to Agent and Lenders that there are no other Liens upon any Collateral except for Permitted Liens.

10.1.4 Organization Documents. Agent and the Lenders shall have received copies of the Organization Documents of each Obligor, and all amendments thereto, certified by the Secretary of State or other appropriate officials of the jurisdiction of Borrower's and each Obligor's states of organization; provided, however, that to the extent governmental certification is not available for any such Organization Document, such Organization Document shall be certified as true, completed and correct by a Senior Officer.

10.1.5 Certificates of Existence. Agent and the Lenders shall have received certificates of existence for each Obligor, issued by the Secretary of State or other appropriate official of such Obligor's jurisdiction of organization and each jurisdiction where the conduct of such Obligor's business activities or ownership of its Property necessitates qualification.

10.1.6 Opinion Letters. Agent and the Lenders shall have received a favorable, written opinion of (i) Paul, Weiss, Rifkind, Wharton & Garrison LLP, as special counsel to Obligors and (ii) Nelson Mullins Riley & Scarborough LLP, local counsel to Borrowers organized in South Carolina, each in form and substance satisfactory to Agent.

10.1.7 Insurance. Agent and the Lenders shall have received certified copies of the property and casualty insurance policies of Borrowers with respect to the Collateral, or certificates of insurance with respect to such policies in form acceptable to Agent, and loss payable endorsements, in form reasonably satisfactory to Agent, naming Agent as loss payee with respect to each such policy and certified copies of Borrower's liability insurance policies, including product liability policies, together with endorsements naming Agent as an additional insured, all as required by the Loan Documents.

10.1.8 Dominion and Concentration Accounts. Agent and the Lenders shall be satisfied with the cash management system established by Borrowers and, subject to **Section 9.1.14**, shall have received the duly executed agreements with respect to each Dominion Account, with Borrowers' existing financial institutions for the collection or servicing of the Accounts.

10.1.9 Landlord Agreements. Subject to grace periods set forth on **Schedule 9.1.14**, Borrowers shall use commercially reasonable efforts to deliver to Agent the Landlord Agreements to be delivered pursuant to **Section 9.1.14** hereof.

10.1.10 Solvency. Agent and Lenders shall have received evidence satisfactory to them from one or more knowledgeable Senior Officers of each Borrower that, after giving effect to the financing under this Agreement and the other Transactions, each Borrower is Solvent.

10.1.11 Compliance with Laws and Other Agreements. Agent and the Lenders shall have determined or received assurances satisfactory to it that none of the Loan Documents or any of the transactions contemplated thereby violate any Applicable Law (including Environmental Laws), court order or agreement binding upon any Obligor.

10.1.12 No Material Adverse Change. No material adverse change, in the opinion of Lenders, in the business, assets, properties, liabilities (actual or contingent), operations, condition (financial or otherwise) or prospects of any Borrower or any other Obligor shall have occurred since December 31, 2011.

10.1.13 Governmental Approval. Borrowers shall have obtained all material Governmental Approvals and third party approvals and consents necessary to effect the Transactions and the other transactions contemplated hereby.

10.1.14 Payment of Fees. Borrowers shall have paid, or made provision for the payment on the Closing Date of, all fees and expenses to be paid hereunder to Agent and Lenders on the Closing Date.

10.1.15 Satisfaction of Existing Debt. Agent and the Lenders shall have received evidence satisfactory to it that the Wellspring Debt (including any accrued interest and premiums, if any) has been terminated and paid in full and all documents executed or delivered in connection therewith have been terminated substantially simultaneously with the initial closing of the transactions hereunder.

10.1.16 Financial Statements. Agent and the Lenders shall have received (i) a pro forma balance sheet of Borrowers dated as of August 31, 2012 and giving effect to the Transactions, (ii) Projections of Borrowers through calendar year 2013 and annually thereafter through 2016, giving effect to the Transactions and evidencing Borrowers' ability to comply with **Section 9.3** hereof and (iii) interim financial statements for Borrowers as of August 31, 2012.

10.1.17 Subordination Agreement. Agent and the Lenders shall have received true and correct copies of the First Priority Debt Documents, in form and substance reasonably satisfactory to Agent and Lenders. Agent, on behalf of the Secured Parties, First Priority Agent and the lenders with respect to the First Priority Debt shall have executed and delivered the Subordination Agreement, in form and substance satisfactory to Agent and First Priority Agent.

10.1.18 Pledge and Security Agreement and Guaranties. Agent and the Lenders shall have received true and correct copies of the Pledge and Security Agreement and the Guaranties, each in form and substance satisfactory to Agent and the Lenders.

10.1.19 No Litigation. No action, suit, investigation, litigation or proceeding pending or threatened in any court or before any arbitrator or governmental instrumentality that in Lenders' judgment (i) could reasonably be expected to have a Material Adverse Effect upon Borrowers' business, assets, Properties, liabilities, operations, condition or prospects, or could impair Borrowers' ability to perform satisfactorily under this Agreement or any of the other Loan Documents or (ii) could reasonably be expected to materially and adversely affect this Agreement or any of the other Loan Documents or the transactions contemplated hereby or thereby.

10.1.20 Officer's Certificates. Agent and the Lenders shall have received certificates, in form and substance satisfactory to it, from a knowledgeable Senior Officer of each

Borrower certifying that, after giving effect to the Term Loans and transactions hereunder, (i) such Borrower is Solvent; (ii) no Default or Event of Default exists; (iii) the representations and warranties set forth in **Section 8** are true and correct in all material respects; provided, however, that any representation or warranty that is qualified as to “materiality”, “Material Adverse Effect” or similar language shall be true and correct (after giving effect to any qualification therein) in all respects; and (iv) such Borrower has complied with all agreements and conditions to be satisfied by it under the Loan Documents.

10.2 Inapplicability of Conditions.

None of the conditions precedent set forth in **Section 10.1** shall be a condition to the obligation of each Lender to pay any amount payable to Agent or any other Lender pursuant to this Agreement.

SECTION 11. EVENTS OF DEFAULT; RIGHTS AND REMEDIES ON DEFAULT

11.1 Events of Default.

The occurrence or existence of any one or more of the following events or conditions shall constitute an “Event of Default” (each of which Events of Default shall be deemed to exist unless and until waived by Agent and Lenders in accordance with the provisions of **Section 12.9** hereof):

11.1.1 Payment of Obligations. Borrowers shall fail to pay any of the Obligations on the due date thereof (whether due at stated maturity, on demand, upon acceleration or otherwise).

11.1.2 Misrepresentations. Any representation, warranty or other written statement to Agent or any Lender by or on behalf of any Obligor, whether made in or furnished in compliance with or in reference to any of the Loan Documents, proves to have been false or misleading in any material respect when made or furnished or when reaffirmed pursuant to **Section 8.2** hereof.

11.1.3 Breach of Specific Covenants. Borrowers shall fail or neglect to perform, keep or observe any covenant contained in **Sections 6.6, 9.1.1, 9.1.2(iv), 9.1.3, 9.1.5, 9.1.6, 9.1.8, 9.1.13, 9.2 or 9.3** hereof on the date that Borrowers are required to perform, keep or observe such covenant.

11.1.4 Breach of Other Covenants. A Borrower shall fail or neglect to perform, keep or observe any covenant contained in this Agreement (other than a covenant which is dealt with specifically elsewhere in **Section 11.1** hereof) and the breach of such other covenant is not cured to Agent’s and Required Lenders’ satisfaction within thirty (30) days after the sooner to occur of any Senior Officer’s receipt of notice of such breach from Agent or the date on which such failure or neglect first becomes actually known to any Senior Officer; provided, however, that such notice and opportunity to cure shall not apply in the case of any failure to perform, keep or observe any covenant which is not capable of being cured at all or within such 30-day period or which is a willful and knowing breach by such Borrower.

11.1.5 Default Under Security Documents/Other Agreements. A Borrower or any other Obligor shall default in the due and punctual observance or performance (taking into account any applicable grace periods) of any liability or obligation to be observed or performed by it under any of the Other Agreements or Security Documents.

11.1.6 Other Defaults. (i) The failure to pay, on the part of any Obligor, (a) the stated principal amount of the First Priority Debt at the final stated maturity beyond any applicable cure or grace period, or (b) any other Debt of any Obligor (other than the Obligations), or (ii) the acceleration of the final stated maturity of any such Debt (which acceleration is not rescinded, annulled or otherwise cured within 30 Business Days of receipt by any Obligor of notice of any such acceleration) if, in each case in clauses (i) and (ii), the aggregate principal amount of such Debt is in excess of \$1,150,000.

11.1.7 Uninsured Losses. Any loss (other than a loss relating to an Account), theft, damage or destruction of any of the Collateral not fully covered (subject to such deductibles as Agent shall have permitted) by insurance if the aggregate amount not covered by insurance exceeds \$1,150,000 in any Fiscal Year.

11.1.8 Invalidity of Subordination Provisions, etc. Any subordination provision in any document or instrument governing Subordinated Debt, or any subordination provision in any guaranty by any Obligor of any Subordinated Debt, shall cease to be in full force and effect, or any Obligor or any other Person (including the holder of any applicable Subordinated Debt) shall contest in any manner the validity, binding nature or enforceability of any such provision.

11.1.9 Solvency. Any Obligor shall cease to be Solvent.

11.1.10 Insolvency Proceedings. Any Insolvency Proceeding shall be commenced by any Obligor; an Insolvency Proceeding is commenced against any Obligor and any of the following events occur: such Obligor consents to the institution of the Insolvency Proceeding against it, the petition commencing the Insolvency Proceeding is not timely contested by such Obligor, the petition commencing the Insolvency Proceeding is not dismissed within thirty (30) days after the date of the filing thereof, an interim trustee is appointed to take possession all or a substantial portion of the Properties of such Obligor or to operate all or any substantial portion of the business of such Obligor or an order for relief shall have been issued or entered in connection with such Insolvency Proceeding; or any Obligor shall make an offer of settlement extension or composition to its unsecured creditors generally.

11.1.11 Business Disruption; Condemnation. There shall occur a cessation of a substantial part of the business of any Obligor for a period which may be reasonably expected to have a Material Adverse Effect; or any Obligor shall suffer the loss or revocation of any Governmental Approvals now held or hereafter acquired by such Obligor which is material to the operations of such Borrower or necessary to the continued or lawful operation of its business; or any Obligor shall be enjoined, restrained or in any way prevented by court, governmental or administrative order from conducting all or any material part of its business affairs; or any material lease or agreement pursuant to which any Obligor leases or occupies any premises on which any Collateral is located shall be canceled or terminated prior to the expiration of its stated

term and such cancellation or termination has a Material Adverse Effect; or any material part of the Collateral shall be taken through condemnation or the value of such Property shall be materially impaired through condemnation.

11.1.12 Change of Control. There shall occur any Change of Control.

11.1.13 ERISA. An ERISA Event occurs with respect to a Pension Plan or Multiemployer Plan which could reasonably be expected to have a Material Adverse Effect or that has resulted or could reasonably be expected to result in liability of an Obligor to a Pension Plan, Multiemployer Plan or PBGC in an amount in excess of \$1,150,000, or that constitutes grounds for appointment of a trustee for or termination by the PBGC of any Pension Plan or Multiemployer Plan; or an Obligor or ERISA Affiliate fails to pay when due any installment payment with respect to its withdrawal liability under Section 4201 of ERISA under a Multiemployer Plan.

11.1.14 Challenge to Loan Documents. Any Obligor or any of its Affiliates shall challenge or contest in any action, suit or proceeding the validity or enforceability of any of the Loan Documents, the legality or enforceability of any of the Obligations or the perfection or priority of any Lien granted to Agent, or any of the Loan Documents ceases to be in full force or effect for any reason other than a full or partial waiver or release by Agent and Lenders in accordance with the terms thereof.

11.1.15 Judgment. One or more judgments or orders for the payment of money in an amount that exceeds, individually or in the aggregate, \$1,150,000 shall be entered against a Borrower or any other Obligor and either (i) enforcement proceedings shall have been commenced by any creditor upon such judgment or order or (ii) there shall be any period of thirty (30) consecutive days during which a stay of enforcement of such judgment or order, by reason of a pending appeal or otherwise, shall not be in effect.

11.1.16 Criminal Forfeiture. Any Obligor shall be convicted under any criminal law that could lead to a forfeiture of any Property of such Obligor.

11.2 Acceleration of Obligations.

Without in any way limiting the right of Agent to demand payment of any portion of the Obligations payable on demand in accordance with this Agreement:

11.2.1 Upon or at any time after the occurrence of an Event of Default (other than pursuant to **Section 11.1.10** hereof) and for so long as such Event of Default shall exist, Agent may in its discretion (and, upon receipt of written instructions to do so from the Required Lenders, shall) declare the principal of and any accrued interest on the Term Loans and all other Obligations owing under any of the Loan Documents to be, whereupon the same shall become without further notice or demand (all of which notice and demand Borrowers expressly waives), forthwith due and payable and Borrowers shall forthwith pay to each Lender its Pro Rata share of the entire principal of and accrued and unpaid interest on the Term Loans and other Obligations plus reasonable attorneys' fees and expenses if such principal and interest are collected by or through an attorney-at-law.

11.2.2 Upon the occurrence of an Event of Default specified in **Section 11.1.10** hereof, all of the Obligations shall become automatically due and payable without declaration, notice or demand by Agent to or upon Borrowers.

11.3 Other Remedies.

Upon and after the occurrence of an Event of Default and for so long as such Event of Default shall exist, Agent may in its discretion (and, upon receipt of written direction of Lenders, shall) exercise from time to time the following rights and remedies (without prejudice to the rights of Agent or any Lender to enforce its claim against any or all Obligor(s)):

11.3.1 All of the rights and remedies of a secured party under the UCC or under other Applicable Law, and all other legal and equitable rights to which Agent may be entitled under any of the Loan Documents, all of which rights and remedies shall be cumulative and shall be in addition to any other rights or remedies contained in this Agreement or any of the other Loan Documents, and none of which shall be exclusive.

11.3.2 The right to collect all amounts at any time payable to a Borrower from any Account Debtor or other Person at any time indebted to a Borrower.

11.3.3 The right to take immediate possession of any of the Collateral, and to (i) require Borrowers to assemble the Collateral, at Borrower's expense, and make it available to Agent at a place designated by Agent which is reasonably convenient to both parties, and (ii) enter any premises where any of the Collateral shall be located and to keep and store the Collateral on said premises until sold (and if said premises be the Property of a Borrower, then such Borrower agrees not to charge Agent or any Lender for storage thereof).

11.3.4 The right to sell or otherwise dispose of all or any Collateral in its then condition, or after any further manufacturing or processing thereof, at public or private sale or sales, with such notice as may be required by Applicable Law, in lots or in bulk, for cash or on credit, all as Agent, in its sole discretion, may deem advisable. Each Borrower agrees that any requirement of notice to such Borrower or any other Obligor of any proposed public or private sale or other disposition of Collateral by Agent shall be deemed reasonable notice thereof if given at least ten (10) days prior thereto, and such sale may be at such locations as Agent may designate in said notice. Agent shall have the right to conduct such sales on Borrower's or any other Obligor's premises, without charge therefor, and such sales may be adjourned from time to time in accordance with Applicable Law. Agent shall have the right to sell, lease or otherwise dispose of the Collateral, or any part thereof, for cash, credit or any combination thereof, and Agent may purchase all or any part of the Collateral at public or, if permitted by law, private sale and, in lieu of actual payment of such purchase price, may set off the amount of such price against the Obligations. The proceeds realized from the sale or other disposition of any Collateral may be applied, after allowing two (2) Business Days for collection, first to any Extraordinary Expenses incurred by Agent, second to interest accrued with respect to any of the Obligations; and third, to the principal balance of the Obligations. If any deficiency shall arise, Obligor(s) shall remain jointly and severally liable to Agent and Lenders therefor.

11.3.5 The right to the appointment of a receiver, without notice of any kind whatsoever, to take possession of all or any portion of the Collateral and to exercise such rights and powers as the court appointing such receiver shall confer upon such receiver.

To the fullest extent assignable by Borrowers, Agent is hereby granted an irrevocable, non-exclusive license or other right to use, license or sub-license (exercisable without payment of royalty or other compensation to any Obligor or any other Person) any or all of Borrower's Intellectual Property and all of Borrower's computer hardware and software trade secrets, brochures, customer lists, promotional and advertising materials, labels, and packaging materials, and any Property of a similar nature, in advertising for sale, marketing, selling and collecting and in completing the manufacturing of any Collateral, and Borrower's rights under all licenses and all franchise agreements shall inure to Agent's benefit.

11.4 Setoff.

Subject to the Subordination Agreement, and in addition to any Liens granted under any of the Loan Documents and any rights now or hereafter available under Applicable Law, Agent, each Lender (and each of their respective Affiliates) is hereby authorized by each Borrower at any time that an Event of Default exists, without notice to Borrowers or any other Person (any such notice being hereby expressly waived) to set off and to appropriate and to apply any and all deposits, general or special (including Debt evidenced by certificates of deposit whether matured or unmatured (but not including trust accounts)) and any other Debt at any time held or owing by Agent, such Lender or any of their Affiliates to or for the credit or the account of Borrowers against and on account of the Obligations of Borrowers arising under the Loan Documents to Agent, such Lender or any of their Affiliates including all claims of any nature or description arising out of or in connection with this Agreement, irrespective of whether or not (i) Agent or such Lender shall have made any demand hereunder, (ii) Agent, at the request or with the consent of Lenders, shall have declared the principal of and interest on the Term Loans and other amounts due hereunder to be due and payable as permitted by this Agreement and even though such Obligations may be contingent or unmatured or (iii) the Collateral for the Obligations is adequate. Notwithstanding the foregoing, each of Agent and Lenders agree with each other that it shall not, without the express consent of Lenders, and that it shall (to the extent that (x) it is lawfully entitled to do so and (y) the accounts are not subject to Permitted Liens in favor of Agent or such Lender as set forth in **Section 9.2.5(ix)**) upon the request of Lenders, exercise its setoff rights hereunder against any accounts of Borrowers now or hereafter maintained with Agent such Lender or any Affiliate of any of them, but Borrowers shall have no claim or cause of action against Agent or any Lender for any setoff made without the consent of Lenders and the validity of any such setoff shall not be impaired by the absence of such consent. If any party (or its Affiliate) exercises the right of setoff provided for hereunder, such party shall be obligated to share any such setoff in the manner and to the extent required by **Section 12.5**.

11.5 Remedies Cumulative; No Waiver.

11.5.1 All covenants, conditions, provisions, warranties, guaranties, indemnities, and other undertakings of Borrowers contained in this Agreement and the other Loan Documents, or in any document referred to herein or contained in any agreement supplementary hereto or in any schedule or contained in any other agreement between Agent or

any Lender and Borrowers, heretofore, concurrently, or hereafter entered into, shall be deemed cumulative to and not in derogation or substitution of any of the terms, covenants, conditions, or agreements of Borrowers herein contained. The rights and remedies of Agent and Lenders under this Agreement and the other Loan Documents shall be cumulative and not exclusive of any rights or remedies that Agent or any Lender would otherwise have. All such rights and remedies shall continue in full force and effect until full payment of all Obligations.

11.5.2 No waiver or course of dealing shall be established by (i) the failure or delay of Agent or any Lender to require strict performance by Borrowers with any terms of the Loan Documents, or to exercise any rights or remedies with respect to Collateral or otherwise; or (ii) acceptance by Agent or any Lender of any payment or performance by an Obligor under any Loan Documents in a manner other than that specified therein. It is expressly acknowledged by Borrowers that any failure to satisfy a financial covenant on a measurement date shall not be cured or remedied by satisfaction of such covenant on a subsequent date.

11.5.3 If Agent or any Lender shall accept performance by Borrowers, in whole or in part, of any obligation that Borrowers are required by any of the Loan Documents to perform only when a Default or Event of Default exists, or if Agent or any Lender shall exercise any right or remedy under any of the Loan Documents that may not be exercised other than when a Default or Event of Default exists, Agent's or Lender's acceptance of such performance by Borrowers or Agent's or Lender's exercise of any such right or remedy shall not operate to waive any such Event of Default or to preclude the exercise by Agent or any Lender of any other right or remedy, unless otherwise expressly agreed in writing by Agent or such Lender, as the case may be.

SECTION 12. AGENT

12.1 Appointment, Authority and Duties of Agent.

12.1.1 Appointment and Authority. Each Secured Party hereby irrevocably appoints and designates Prospect Capital Corporation as Agent under all the Loan Documents. Agent may, and each Secured Party by its acceptance of a Term Loan shall be deemed irrevocably to have authorized Agent to, enter into all Loan Documents to which Agent is or is intended to be a party and all amendments hereto and all Security Documents at any time executed by Borrowers, for the benefit of the Secured Parties, except as otherwise provided in this **Section 12**, to exercise such rights and powers under this Agreement and the other Loan Documents as are specifically delegated to Agent by the terms hereof and thereof, together with such other rights and powers as are reasonably incidental thereto. Each Secured Party agrees that any action taken by Agent or Lenders in accordance with the provisions of this Agreement or the other Loan Documents, and the exercise by Agent or Lenders of any of the powers set forth herein or therein, together with such other powers as are reasonably incidental thereto, shall be authorized and binding upon all Lenders. Without limiting the generality of the foregoing, Agent shall have the sole and exclusive right and authority to (i) execute and deliver as Agent each Loan Document and accept delivery of each such agreement delivered by Borrowers or any other Obligor; (ii) act as collateral agent for Secured Parties for purposes of the perfection of all security interests and Liens created by this Agreement or the Security Documents with respect to all material items of the Collateral and, subject to the direction of Required Lenders or other

Secured Parties, for all other purposes stated therein; provided, however, that Agent hereby appoints, authorizes and directs each Secured Party to act as a collateral sub-agent for Agent and the other Lenders for purposes of the perfection of all security interests and Liens with respect to Borrower's Deposit Accounts maintained with, and all cash and Cash Equivalents held by, such Secured Party; (iii) subject to the direction of Required Lenders or other Secured Parties, manage, supervise or otherwise deal with the Collateral; and (iv) except as may be otherwise specifically restricted by the terms of this Agreement and subject to the direction of Required Lenders or other Secured Parties, exercise all remedies given to Agent with respect to any of the Collateral under the Loan Documents relating thereto, Applicable Law or otherwise. The duties of Agent shall be ministerial and administrative in nature, and Agent shall not have by reason of this Agreement or any other Loan Document a fiduciary relationship with any Secured Party (or any Lender's participants).

12.1.2 Duties. Agent (which term, as used in this sentence, shall include reference to Agent's officers, directors, employees, attorneys, agents and Affiliates and to the officers, directors, employees, attorneys and agents of Agent's Affiliates) shall not: (i) have any duties or responsibilities except those expressly set forth in this Agreement and the other Loan Documents or (ii) be required to take, initiate or conduct any litigation, foreclosure or collection proceedings hereunder or under any of the other Loan Documents except to the extent directed to do so by Lenders during the continuance of any Event of Default. The conferral upon Agent of any right hereunder shall not imply a duty on Agent's part to exercise any such right unless instructed to do so by Lenders in accordance with this Agreement.

12.1.3 Agent Professionals. Agent may perform any of its duties by or through its agents and employees and may employ one or more Agent Professionals and shall not be responsible for the negligence or misconduct of any such Agent Professionals selected by it with reasonable care. Borrowers shall promptly (and in any event, **on demand**) reimburse Agent for all reasonable expenses (including all Extraordinary Expenses) incurred by Agent pursuant to any of the provisions hereof or of any of the other Loan Documents or in the execution of any of Agent's duties hereby or thereby created or in the exercise of any right or power herein or therein imposed or conferred upon it or Lenders (excluding, however, general overhead expenses), and each Lender agrees promptly to pay to Agent, **on demand**, such Lender's Pro Rata share of any such reimbursement for expenses (including Extraordinary Expenses) that is not timely made by Borrowers to Agent.

12.1.4 Instructions of Required Lenders. The rights, remedies, powers and privileges conferred upon Agent hereunder and under the other Loan Documents may be exercised by Agent without the necessity of the joinder of any other parties unless otherwise required by Applicable Law. Agent may request instructions from the Required Lenders or other Secured Parties with respect to any act or action (including the failure to act) in connection with any Loan Documents or Collateral, and may seek assurances to its satisfaction from Secured Parties of their indemnification obligations against Claims that could be incurred by Agent. Agent may refrain from any act until it has received such instructions or assurances and shall not incur liability to any Person by reason of so refraining. Instructions of Required Lenders shall be binding upon all Secured Parties, and no Secured Party shall have any right of action whatsoever against Agent as a result of Agent acting or refraining from acting pursuant to instructions of

Required Lenders. Without limiting the foregoing, no Secured Party shall have any right of action whatsoever against Agent as a result of Agent acting or refraining from acting hereunder or under any of the Loan Documents pursuant to or in accordance with the instructions of Required Lenders except for Agent's own gross negligence or willful misconduct in connection with any action taken by it. Notwithstanding anything to the contrary contained in this Agreement, Agent shall not be required to take any action that is in its opinion contrary to Applicable Law or the terms of any of the Loan Documents or that would in its reasonable opinion subject it or any of its officers, employees or directors to personal liability; provided, however, that if Agent shall fail or refuse to take action that is not contrary to Applicable Law or to any of the terms of any of the Loan Documents even if such action in Agent's opinion would subject it to potential liability, Lenders may remove Agent and appoint a successor Agent in the same manner and with the same effects as is provided in this Agreement with respect to Agent's resignation.

12.2 Agreements Regarding Collateral.

Secured Parties hereby irrevocably authorize Agent, at its option and in its discretion, to release any Lien upon any Collateral (i) upon payment or satisfaction of all of the Obligations, (ii) constituting Equipment or Inventory sold or disposed of in accordance with the terms of **Section 7.4.2** of this Agreement if a Borrower certifies to Agent that the disposition is made in compliance with the terms **Section 7.4.2** of this Agreement (and Agent may rely conclusively on any such certificate, without further inquiry), or (iii) subject to **Section 12.9**, if approved or ratified by Lenders; provided, however, that Agent (without the consent of any Secured Party) shall be authorized to release any Lien upon any Collateral having a Net Book Value of less than \$500,000 in the aggregate during any 12-month period. Agent shall have no obligation whatsoever to any of Secured Parties to assure that any of the Collateral exists or is owned by a Borrower or is cared for, protected or insured or has been encumbered, or that Agent's Liens have been properly or sufficiently or lawfully created, perfected, protected or enforced or entitled to any particular priority or to exercise any duty of care with respect to any of the Collateral.

12.3 Reliance By Agent.

Agent shall be entitled to rely, and shall be fully protected in so relying, upon any certification, notice or other communication (including any thereof by telephone, telex, telegram, telecopier message or cable) believed by it to be genuine and correct and to have been signed, sent or made by or on behalf of the proper Person or Persons, and upon advice and statements of Agent Professionals selected by Agent. As to any matters not expressly provided for by this Agreement or any of the other Loan Documents, Agent shall in all cases be fully protected in acting or refraining from acting hereunder and thereunder in accordance with the instructions of Lenders, and such instructions of Lenders and any action taken or failure to act pursuant thereto shall be binding upon Lenders. Agent shall have a reasonable and practicable amount of time to act upon any instruction, notice or other communication under any Loan Document, and shall not be liable for any delay in acting.

12.4 Action Upon Default.

Agent shall not be deemed to have knowledge of the occurrence of a Default or an Event of Default or of any failure to satisfy any condition in **Section 10**, unless it has received written notice from Lenders or Borrowers specifying the occurrence and nature of such Default or Event of Default or failure of such condition. If Agent shall receive such a notice of a Default or an Event of Default or shall otherwise acquire actual knowledge of any Default or Event of Default, Agent shall promptly notify Lenders in writing and Agent shall take such action and assert such rights under this Agreement and the other Loan Documents, or shall refrain from taking such action and asserting such rights, as Lenders shall direct from time to time. If any Lender shall receive a notice of a Default or an Event of Default or shall otherwise acquire actual knowledge of any Default or Event of Default, such Lender shall promptly notify Agent and the other Lenders in writing. As provided in **Section 12.3** hereof, Agent shall not be subject to any liability by reason of acting or refraining to act pursuant to any request of Lenders except for its own willful misconduct or gross negligence in connection with any action taken by it. Each Secured Party agrees that, except as otherwise provided in any of the Loan Documents and without the prior written consent of Lenders, it will not take any legal action or institute any action or proceeding against any Obligor with respect to any of the Obligations or Collateral or accelerate or otherwise enforce its portion of the Obligations. Without limiting the generality of the foregoing, no Secured Party may exercise any right that it might otherwise have under Applicable Law to credit bid at foreclosure sales, UCC sales or other similar sales or dispositions of any of the Collateral except as authorized by Lenders. Notwithstanding anything to the contrary set forth in this **Section 12.4** or elsewhere in this Agreement, each Lender shall be authorized to take such action to preserve or enforce its rights against any Obligor where a deadline or limitation period is otherwise applicable and would, absent the taken of specified action, bar the enforcement of Obligations held by such Lender against such Obligor, including the filing of proofs of claim in any Insolvency Proceeding.

12.5 Ratable Sharing.

If any Lender shall obtain any payment or reduction (including any amounts received as adequate protection of a bank account deposit treated as cash collateral under the Bankruptcy Code) of any Obligation of Borrowers hereunder (whether voluntary, involuntary, through the exercise of any right of set-off or otherwise) in excess of its Pro Rata share of payments or reductions on account of such Obligations obtained by all of Lenders, such Lender shall forthwith (i) notify the other Lenders and Agent of such receipt and (ii) purchase from the other Lenders such participations in the affected Obligations as shall be necessary to cause such purchasing Lender to share the excess payment or reduction, net of costs incurred in connection therewith, on a Pro Rata basis; provided, however, that if all or any portion of such excess payment or reduction is thereafter recovered from such purchasing Lender or additional costs are incurred, the purchase shall be rescinded and the purchase price restored to the extent of such recovery or such additional costs, but without interest. Each Borrower agrees that any Lender so purchasing a participation from another Lender pursuant to this **Section 12.5** may, to the fullest extent permitted by Applicable Law, exercise all of its rights of payment (including the right of set-off) with respect to such participation as fully as if such Lender were the direct creditor of such Borrower in the amount of such participation.

12.6 Indemnification of Agent Indemnitees.

12.6.1 Each Lender agrees to indemnify and defend the Agent Indemnitees (to the extent not reimbursed by Borrowers under this Agreement, but without limiting the indemnification obligation of Borrowers under this Agreement), on a Pro Rata basis, and to hold each of the Agent Indemnitees harmless from and against, any and all Claims which may be imposed on, incurred by or asserted against any of the Agent Indemnitees in any way related to or arising out of this Agreement or any of the other Loan Documents or any other document contemplated by or referred to herein or therein or the transactions contemplated hereby or thereby (including the costs and expenses which Borrowers are obligated to pay under **Section 14.2** hereof) or the enforcement of any of the terms hereof or thereof or of any such other documents; provided, however, that no Lender shall be liable to any Agent Indemnitee for any of the foregoing to the extent that they result solely from the willful misconduct or gross negligence of such Agent Indemnitee.

12.6.2 Without limiting the generality of the foregoing provisions of this **Section 12.6**, if Agent should be sued by any receiver, trustee in bankruptcy, debtor-in-possession or other Person on account of any alleged preference or fraudulent transfer received or alleged to have been received from a Borrower or any other Obligor as the result of any transaction under the Loan Documents, then in such event any monies paid by Agent in settlement or satisfaction of such suit, together with all Extraordinary Expenses incurred by Agent in the defense of same, shall be promptly reimbursed to Agent by Lenders to the extent of each Lender's Pro Rata share.

12.6.3 Without limiting the generality of the foregoing provisions of this **Section 12.6**, if at any time (whether prior to or after the Commitment Termination Date) any action or proceeding shall be brought against any of the Agent Indemnitees by an Obligor or by any other Person claiming by, through or under an Obligor, to recover damages for any act taken or omitted by Agent under any of the Loan Documents or in the performance of any rights, powers or remedies of Agent against any Obligor, any Account Debtor, the Collateral or with respect to any Term Loans, or to obtain any other relief of any kind on account of any transaction involving any Agent Indemnitees under or in relation to any of the Loan Documents, each Lender agrees to indemnify, defend and hold the Agent Indemnitees harmless with respect thereto and to pay to the Agent Indemnitees such Lender's Pro Rata share of such amount as any of the Agent Indemnitees shall be required to pay by reason of a judgment, decree, or other order entered in such action or proceeding or by reason of any compromise or settlement agreed to by the Agent Indemnitees, including all interest and costs assessed against any of the Agent Indemnitees in defending or compromising such action, together with attorneys' fees and other legal expenses paid or incurred by the Agent Indemnitees in connection therewith; provided, however, that no Lender shall be liable to any Agent Indemnitee for any of the foregoing to the extent that they arise solely from the willful misconduct or gross negligence of such Agent Indemnitee. In Agent's discretion, Agent may also reserve for or satisfy any such judgment, decree or order from proceeds of Collateral prior to any distributions therefrom to or for the account of Lenders.

12.7 Limitation on Responsibilities of Agent.

Agent shall in all cases be fully justified in failing or refusing to act hereunder unless it shall have received further assurances to its satisfaction from Lenders of their indemnification

obligations under **Section 12.6** hereof against any and all Claims which may be incurred by Agent by reason of taking or continuing to take any such action. Agent shall not be liable to any Secured Party (or any Lender's participants) for any action taken or omitted to be taken under or in connection with this Agreement or the other Loan Documents except as a result of actual gross negligence or willful misconduct on the part of Agent. Agent does not assume any responsibility for any failure or delay in performance or breach by any Obligor, any Lender or other Secured Party of its obligations under this Agreement or any of the other Loan Documents. Agent does not make to Lenders or other Secured Parties, and no Lender makes to Agent or the other Lenders or Secured Parties, any express or implied warranty, representation or guarantee with respect to the Term Loans, the Collateral, the Loan Documents or any Obligor. Neither Agent nor any of its officers, directors, employees, attorneys or agents shall be responsible to Secured Parties, and no Secured Party nor any of its agents, attorneys or employees shall be responsible to Agent or the other Secured Parties, for: (i) any recitals, statements, information, representations or warranties contained in any of the Loan Documents or in any certificate or other document furnished pursuant to the terms hereof; (ii) the execution, validity, genuineness, effectiveness or enforceability of any of the Loan Documents; (iii) the validity, genuineness, enforceability, collectability, value, sufficiency or existence of any Collateral, or the perfection or priority of any Lien therein; or (iv) the assets, liabilities, financial condition, results of operations, business, creditworthiness or legal status of any Obligor or any Account Debtor. Neither Agent nor any of its officers, directors, employees, attorneys or agents shall have any obligation to any Secured Party to ascertain or inquire into the existence of any Default or Event of Default, the observance or performance by any Obligor of any of the duties or agreements of such Obligor under any of the Loan Documents or the satisfaction of any conditions precedent contained in any of the Loan Documents. Agent may consult with and employ legal counsel, accountants and other experts and shall be entitled to act upon, and shall be fully protected in any action taken in good faith reliance upon, any advice given by such experts.

12.8 Successor Agent and Co-Agents.

12.8.1 Subject to the appointment and acceptance of a successor Agent as provided below, Prospect Capital Corporation may resign as Agent at any time by giving at least thirty (30) days written notice thereof to each Lender and Borrowers. Upon receipt of any notice of such resignation, Required Lenders shall have the right to appoint a successor Agent which shall be (i) a Lender, (ii) a United States based affiliate of a Lender, or (iii) a commercial bank that is organized under the laws of the United States or of any State thereof and has a combined capital surplus of at least \$200,000,000 and, provided no Default or Event of Default then exists, is reasonably acceptable to Borrowers (and for purposes hereof, any successor to Prospect Capital Corporation shall be deemed acceptable to Borrowers). Upon the acceptance by a successor Agent of an appointment to serve as an Agent hereunder, such successor Agent shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring Agent without further act, deed or conveyance, and the retiring Agent shall be discharged from its duties and obligations hereunder. After any retiring Agent's resignation hereunder as Agent, the provisions of this **Section 12** (including the provisions of **Section 12.6** hereof) shall continue in effect for its benefit in respect of any actions taken or omitted to be taken by it while it was acting as Agent. Notwithstanding anything to the contrary contained in this Agreement, any successor by merger or acquisition of the stock or assets of Prospect Capital Corporation

shall continue to be Agent hereunder unless such successor shall resign in accordance with the provisions hereof.

12.8.2 It is the purpose of this Agreement that there shall be no violation of any Applicable Law denying or restricting the right of financial institutions to transact business as agent or otherwise in any jurisdiction. It is recognized that, in case of litigation under any of the Loan Documents, or in case Agent deems that by reason of present or future laws of any jurisdiction Agent might be prohibited from exercising any of the powers, rights or remedies granted to Agent or Lenders hereunder or under any of the Loan Documents or from holding title to or a Lien upon any Collateral or from taking any other action which may be necessary hereunder or under any of the Loan Documents, Agent may appoint an additional Person as a separate collateral agent or co-collateral agent which is not so prohibited from taking any of such actions or exercising any of such powers, rights or remedies. If Agent shall appoint an additional Person as a separate collateral agent or co-collateral agent as provided above, each and every remedy, power, right, claim, demand or cause of action intended by any of the Loan Documents to be exercised by or vested in or conveyed to Agent with respect thereto shall be exercisable by and vested in such separate collateral agent or co-collateral agent, but only to the extent necessary to enable such separate collateral agent or co-collateral agent to exercise such powers, rights and remedies, and every covenant and obligation necessary to the exercise thereof by such separate collateral agent or co-collateral agent shall run to and be enforceable by either of them. Should any instrument from Lenders be required by the separate collateral agent or co-collateral agent so appointed by Agent in order more fully and certainly to vest in and confirm to him or it such rights, powers, duties and obligations, any and all of such instruments shall, on request, be executed, acknowledged and delivered by Lenders whether or not a Default or Event of Default then exists. In case any separate collateral agent or co-collateral agent, or a successor to either, shall die, become incapable of acting, resign or be removed, all the estates, properties, rights, powers, duties and obligations of such separate collateral agent or co-collateral agent, so far as permitted by Applicable Law, shall vest in and be exercised by Agent until the appointment of a new collateral agent or successor to such separate collateral agent or co-collateral agent.

12.9 Consents, Amendments and Waivers.

12.9.1 No amendment or modification of any provision of this Agreement shall be effective without the prior written agreement of Required Lenders and Borrowers, and no waiver of any Default or Event of Default shall be effective without the prior written consent of Required Lenders; provided, however, that (i) without the prior written consent of Agent, no amendment or waiver shall be effective with respect to any provision in any of the Loan Documents (including this **Section 12**) to the extent such provision relates to the rights, duties or immunities of Agent; (ii) without the prior written consent of each affected Lender, no modification shall be effective that would reduce the amount of, or waive or delay payment of, any principal (excluding mandatory prepayments (other than at the Maturity Date)), interest, fees, Yield Maintenance Premium or other amounts payable to such Lender hereunder or under any other Loan Document; and (iii) without the prior written consent of all Lenders, no modification shall be effective that would (a) extend the Maturity Date; (b) alter **Sections 4.6, 6.1** (except to add Collateral), **12.5** or **12.9**; (c) amend the definitions of Pro Rata or Required Lenders; (d) release Collateral with a book value greater than \$1,500,000 during any calendar

year, except as currently contemplated by the Loan Documents; (e) release any Obligor from liability for any Obligations, if such Obligor is Solvent at the time of the release; (f) increase the amount of the Term Loans or any Lender's Commitment Percentage; (g) subordinate all or any portion of the Term Loans to any Debt (other than the First Priority Debt in accordance with the Subordination Agreement), or (h) permit any Obligor to assign or transfer any of its rights or obligations under any of the Loan Documents other than in connection with a transaction permitted hereunder. Any waiver or consent granted by Lenders hereunder shall be effective only if in writing and then only in the specific instance and for the specific purpose for which it was given.

12.9.2 In connection with any proposed amendment to any of the Loan Documents or waiver of any of the terms thereof or any Default or Event of Default thereunder, Borrowers shall not solicit, request or negotiate for or with respect to any such proposed amendment or waiver of any of the provisions of this Agreement or any of the other Loan Documents unless each Lender shall be informed thereof by Borrowers or Agent (to the extent known by Agent) and shall be afforded an opportunity of considering the same and supplied by Borrowers with sufficient information to enable it to make an informed decision with respect thereto. Borrowers will not, directly or indirectly, pay or cause to be paid any remuneration or other thing of value, whether by way of supplemental or additional interest, fee or otherwise, to any Lender (in its capacity as a Lender hereunder) as consideration for or as an inducement to the consent to or agreement by such Lender with any waiver or amendment of any of the terms and provisions of this Agreement or any of the other Loan Documents unless such remuneration or thing of value is concurrently paid, on the same terms, on a Pro Rata basis to all Lenders.

12.10 Due Diligence and Non-Reliance.

Each Lender hereby acknowledges and represents that it has, independently and without reliance upon Agent or the other Lenders, and based upon such documents, information and analyses as it has deemed appropriate, made its own credit analysis of each Obligor and its own decision to enter into this Agreement and to fund the Term Loans to be made by it hereunder and each Secured Party has made such inquiries as it feels necessary concerning the Loan Documents, the Collateral and each Obligor. Each Secured Party hereby further acknowledges and represents that the other Secured Parties have not made any representations or warranties to it concerning any Obligor, any of the Collateral or the legality, validity, sufficiency or enforceability of any of the Loan Documents. Each Secured Party also hereby acknowledges that it will, independently and without reliance upon the other Secured Party, and based upon such financial statements, documents and information as it deems appropriate at the time, continue to make and rely upon its own credit decisions in making the Term Loans and in taking or refraining to take any other action under this Agreement or any of the other Loan Documents. Except for notices, reports and other information expressly required to be furnished to any Secured Party by Agent hereunder, Agent shall not have any duty or responsibility to provide any Secured Party with any notices, reports or certificates furnished to Agent by any Obligor or any credit or other information concerning the affairs, financial condition, business or Properties of any Obligor (or any of its Affiliates) which may come into possession of Agent or any of its Affiliates.

12.11 Representations and Warranties of Lenders.

By its execution of this Agreement, each Lender hereby represents and warrants to Borrowers and the other Lenders that it has the power to enter into and perform its obligations under this Agreement and the other Loan Documents, and that it has taken all necessary and appropriate action to authorize its execution and performance of this Agreement and the other Loan Documents to which it is a party, each of which will be binding upon it and the obligations imposed upon it herein or therein will be enforceable against it in accordance with the respective terms of such documents.

12.12 Several Obligations.

The obligations and commitments of each Lender under this Agreement and the other Loan Documents are several and neither Agent nor any Lender shall be responsible for the performance by the other Lenders of its obligations or commitments hereunder or thereunder. Notwithstanding any liability of Lenders stated to be joint and several to third Persons under any of the Loan Documents, such liability shall be shared, as among Lenders, Pro Rata.

12.13 Individual Capacities.

With respect to its obligation to lend under this Agreement and each Term Loan issued to it, Agent shall have the same rights and powers hereunder and under the other Loan Documents as any other Lender or holder of a Term Loan and may exercise the same as though it were not performing the duties specified herein; and the terms “Lenders,” “Required Lender” or any similar term shall, unless the context clearly otherwise indicates, include Agent in its capacity as a Lender.

12.14 No Third Party Beneficiaries.

This **Section 12** is not intended to confer any rights or benefits upon Borrowers or any other Person except Secured Parties and Agent, and no Person (including Borrowers) other than Secured Parties and Agent shall have any right to enforce any of the provisions of this **Section 12** except as expressly provided in **Section 12.16** hereof. As between Borrowers and Agent, any action that Agent may take or purport to take on behalf of Secured Parties under any of the Loan Documents shall be conclusively presumed to have been authorized and approved by Secured Parties as herein provided.

12.15 Notice of Transfer.

Agent may deem and treat a Lender party to this Agreement as the owner of such Lender’s portion of the Term Loans for all purposes, unless and until a written notice of the assignment or transfer thereof executed by such Lender has been received by Agent.

12.16 Remittance of Payments and Collections.

12.16.1 All payments by any Lender to Agent shall be made not later than the time set forth elsewhere in this Agreement on the Business Day such payment is due; provided, however, that if such payment is due on demand by Agent and such demand is made on the paying Lender after 11:00 a.m. on such Business Day, then payment shall be made by 11:00 a.m.

on the next Business Day. Payment by Agent to any Lender shall be made by wire transfer, promptly following Agent's receipt of funds for the account of such Lender and in the type of funds received by Agent; provided, however, that if Agent receives such funds at or prior to 12:00 noon, Agent shall pay such funds to such Lender by 2:00 p.m. on such Business Day, but if Agent receives such funds after 12:00 noon, Agent shall pay such funds to such Lender by 2:00 p.m. on the next Business Day.

12.16.2 With respect to the payment of any funds from Agent to a Lender or from a Lender to Agent, the party failing to make full payment when due pursuant to the terms hereof shall, on demand by the other party, pay such amount together with interest thereon at the Federal Funds Rate. In no event shall Borrowers be entitled to receive any credit for any interest paid by a Lender to Agent, nor shall any Defaulting Lender be entitled to interest on any amounts held by Agent pursuant to **Section 3.2**.

12.16.3 If Agent pays any amount to a Lender in the belief or expectation that a related payment has been or will be received by Agent from an Obligor and such related payment is not received by Agent, then Agent shall be entitled to recover such amount from each Lender that receives such amount. If Agent determines at any time that any amount received by it under this Agreement or any of the other Loan Documents must be returned to an Obligor or paid to any other Person pursuant to any Applicable Law, court order or otherwise, then, notwithstanding any other term or condition of this Agreement or any of the other Loan Documents, Agent shall not be required to distribute such amount to any Lender.

12.17 Subordination Agreement.

12.17.1 Each Lender hereby agrees to be bound by the terms of the Subordination Agreement.

12.17.2 Each Lender (and each person that becomes a Lender hereunder pursuant to **Section 13.3**) agrees that Agent may take such actions on its behalf as is contemplated by the terms of the Subordination Agreement.

12.17.3 Notwithstanding anything contained herein to the contrary, the Liens granted to Agent, for the benefit of the Secured Parties, pursuant to this Agreement and the other Loan Documents, and the exercise of any right or remedy by Agent, for the benefit of the Secured Parties, under this Agreement and the other Loan Documents (other than the Subordination Agreement), are subject to the provisions of the Subordination Agreement. In the event of any conflict between the terms of the Subordination Agreement and this Agreement and the other Loan Documents (other than the Subordination Agreement), the terms of the Subordination Agreement shall govern and control.

SECTION 13. BENEFIT OF AGREEMENT; ASSIGNMENTS AND PARTICIPATIONS

13.1 Successors and Assigns.

This Agreement shall be binding upon and inure to the benefit of Borrowers, Agent, Secured Parties, and their respective successors and permitted assigns, except that (i) no Borrower shall have the right to assign its rights or delegate its obligations under any Loan Documents; and (ii) any assignment by a Lender must be made in compliance with **Section 13.3**. Agent may treat the Person which made any Term Loans as the owner thereof for all purposes until such Person makes an assignment in accordance with **Section 13.3**. Any authorization or consent of a Lender shall be conclusive and binding on any subsequent transferee or assignee of such Lender.

13.2 Participations.

13.2.1 Permitted Participants; Effect. Subject to **Section 13.2.3**, any Lender may sell to a financial institution ("Participant") a participating interest in the rights and obligations of such Lender under any Loan Documents. Despite any sale by a Lender of participating interests to a Participant, such Lender's obligations under the Loan Documents shall remain unchanged, it shall remain solely responsible to the other parties hereto for performance of such obligations, it shall remain the holder of its Term Loans for all purposes, all amounts payable by Borrowers shall be determined as if it had not sold such participating interests, and Borrowers and Agent shall continue to deal solely and directly with such Lender in connection with the Loan Documents. Each Lender shall be solely responsible for notifying its Participants of any matters under the Loan Documents, and Agent and the other Lenders shall not have any obligation or liability to any such Participant. A Participant that would be a Foreign Lender if it were a Lender shall be entitled to the benefits of **Section 4.9** if such Participant has complied with the requirements of **Section 4.10** as if it were a Lender, it being understood that the documentation described in **Section 4.10** shall be delivered by the Participant to the Lender granting the participation) with respect to its participation in the Term Loan outstanding from time to time; provided, that such Participant agrees to be subject to the provisions of **Section 2.8** as if it were an assignee under **Section 13.3.1**; provided, further that no Participant shall be entitled to receive any greater amount pursuant to such Section than the transferor Lender would have been entitled to receive in respect of the amount of the participation transferred by such transferor Lender to such Participant had no such transfer occurred. Each Lender that sells a participating interest shall, acting solely for this purpose as an agent of the Borrowers, maintain a register on which it enters the name and address of each Participant and the principal amounts (and stated interest) of each Participant's interest in the Loan Documents or other obligations under this Agreement (the "Participant Register"); provided, however, that no Lender shall have any obligation to disclose all or any portion of the Participant Register to any Person (including the identity of any Participant or any information relating to a Participant's interest in any commitments, loans, letters of credit or its other obligations under any Loan Document) except to the extent that such disclosure is necessary to establish that such commitment, loan letter of credit or other obligation is in "registered form" under Section 5f.103-1(c) of the United States Treasury Regulations. The entries in the Participant Register shall be conclusive absent manifest error, and such Lender shall treat each Person whose name is recorded in the Participant Register as the owner of such participation for all purposes of this Agreement notwithstanding any notice to the contrary.

13.2.2 Voting Rights. Each Lender shall retain the sole right to approve, without the consent of any Participant, any amendment, waiver or other modification of any Loan Document other than that which (i) forgives principal, interest or fees, reduces the stated interest rate or fees payable with respect to any Term Loans in which such Participant has an interest, (ii) postpones the Maturity Date or any date fixed for any regularly scheduled payment of principal, interest or fees on the Term Loans, or (iii) releases any Borrower, Obligor or substantially all of the Collateral.

13.2.3 Benefit of Set-Off. Borrowers agree that each Participant shall have a right of set-off in respect of its participating interest to the same extent as if such interest were owing directly to a Lender, and each Lender shall also retain the right of set-off with respect to any participating interests sold by it. By exercising any right of set-off, a Participant agrees to share with Lenders all amounts received through its set-off, in accordance with **Section 12.5** as if such Participant were a Lender.

13.3 Assignments.

13.3.1 Permitted Assignments. A Lender may assign to an Eligible Assignee any of its rights and obligations under the Loan Documents, as long as (i) each assignment (other than an assignment to a Lender or an Affiliate of a Lender) is in a minimum principal amount of \$5,000,000 (or, if less, the entire amount of such Lender's portion of the Term Loans) the parties to each such assignment shall execute and deliver to EB an Assignment and Acceptance. Nothing herein shall limit the right of a Lender to pledge or assign any rights under the Loan Documents to secure obligations of such Lender, including a pledge or assignment to a Federal Reserve Bank; provided, however, that no such pledge or assignment shall release such Lender from its obligations hereunder or substitute the pledge or assignee for such Lender as a party hereto. Notwithstanding anything in the Loan Documents to the contrary, (i) no Lender nor any of its Affiliates shall be required to execute or deliver an Assignment and Acceptance in connection with any transaction involving such Lender and any of its Affiliates, or the lenders or funding or financing sources of such Lender or any of its Affiliates, (ii) subject to the provisions at the end of this paragraph, no lender to, funding or financing source of such Lender or any of its Affiliates shall be considered a Transferee, and (iii) there shall be no limitation or restriction on (A) the ability of such Lender or any of its Affiliates to assign or otherwise transfer any Loan Document, or any commitment or obligation thereunder, to any such Affiliate or lender or funding or financing source or (B) any such lender's or funding or financing source's ability, or the ability of any agent in respect thereof, to assign or otherwise transfer any Loan Document, or any commitment or obligation thereunder; provided that such Lender shall continue to be liable as a "Lender" under the Loan Documents unless such Affiliate, lender, funding or financing source or assignee, as the case may be, executes and delivers an Assignment and Acceptance and thereby becomes a "Lender" in accordance with the terms of this Agreement. The Agent, acting for this purpose as an agent of the Borrowers, shall maintain at one of its offices a copy of each Assignment and Acceptance delivered to it and a register for the recordation of the names and address of the Lenders, and the respective principal amounts (and stated interest on) owing to, each Lender pursuant to the terms hereof from time to time (the "Register"). The entries in the Register shall be conclusive absent manifest error, and the Borrowers, the Agent and the Lenders may treat each Person whose name is recorded in the Register pursuant to the terms hereof as a

Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. The Register shall be available for inspection by any Borrower and any Lender, at any reasonable time and from time to time upon reasonable prior notice. No assignment shall be effective for purposes of this Agreement unless it has been recorded in the Register as provided in this **Section 13.3.1**.

13.3.2 Effect; Effective Date. Upon delivery to Agent of an assignment notice in the form of **Exhibit D** and a processing fee of \$3,500 (unless otherwise agreed by Agent in its discretion), the assignment shall become effective as specified in the notice, if it complies with this **Section 13.3**. From such effective date, the Eligible Assignee shall for all purposes be a Lender under the Loan Documents, and shall have all rights and obligations of a Lender thereunder. Upon consummation of an assignment, the transferor Lender, Agent and Borrowers shall make appropriate arrangements for issuance of replacement and/or new Notes, as applicable. The transferee Lender shall comply with **Section 4.10** and deliver, upon request, an administrative questionnaire satisfactory to Agent.

13.3.3 Dissemination of Information. Each Borrower authorizes each Lender and Agent to disclose to any Participant, any Eligible Assignee or any other Person acquiring an interest in the Loan Documents by operation of law (each a “Transferee”), and any prospective Transferee, any and all information in Agent’s or such Lender’s possession concerning such Borrower, its Subsidiaries or the Collateral, subject to appropriate confidentiality undertakings on the part of such Transferee.

13.3.4 Certain Assignees. No assignment or participation may be made to a Borrower, Affiliate of a Borrower or a natural person.

SECTION 14. MISCELLANEOUS

14.1 Power of Attorney

Each Borrower hereby irrevocably designates, makes, constitutes and appoints Agent (and all Persons designated by Agent) as such Borrower’s true and lawful attorney (and agent-in-fact) and Agent, or Agent’s designee, may, without notice to such Borrower and in either such Borrower’s or Agent’s name, but at the cost and expense of Borrowers:

14.1.1 At such time or times as Agent or said designee, in its sole discretion, may determine, endorse Borrower’s name on any Payment Item or proceeds of the Collateral which come into the possession of Agent or under Agent’s control.

14.1.2 At any time that an Event of Default exists: (i) demand payment of the Accounts from the Account Debtors, enforce payment of the Accounts by legal proceedings or otherwise, and generally exercise all of a Borrower’s rights and remedies with respect to the collection of the Accounts; (ii) settle, adjust, compromise, discharge or release any of the Accounts or other Collateral or any legal proceedings brought to collect any of the Accounts or other Collateral; (iii) sell or assign any of the Accounts and other Collateral upon such terms, for such amounts and at such time or times as Agent deems advisable; (iv) take control, in any manner, of any item of payment or proceeds relating to any Collateral; (v) prepare, file and sign

Borrower's name to a proof of claim in bankruptcy or similar document against any Account Debtor or to any notice of Lien, assignment or satisfaction of Lien or similar document in connection with any of the Collateral; (vi) receive, open and dispose of all mail addressed to such Borrower and to notify postal authorities to change the address for delivery thereof to such address as Agent may designate; (vii) endorse the name of such Borrower upon any of the items of payment or proceeds relating to any Collateral and deposit the same to the account of Agent on account of the Obligations; (viii) endorse the name of such Borrower upon any chattel paper, document, instrument, invoice, freight bill, bill of lading or similar document or agreement relating to any Accounts or Inventory of any Obligor and any other Collateral; (ix) use such Borrower's stationery and sign the name of such Borrower to verifications of the Accounts and notices thereof to Account Debtors; (x) use the information recorded on or contained in any data processing equipment and computer hardware and software relating to the Accounts, Inventory, Equipment or any other Collateral; (xi) make and adjust claims under policies of insurance; (xii) sign the name of such Borrower on any proof of claim in bankruptcy against Account Debtors and on notices of Liens, claims of mechanic's Liens or assignments or releases of mechanic's Liens securing any Accounts; (xiii) take all action as may be necessary to obtain the payment of any letter of credit or banker's acceptance of which such Borrower is a beneficiary; and (xiv) do all other acts and things necessary, in Agent's determination, to fulfill such Borrower's obligations under this Agreement.

14.2 General Indemnity.

Each Borrower hereby agrees to indemnify and defend the Indemnitees and to hold the Indemnitees harmless from and against any Claim ever suffered or incurred by any of the Indemnitees arising out of or related to this Agreement or any of the other Loan Documents, the performance by Agent or Lenders of their duties or the exercise of any of their rights or remedies under this Agreement or any of the other Loan Documents, or as a result of such Borrower's failure to observe, perform or discharge any of such Borrower's duties hereunder. Each Borrower shall also indemnify and defend the Indemnitees against and save the Indemnitees harmless from all Claims of any Person arising out of, related to, or with respect to any transactions entered into pursuant to this Agreement or Agent's Lien upon the Collateral. Without limiting the generality of the foregoing, this indemnity shall extend to any Claims asserted against or incurred by any of the Indemnitees by any Person under any Environmental Laws or similar laws by reason of such Borrower's or any other Person's failure to comply with, or liability pursuant to, Environmental Law, or by reason of the release of or exposure of any Person to any Hazardous Material at any Real Estate currently or formerly owned, leased or operated by any Borrower. Additionally, if any Taxes (excluding Taxes imposed upon or measured solely by the net income of Agent and Lenders, but including any intangibles tax, stamp tax, recording tax or franchise tax) shall be payable by Agent or any Obligor on account of the execution or delivery of this Agreement, or the execution, delivery, issuance or recording of any of the other Loan Documents, or the creation or repayment of any of the Obligations hereunder, by reason of any Applicable Law now or hereafter in effect, Borrowers will pay (or will promptly reimburse Agent and Lenders for the payment of) all such Taxes, including any interest and penalties thereon, and will indemnify and hold Indemnitees harmless from and against all liability in connection therewith. The foregoing indemnities shall not apply to Claims incurred by any of the Indemnitees to the extent incurred as a direct result of their own gross

negligence or willful misconduct or that arise out of any disputes arising solely out of the relationship between Agent and any Lender.

Each Indemnatee will promptly notify Borrowers of any investigation, litigation or proceeding asserted or threatened in writing or instituted against it that may give rise to a claim under **Section 14.2**; provided, however, that the failure to so notify Borrowers shall in no way impair Borrowers' obligations under this **Section 14.2**. Borrowers, at the request of any Indemnatee, shall have the obligation to defend such Indemnatee against any such investigation, litigation or proceeding and shall promptly do so with representation by legal counsel reasonably satisfactory to such Indemnatee, and the Indemnatee shall use its reasonable efforts to cooperate in such defense. In all events, such Indemnatee shall have the right to have legal counsel of its choice participate in such defense; provided, however, that if Borrowers are defending such Indemnatee at such Indemnatee's request, the legal fees associated with Indemnatee's counsel participating in such defense, if any, shall be paid by such Indemnatee. If such obligation to defend is not requested by an Indemnatee, Borrowers' may participate in the defense thereof and any settlement negotiations, at Borrowers' expense, with legal counsel of Borrowers' choice (which counsel shall be reasonably satisfactory to such Indemnatee). No action taken by legal counsel chosen by such Indemnatee in defending against any such investigation, litigation or proceeding, shall vitiate or in any way impair Borrowers' obligation and duty hereunder to indemnify and hold harmless such Indemnatee.

14.3 Survival of All Indemnities.

Notwithstanding anything to the contrary in this Agreement or any of the other Loan Documents, the obligation of each Borrower and each Lender with respect to each indemnity given by it in this Agreement, whether given by a Borrower to Agent Indemnitees or Lender Indemnitees, or by any Lender to any Agent Indemnitees shall survive the Full Payment of all Obligations.

14.4 Modification of Agreement.

Subject to **Section 12.9** hereof, no term or provision of this Agreement may be modified, altered, amended or waived, except by an agreement in writing signed by Borrowers, Agent and Lenders; provided, however, that no consent, written or otherwise, of Borrowers shall be necessary or required in connection with any amendment of any of the provisions of **Sections 4.5** or **12** so long as such amendment imposes no additional obligations on Borrowers, or any other provision of this Agreement that affects only the rights, duties and responsibilities of Lenders and Agent as among themselves so long as no such amendment imposes any additional obligations on Borrowers. Any modification, amendment or waiver that Prospect Capital Corporation is a required signatory thereto, whether in its capacity as an Agent or a Lender, must be signed by either John F. Barry III as Chief Executive Officer or M. Grier Eliasek as Chief Operating Officer, or the successor of either or such other person notified to the Borrowers and the Agent for such purpose.

14.5 Severability.

All provisions of this Agreement are severable, and the unenforceability or invalidity of any of the provisions of this Agreement shall not affect the validity or enforceability of the remaining provisions of this Agreement. Should any part of this Agreement be held invalid or unenforceable in any jurisdiction, the invalid or unenforceable portion or portions shall be removed (and no more) only in that jurisdiction, and the remainder shall be enforced as fully as possible (removing the minimum amount possible) in that jurisdiction.

14.6 Cumulative Effect; Conflict of Terms.

The provisions of the Other Agreements and the Security Documents are hereby made cumulative with the provisions of this Agreement. Without limiting the generality of the foregoing, the parties acknowledge that this Agreement and the other Loan Documents may use several different limitations, tests or measurements to regulate the same or similar matters and that such limitations, tests and measures are cumulative and each must be performed, except as may be expressly stated to the contrary in this Agreement. Except as otherwise provided in any of the other Loan Documents by specific reference to the applicable provision of this Agreement, if any provision contained in this Agreement is in direct conflict with, or inconsistent with, any provision in any of the other Loan Documents, the provision contained in this Agreement shall govern and control.

14.7 Execution in Counterparts.

This Agreement and any amendments hereto may be executed in any number of counterparts, including facsimiles, and by different parties hereto in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

14.8 Consent.

Whenever Agent's or Lenders' consent is required to be obtained under this Agreement or any of the other Loan Documents as a condition to any action, inaction, condition or event, Agent and each Lender shall be authorized to give or withhold its consent in its sole and absolute discretion and to condition its consent upon the giving of additional collateral security for the Obligations, the payment of money or any other matter.

14.9 Notices.

All notices, requests and demands to or upon a party hereto shall be in writing and shall be sent either by hand, by overnight courier service, by certified or registered mail, by telefacsimile or by email (in portable document format ("pdf") or tagged image file format ("TIFF")), and shall be deemed to have been validly served, given or delivered (i) in the case of notices and other communications delivered by hand or overnight courier service, upon actual receipt thereof, (ii) in the case of notices and other communications delivered by certified or registered mail, upon the earlier of actual delivery and the third Business Day after the date deposited in the U.S. mail with postage prepaid and properly addressed, provided, that no notice or communication to Agent or to Prospect in its capacity as a Lender shall be effective until actually received by the Administrative Agent or Prospect, as applicable, (iii) in the case of

notices and other communications delivered by telefacsimile, upon receipt by the sender of an acknowledgment or transmission report generated by the machine from which the telefacsimile was sent indicating that the telefacsimile was sent in its entirety to the recipient's telefacsimile number and (iv) in the case of notices and other communications delivered by email, upon receipt by the sender of an acknowledgement from the intended recipient (such as by the "return receipt requested" function, a return email or other written acknowledgement), provided, that no notice or communication to the Agent or to Prospect in its capacity as a Lender shall be effective until receipt by the sender of written confirmation of receipt affirmatively initiated by the Agent or Prospect, as applicable, and further provided, in each case, that if a notice or other communication would be deemed to have been given in accordance with the foregoing at any time other than during the recipient's normal business hours on a Business Day for such recipient, such notice or other communication shall be deemed given on the next succeeding Business Day for such recipient, and provided, further, that no notice to Prospect shall be effective until delivered by at least two, not one, of the methods described in clauses (i) through (iv) above, in each case addressed to the noticed party at the address shown for such party on the signature page hereof or, in the case of a Person who becomes a Lender after the date hereof, at the address shown on the Assignment and Acceptance by which such Person became a Lender. Notwithstanding the foregoing, no notice to or upon any Borrower pursuant to **Section 11.1.4** shall be effective until such notice is actually delivered to such Borrower at its address for notices. Any written notice, request or demand that is not sent in conformity with the provisions hereof shall nevertheless be effective on the date that such notice, request or demand is actually received by the individual to whose attention at the noticed party such notice, request or demand is required to be sent. Agent and Lenders make no assurances as to the privacy and security of electronic communications. Voice mail may not be used as effective notice under the Loan Documents. Agent and Lenders may rely upon any notices purportedly given by or on behalf of any Borrower even if such notices were not made in a manner specified herein, were incomplete or were not confirmed, or if the terms thereof, as understood by the recipient, varied from a later confirmation. Each Borrower shall indemnify and hold harmless each Indemnitee from any liabilities, losses, costs and expenses arising from any telephonic communication purportedly given by or on behalf of a Borrower. Each Borrower and each Lender acknowledges and agrees that the use of electronic transmission in general, and email in particular, is not necessarily secure and that there are risks associated with the use thereof, including risks of interception, disclosure and abuse, and each indicates it assumes and accepts such risks by hereby authorizing the use of electronic transmission. Any party hereto may change its address, facsimile number or email address for notices and other communications hereunder by notice to all of the other parties hereto in accordance with the foregoing.

14.10 Performance of Borrowers' Obligations.

If a Borrower shall fail to discharge any covenant, duty or obligation hereunder or under any of the other Loan Documents, Agent may, in its sole discretion at any time or from time to time, for such Borrower's account and at Borrowers' expense, pay any amount or do any act required of a Borrower hereunder or under any of the Loan Documents or otherwise lawfully requested by Agent to enforce any of the Loan Documents or Obligations, preserve, protect, insure or maintain any of the Collateral, or preserve, defend, protect or maintain the validity or priority of Agent's Liens in any of the Collateral, including the payment of any judgment against

a Borrower, any insurance premium, any warehouse charge, any finishing or processing charge, any landlord claim, any other Lien upon or with respect to any of the Collateral. All payments that Agent may make under this Section and all out-of-pocket costs and expenses (including Extraordinary Expenses) that Agent pays or incurs in connection with any action taken by it hereunder shall be reimbursed to Agent by Borrowers **on demand**, with interest from the date such payment is made or such costs or expenses are incurred until paid in full at the Default Rate. Any payment made or other action taken by Agent under this Section shall be without prejudice to any right to assert, and without waiver of, an Event of Default hereunder and to proceed thereafter as provided herein or in any of the other Loan Documents.

14.11 Credit Inquiries.

Each Borrower hereby authorizes and permits Agent and Lenders (but Agent and Lenders shall have no obligation) to respond to usual and customary credit inquiries from third parties concerning such Borrower or any of its Subsidiaries.

14.12 Time of Essence.

Time is of the essence with respect to this Agreement, the Other Agreements, the Security Documents and all Obligations.

14.13 Indulgences Not Waivers.

Agent's or any Lender's failure at any time or times hereafter, to require strict performance by each Borrower of any provision of this Agreement shall not waive, affect or diminish any right of Agent or any Lender thereafter to demand strict compliance and performance therewith. A waiver or consent, express or implied, of or to any breach or default by any party in the performance by that party of its obligations with respect to the agreement is not a waiver or consent of or to any other breach or default in the performance by that party of the same or any other obligations of that party.

14.14 Entire Agreement; Appendix A, Exhibits and Schedules.

This Agreement and the other Loan Documents, together with all other instruments, agreements and certificates executed by the parties in connection therewith or with reference thereto, embody the entire understanding and agreement between the parties hereto and thereto with respect to the subject matter hereof and thereof and supersede all prior agreements, understandings and inducements, whether express or implied, oral or written. Appendix A, each of the Exhibits and each of the Schedules attached hereto are incorporated into this Agreement and by this reference made a part hereof.

14.15 Interpretation.

No provision of this Agreement or any of the other Loan Documents shall be construed against or interpreted to the disadvantage of any party hereto by any court or other governmental or judicial authority by reason of such party having, or being deemed to have, structured, drafted or dictated such provision.

14.16 Obligations of Lenders Several.

The obligations of each Lender hereunder are several, and no Lender shall be responsible for the obligations of any other Lender. Nothing contained in this Agreement and no action taken by Lenders pursuant hereto shall be deemed to constitute Lenders to be a partnership, association, joint venture or any other kind of entity, nor to constitute control of any Borrower. The amounts payable at any time hereunder to each Lender shall be a separate and independent debt. It shall not be necessary for Agent or any other Lender to be joined as an additional party in any proceeding for such purpose.

14.17 Advertising and Publicity.

With the prior consent of Borrowers (which shall not be unreasonably withheld or delayed), Agent, on behalf of Lenders, may issue and disseminate to the public (by advertisement or otherwise) information describing the credit accommodations made available by Lenders pursuant to this Agreement, including the name and address of Borrowers, the amount and security for the credit accommodations and the general nature of Borrowers' business; provided, however, that detail regarding terms (such as interest rate) may be provided only to industry publications, such as the "LPC Gold Sheets."

14.18 Confidentiality.

Agent and Lenders each agrees to exercise reasonable efforts (and, in any event, with at least the same degree of care as it ordinarily exercises with respect to confidential information of its other customers) to keep any confidential information that is delivered or made available by Borrowers to it and that is marked confidential, including information made available to Agent or any Lender in connection with a visit or investigation by any Person contemplated in **Section 9.1.1** hereof, confidential from any Person other than their respective Affiliates, general and limited partners, investors and individuals employed or retained by Agent or such Lender who are or are expected to become engaged in evaluating, approving, structuring, administering or otherwise giving professional advice with respect to the Term Loans or Collateral, including any of their respective legal counsel, auditors or other professional advisors; provided, however, that nothing herein shall prevent Agent or any Lender from disclosing such confidential information (i) to any party to this Agreement from time to time or any Participant, (ii) pursuant the order of any court or administrative agency, (iii) upon the request or demand of any regulatory agency or self-regulatory authority purporting to have jurisdiction over it or its Affiliates, (iv) which has been publicly disclosed other than by an act or omission of Agent or any Lender except as permitted herein or which becomes available to Agent or any Lender on a non-confidential basis from a source other than Obligor, (v) to the extent reasonably required in connection with any litigation (with respect to any of the Loan Documents or any of the transactions contemplated thereby) to which Agent, any Lender or their respective Affiliates may be a party (and, to the extent reasonably practicable, prior notice of such required disclosure shall be provided to Borrowers), (vi) in connection with any action or proceeding, or other exercise of rights or remedies, relating to any Loan Documents or Obligations, (vii) to any actual or proposed Participant, Assignee, counterparty or advisors to any Transferee of all or part of a Lender's rights hereunder so long as such Transferee has agreed in writing to be bound by the provisions of this Section, (viii) to the National Association of Insurance Commissioners or any similar

organization or to any nationally recognized rating agency that requires access to information about a Lender's portfolio in connection with ratings issued with respect to such Lender, (ix) to the extent reasonably required by Applicable Law or (x) with the consent of Borrowers.

14.19 Patriot Act Notice.

Agent and Lenders hereby notify Borrowers that pursuant to the requirements of the Patriot Act, Agent and Lenders are required to obtain, verify and record information that identifies each Borrower, including its legal name, address, tax ID number and other information that will allow Agent and Lenders to identify it in accordance with the Patriot Act. Agent and Lenders will also require information regarding each personal guarantor, if any, and may require information regarding Borrowers' management and owners, such as legal name, address, social security number and date of birth.

14.20 Governing Law; Consent to Forum.

This Agreement shall be governed by and construed in accordance with the laws of the State of New York; provided, however, that if any of the Collateral shall be located in any jurisdiction other than New York, the laws of such jurisdiction shall govern the method, manner and procedure for foreclosure of Agent's Lien upon such Collateral and the enforcement of Agent's other remedies in respect of such Collateral to the extent that the laws of such jurisdiction are different from or inconsistent with the laws of the State of New York. As part of the consideration for new value received, and regardless of any present or future domicile or principal place of business of Borrowers, any Lender or Agent, each Borrower hereby consents and agrees that the state courts for the State of New York, or, at Agent's option, the United States District Court for the Southern District of New York, shall have jurisdiction to hear and determine any claims or disputes among Borrowers, Agent and Lenders pertaining to this Agreement or to any matter arising out of or related to this Agreement. Each Borrower expressly submits and consents in advance to such jurisdiction in any action or suit commenced in any such Court, and each Borrower hereby waives any objection that such Borrower may have based upon lack of personal jurisdiction, improper venue or forum non conveniens and hereby consents to the granting of such legal or equitable relief as is deemed appropriate by such Court. Each Borrower hereby waives personal service of the summons, complaint and other process issued in any such action or suit and agrees that service of such summons, complaint and other process may be made by certified mail addressed to such Borrower at the address set forth in this Agreement and that service so made shall be deemed completed upon the earlier of such Borrower's actual receipt thereof or three (3) days after deposit in the U.S. mails, proper postage prepaid. Nothing in this Agreement shall be deemed or operate to affect the right of Agent to serve legal process in any other manner permitted by law, or to preclude the enforcement by Agent of any judgment or order obtained in such forum or the taking of any action under this Agreement to enforce same in any other appropriate forum or jurisdiction.

14.21 Waivers by Borrowers.

To the fullest extent permitted by Applicable Law, each Borrower waives (i) the right to trial by jury (which Agent and each Lender hereby also waives) in any action, suit, proceeding or counterclaim of any kind arising out of or related to any of the Loan Documents, the Obligations or the Collateral; (ii) presentment, demand and protest and notice of presentment, protest, default, non payment, maturity, release, compromise, settlement, extension or renewal of any or all commercial paper, accounts, contract rights, documents, instruments, chattel paper and guaranties at any time held by Agent on which such Borrower may in any way be liable and hereby ratifies and confirms whatever Agent may do in this regard; (iii) notice prior to taking possession or control of the Collateral or any bond or security which might be required by any court prior to allowing Agent to exercise any of Agent's remedies; (iv) the benefit of all valuation, appraisal and exemption laws; (v) any claim against Agent or any Lender, on any theory of liability, for special, indirect, consequential, or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, any of the Loan Documents, any transaction thereunder or the use of the proceeds of any Term Loans; and (vi) notice of acceptance hereof. Each Borrower acknowledges that the foregoing waivers are a material inducement to Agent's and Lender's entering into this Agreement and that Agent and Lenders are relying upon the foregoing waivers in its future dealings with Borrowers. Each Borrower warrants and represents that it has reviewed the foregoing waivers with its legal counsel and has knowingly and voluntarily waived its jury trial rights following consultation with legal counsel. In the event of litigation, this Agreement may be filed as a written consent to a trial by the Court.

14.22 Binding Effect; Further Assurances.

This Agreement shall become effective at such time, on or after the Closing Date, that the conditions precedent set forth in **Section 10.1** have been satisfied and when it shall have been executed by Borrowers and Agent, and Agent shall receive copies hereof (telecopied or otherwise) which, when taken together, bear the signatures of each Lender and thereafter this Agreement shall be binding upon and inure to the benefit of each Borrower, each Lender and Agent, together with their respective successors and assigns. Each Borrower agrees, upon the request of Agent and/or the Required Lenders, to promptly take such actions, as reasonably requested, as are appropriate to carry out the intent of this Agreement and the other Loan Documents, including, but not limited to, such actions as are reasonably necessary to ensure that Agent, for its own benefit and the ratable benefit of Lenders, have a perfected security interest in all collateral securing the Obligations, subject to no Liens other than Permitted Liens.

14.23 Obligations Subject to Subordination Agreement.

This instrument and the rights and Obligations evidenced hereby are subordinate, in the manner and to the extent set forth in that certain Intercreditor and Subordination Agreement (the "Subordination Agreement") dated as of September 28, 2012 between the Agent, as second priority agent for the Lenders and Bank of America, N.A., as First Priority Agent for the First Priority Lenders, to the indebtedness (including interest) owed by Ellett Brothers, LLC ("Ellett"), the other borrowers from time to time party thereto (together with Ellett, individually a "Borrower" and collectively the "Borrowers"), pursuant to that certain Third Amended and Restated Loan and Security Agreement, dated as of September 28, 2012, by and among the

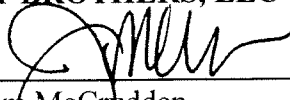
Borrowers, the lenders from time to time party thereto and Bank of America, N.A., as agent, and the indebtedness owed by any guarantors under guaranties with respect thereto, as such agreements have been and hereafter may be amended, restated, supplemented, extended, renewed, refinanced, replaced or otherwise modified and to any indebtedness refinancing the indebtedness under such agreements as contemplated by the Subordination Agreement; and each holder of this instrument, by its acceptance hereof, irrevocably agrees to be bound by the provisions of the Subordination Agreement.

*[Remainder of the page intentionally left blank;
signatures commence on the following page]*

IN WITNESS WHEREOF, this Agreement has been duly executed on the day and year specified at the beginning of this Agreement.

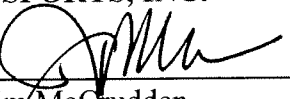
BORROWERS:

ELLETT BROTHERS, LLC

By: 
Name: Jim McCrudden
Title: Vice President - Finance, Secretary and
Chief Financial Officer

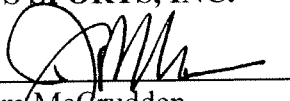
Address: Ellett Brothers
267 Columbia Avenue
Chapin, SC 29036
Attention: Jim McCrudden
Telecopy No.: 803-932-1500

EVANS SPORTS, INC.

By: 
Name: Jim McCrudden
Title: Vice President - Finance and Secretary

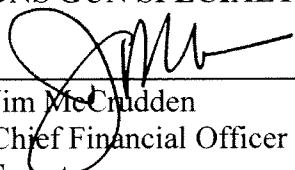
Address: Ellett Brothers
267 Columbia Avenue
Chapin, SC 29036
Attention: Jim McCrudden
Telecopy No.: 803-932-1500

JERRY'S SPORTS, INC.

By: 
Name: Jim McCrudden
Title: Chief Financial Officer, Chief Operating
Officer and Assistant Secretary

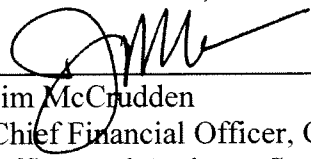
Address: Ellett Brothers
267 Columbia Avenue
Chapin, SC 29036
Attention: Jim McCrudden
Telecopy No.: 803-932-1500

SIMMONS GUN SPECIALTIES, INC.

By: 
Name: Jim McCrudden
Title: Chief Financial Officer and Assistant Secretary

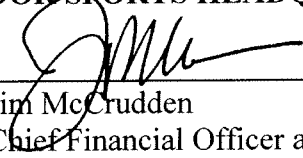
Address: Ellett Brothers
267 Columbia Avenue
Chapin, SC 29036
Attention: Jim McCrudden
Telecopy No.: 803-932-1500

BONITZ BROTHERS, INC.

By: 
Name: Jim McCrudden
Title: Chief Financial Officer, Chief Operating Officer and Assistant Secretary

Address: Ellett Brothers
267 Columbia Avenue
Chapin, SC 29036
Attention: Jim McCrudden
Telecopy No.: 803-932-1500

OUTDOOR SPORTS HEADQUARTERS, INC.

By: 
Name: Jim McCrudden
Title: Chief Financial Officer and Assistant Secretary

Address: Ellett Brothers
267 Columbia Avenue
Chapin, SC 29036
Attention: Jim McCrudden
Telecopy No.: 803-932-1500

AGENT:

PROSPECT CAPITAL CORPORATION

By: *M. David Elisek*
Name: *M. DAVID ELISEK*
Title: *PRESIDENT*

LENDER:

PROSPECT CAPITAL CORPORATION

By: 
Name: M. Grier Eliasek
Title: President

Address for Notice:

Prospect Capital Corporation
10 East 40th Street, 44th Floor
New York, New York 10016
Attention: General Counsel and Geoffrey Chang
Facsimile No.: 212-448-9652
Email: fax@prospectstreet.com
pl@prospectstreet.com
gchang@prospectstreet.com
grier@prospectstreet.com
jbarry@prospectstreet.com

LENDER:

SUMMIT PARTNERS CREDIT FUND, L.P.

By: Summit Partners Credit GP, L.P.

Its: General Partner

By: Summit Partners Credit GP, LLC

Its: General Partner

By: 

Name: Martin Mannion

Title: Authorized Signatory

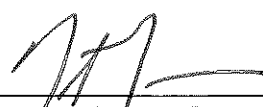
**SUMMIT PARTNERS CREDIT FUND A-1,
L.P.**

By: Summit Partners Credit GP A-1, L.P.

Its: General Partner

By: Summit Partners Credit GP A-1, LLC

Its: General Partner

By: 

Name: Martin Mannion

Title: Authorized Signatory

Address for Notice:

c/o Summit Partners, L.P.

222 Berkeley Street, 18th Floor

Boston, MA 02116

Fax: 617.498.4901

Attn: Todd Hearle

LENDER:

SUMMIT INVESTORS I, LLC

By: Summit Investors Management, LLC
Its: Manager

By: Summit Partners, L.P.
Its: Manager

By: Summit Master Company, LLC
Its: General Partner

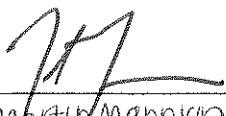
By: 
Name: Martin Mannion
Title: Authorized Signatory

SUMMIT INVESTORS I (UK), LP

By: Summit Investors Management, LLC
Its: Manager

By: Summit Partners, L.P.
Its: Manager

By: Summit Master Company, LLC
Its: General Partner

By: 
Name: Martin Mannion
Title: Authorized Signatory

Address for Notice:
c/o Summit Partners, L.P.
222 Berkeley Street, 18th Floor
Boston, MA 02116
Fax: 617.498.4901
Attn: Todd Hearle

APPENDIX A

GENERAL DEFINITIONS

When used in the Second Lien Loan and Security Agreement dated September 28, 2012 (as at any time amended, the “Agreement”), by and among **ELLETT BROTHERS, LLC** (“EB”), a South Carolina limited liability company, **EVANS SPORTS, INC.** (“Evans”), a South Carolina corporation, **JERRY’S SPORTS, INC.** (“Jerry”), a Delaware corporation, **SIMMONS GUN SPECIALTIES, INC.** (“Simmons”), a Delaware corporation, **BONITZ BROTHERS, INC.** (“Bonitz”), a Delaware corporation, **OUTDOOR SPORTS HEADQUARTERS, INC.** (“Outdoor”), a Delaware corporation, each with its chief executive office and principal place of business at 267 Columbia Avenue, Chapin, South Carolina (EB, Evans, Jerry, Simmons, Bonitz and Outdoor being referred to collectively as “Borrowers,” and individually as a “Borrower”), each financial institution listed on the signature pages attached thereto and its successors and assigns, which become “Lenders” as provided therein (each such financial institution and its successors and assigns referred to collectively herein as “Lenders” and individually as “Lender”), and **PROSPECT CAPITAL CORPORATION** (“Agent”), in its capacity as collateral and administrative agent for itself and Lenders, the following terms shall have the following meanings (terms defined in the singular to have the same meaning when used in the plural and vice versa):

Account - shall have the meaning ascribed to “account” in the UCC and shall include any and all rights of a Borrower to payment for goods sold or leased or for services rendered that are not evidenced by an Instrument or Chattel Paper, whether or not they have been earned by performance.

Account Debtor - any Person who is or may become obligated under or on account of an Account.

Adjusted EBITDA -- for any fiscal period of an Obligor, an amount equal to the sum for such fiscal period of (i) Adjusted Net Earnings, plus (ii) provision for taxes based on income for such period, to the extent deducted in the calculation of Adjusted Net Earnings, plus (iii) Interest Expense for such period, to the extent deducted in the calculation of Adjusted Net Earnings, plus (iv) depreciation and amortization expense for such period, to the extent deducted in the calculation of Adjusted Net Earnings, plus (v) extraordinary and non-recurring non-cash losses for such period, to the extent deducted in the calculation of Adjusted Net Earnings, plus (vi) non-recurring fees, expenses or charges (whether or not paid in cash), including severance expenses and related legal fees, and directors’ fees and non-recurring consulting fees in an aggregate amount equal to (x) up to \$3,000,000 in any trailing twelve Fiscal Month period, plus (y) amounts in excess of \$3,000,000 during such period subject to the consent of the Required Lenders (such consent not to be unreasonably withheld); plus (vii) management fees and out-of-pocket expenses pursuant to the Expense Reimbursement Agreement; plus (viii) fees and expenses incurred in connection with (A) the negotiation, execution and delivery of the Loan Documents and the Second Priority Loan Documents, including amendments and other modifications thereof from time to time, and (B) the consummation of the Transactions; plus

(ix) proceeds of business interruption insurance received in cash during such period and expenses incurred in connection with extraordinary casualty events to the extent such expenses are reimbursed in cash by insurance during such period; minus (x) extraordinary and non-recurring non-cash gains for such period, to the extent added in the calculation of Adjusted Net Earnings.

Adjusted Net Earnings - with respect to any period, means the net earnings (or loss) for such period of Borrowers, all as reflected on the financial statement of Borrowers supplied to Lender pursuant to **Section 9.1.3** hereof, but excluding: (i) any gain (or loss) arising from any write-up (or write-down) of assets during such period; (ii) earnings of any Subsidiary accrued prior to the date it became a Subsidiary; (iii) earnings of any Person, substantially all the assets of which have been acquired in any manner by a Borrower, realized by such Person prior to the date of such acquisition; (iv) net earnings of any entity (other than a Subsidiary of a Borrower) in which a Borrower has an ownership interest unless such net earnings have actually been received by a Borrower in the form of cash Distributions; (v) any portion of the net earnings of any Subsidiary which for any reason is unavailable for payment of Distributions to a Borrower; (vi) the earnings of any Person to which any assets of Borrower shall have been sold, transferred or disposed of, or into which a Borrower shall have merged, or been a party to any consolidation or other form of reorganization, prior to the date of such transaction; and (vii) any gain (or loss) arising from extraordinary or non-recurring items, all as determined in accordance with GAAP.

Affiliate - with respect to any Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified. “Control” means the possession, directly or indirectly, of the power to vote ten percent (10%) or more of the securities having ordinary voting power for the election of the directors or managers (or similar governing body) or to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. “Controlling” and “Controlled” have correlative meanings.

Agent – as defined in the introductory paragraph.

Agent Indemnitees - Agent in its capacity as collateral and administrative agent for Lenders under the Loan Documents and all of Agent’s present and future officers, directors, agents and attorneys.

Agent Professionals - attorneys, accountants, appraisers, consultants, business valuation experts, environmental engineers or consultants, turnaround specialists and other professionals or experts retained by Agent.

Agreement - the Loan and Security Agreement referred to in the first sentence of this Appendix A, all Exhibits and Schedules thereto and this Appendix A.

Allocable Amount – as defined in **Section 4.11.3**.

Anti-Terrorism Laws - any laws relating to terrorism or money laundering, including the Patriot Act.

Applicable Law - all laws, rules and regulations applicable to the Person, conduct, transaction, covenant, Loan Document or Material Contract in question, including all applicable common law and equitable principles; all provisions of all applicable state, federal and foreign constitutions, statutes, rules, regulations and orders of governmental bodies; and all orders, judgments and decrees of all courts and arbitrators, including, without limitation, the Federal Gun Control Act, the National Firearms Act, the Arms Export Control Act, and the implementing regulations of the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Approved Fund - any Person (other than a natural person) that is engaged in making, purchasing, holding or otherwise investing in commercial loans and similar extensions of credit in its ordinary course of activities, and is administered or managed by a Lender, an entity that administers or manages a Lender, or an Affiliate of either.

Assignment and Acceptance - an assignment and acceptance entered into by a Lender and an assignee of such Lender's Term Loans, in the form of **Exhibit C**.

Bank of America - Bank of America, N.A., a national banking association.

Bankruptcy Code - title 11 of the United States Code.

Board of Governors - the Board of Governors of the Federal Reserve System.

Bonitz - as defined in the introductory paragraph.

Borrowers - EB, Evans, Jerry, Simmons, Bonitz, Outdoor and each other Person that becomes a Borrower pursuant to **Section 9.1.12**.

Business Day - any day excluding Saturday, Sunday and any other day that is a legal holiday under the laws of the State of New York, the State of North Carolina, or is a day on which banking institutions located in such state are closed.

Business Interruption Insurance Assignment - the Collateral Assignment of Business Interruption Insurance to be executed by Borrowers on or after the Closing Date in favor of Agent, in form and substance satisfactory to Lender, as security for the payment of the Obligations.

Capital Expenditures - expenditures made or liabilities incurred for the acquisition of any fixed assets or improvements, replacements, substitutions or additions thereto which have a useful life of more than one year.

Capital Stock - (i) in the case of a corporation, capital stock, (ii) in the case of an association or business entity, any and all shares, interests, participations, rights or other equivalents (however designated) of capital stock, (iii) in the case of a partnership, partnership interests (whether general or limited), (iv) in the case of a limited liability company, membership interests and (v) any other equity interest or equity participation that confers on a Person the right to receive a share of the profits and losses of, or distributions of assets of, the issuing Person.

Capitalized Lease Obligation - any Debt represented by obligations under a lease that is required to be capitalized for financial reporting purposes in accordance with GAAP.

Cash Collateral - cash or Cash Equivalents, and any interest earned thereon, that is deposited with Agent or First Priority Agent in accordance with this Agreement or the First Priority Loan Agreement, as applicable, for the Pro Rata benefit of Lenders as security for the Obligations.

Cash Equivalents - (i) marketable direct obligations issued or unconditionally guaranteed by the United States government and backed by the full faith and credit of the United States government having maturities of not more than 12 months from the date of acquisition; (ii) domestic certificates of deposit and time deposits having maturities of not more than 12 months from the date of acquisition, bankers' acceptances having maturities of not more than 12 months from the date of acquisition and overnight bank deposits, in each case issued by any commercial bank organized under the laws of the United States, any state thereof or the District of Columbia, which at the time of acquisition are rated A-1 (or better) by S&P or P-1 (or better) by Moody's, and (unless issued by a Lender) not subject to offset rights in favor of such bank arising from any banking relationship with such bank; (iii) repurchase obligations with a term of not more than thirty (30) days for underlying securities of the types described in clauses (i) and (ii) entered into with any financial institution meeting the qualifications specified in clause (ii) above; and (iv) commercial paper having at the time of investment therein or a contractual commitment to invest therein a rating of A-1 (or better) by S&P or P-1 (or better) by Moody's, and having a maturity within 9 months after the date of acquisition thereof.

Cash Management Services - any services provided from time to time by a Lender or any of its Affiliates to any Borrower or Subsidiary in connection with operating, collections, payroll, trust, or other depository or disbursement accounts, including automated clearinghouse, e-payable, electronic funds transfer, wire transfer, controlled disbursement, overdraft, depository, information reporting, lockbox and stop payment services.

CERCLA - the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. ' 9601 et seq. and its implementing regulations.

Change in Law - the occurrence, after the date hereof, of (i) the adoption, taking effect or phasing in of any law, rule, regulation or treaty; (ii) any change in any law, rule, regulation or treaty or in the administration, interpretation or application thereof; or (iii) the making, issuance or application of any request, guideline, requirement or directive (whether or not having the force of law) by any Governmental Authority; provided, however, that "Change in Law" shall include, regardless of the date enacted, adopted or issued, all requests, guidelines, requirements or directives (a) under or relating to the Dodd-Frank Wall Street Reform and Consumer Protection Act, or (b) promulgated pursuant to Basel III by the Bank of International Settlements, the Basel Committee on Banking Supervision (or any similar authority) or any other Governmental Authority.

Change of Control - the occurrence of any of the following events after the Closing Date: (i) Wellspring shall fail to own and control, directly or indirectly, or have control over, more than 50% of the Capital Stock of SportCo, or (ii) SportCo shall fail to own, directly or indirectly, or

have control over, all of the Capital Stock of Holdings, or (iii) Holdings shall fail to own, directly or indirectly, or have control over, all of the Capital Stock of Borrowers or (iv) during any period of up to 24 consecutive months, commencing after the Closing Date, individuals who at the beginning of such 24 month period were directors of EB (together with any new director whose election by EB's Board of Directors or whose nomination for election by EB's shareholders was approved by a vote of at least two-thirds of the directors then still in office who either were directors at the beginning of such period or whose election or nomination for election was previously so approved) cease for any reason to constitute a majority of the directors of EB then in office.

Chattel Paper - shall have the meaning given to "chattel paper" in the UCC.

Claims - any and all claims, demands, liabilities, obligations, losses, damages, penalties, actions, judgments, suits, awards, remedial response costs, expenses or disbursements of any kind or nature whatsoever (including reasonable attorneys', accountants', consultants' or paralegals' fees and expenses), whether arising under or in connection with the Loan Documents, any Applicable Law (including any Environmental Laws) or otherwise, that may now or hereafter be suffered or incurred by a Person and whether suffered or incurred in or as a result of any investigation, litigation, arbitration or other judicial or non-judicial proceeding or any appeals related thereto.

Closing Date - the date on which all of the conditions precedent in **Section 10** of the Agreement are satisfied and the Term Loans are made under the Agreement.

Closing Date Distribution - the one-time cash Distribution by Borrowers to Holdings (for further distribution to SportCo and Wellspring and the other shareholders of SportCo) on the Closing Date in an amount up to \$134,500,000, which Distribution shall be excluded from all calculations of the Consolidated Fixed Charge Coverage Ratio.

Code - the Internal Revenue Code of 1986.

Collateral - all of the Property and interests in Property described in **Section 6** of the Agreement; all Property described in any of the Security Documents as security for the payment or performance of any of the Obligations; and all other Property and interests in Property that now or hereafter secure (or are intended to secure) the payment and performance of any of the Obligations.

Commercial Tort Claim - shall have the meaning ascribed to "commercial tort claim" in the UCC.

Commitment Percentage - shall mean, for any Lender, the percentage identified as its Commitment Percentage on Schedule 2, as such percentage may be modified in connection with any assignment made in accordance with the provisions of **Section 13.3**.

Compliance Certificate - a Compliance Certificate to be provided by Borrowers to Agent in accordance with, and in the form annexed as **Exhibit B** to, the Agreement, and the supporting schedules to be annexed thereto.

Consolidated - the consolidation in accordance with GAAP of the accounts or other items as to which such term applies.

Consolidated Capital Expenditures – for any applicable period of computation, Capital Expenditures of the Obligors on a Consolidated basis other than Capital Expenditures that are financed with Money Borrowed if (i) such Money Borrowed does not consist of Revolver Loans (as defined in the First Priority Loan Agreement), and (ii) such Money Borrowed is secured solely by the assets that are being financed.

Consolidated Fixed Charge Coverage Ratio – the ratio, for any applicable period of computation, of (i) Adjusted EBITDA for such period minus cash income taxes and Distributions paid for such period minus Consolidated Capital Expenditures for such period to (ii) Fixed Charges for such period.

Consolidated Funded Debt - for any applicable period of computation, Funded Debt of the Obligors on a Consolidated basis.

Consolidated Interest Expense - for any applicable period of computation, the sum of (a) total interest expense of the Obligors for such period with respect to all outstanding Indebtedness of the Obligors, plus (b) all dividends (other than dividends payable solely in Capital Stock (other than Disqualified Capital Stock)) made on account of preferred Capital Stock of any Obligor for such period. For the avoidance of doubt, when calculating Consolidated Interest Expense, cash interest income earned in any period will not be net against Consolidated Interest Expense.

Consolidated Scheduled Debt Payments - for any applicable period of computation, the sum of all scheduled payments of principal of Consolidated Funded Debt for such period (including the principal component of payments due on capital leases for such period), whether paid under the First Priority Loan Documents or the Second Priority Loan Documents, and together with any applicable Prepayment Premiums.

Consolidated Senior Debt – for any applicable period of computation, the outstanding principal amount of all Consolidated Funded Debt of the Obligors minus the outstanding principal amount of the Subordinated Debt of the Obligors.

Consolidated Senior Leverage Ratio - the ratio, for any applicable period of computation, of (a) Consolidated Senior Debt to (b) Adjusted EBITDA for such period.

Consolidated Total Leverage Ratio - the ratio, for any applicable period of computation, of (a) Consolidated Funded Debt to (b) Adjusted EBITDA for such period.

Contingent Obligation - with respect to any Person, any obligation of such Person arising from any guaranty, indemnity or other assurance of payment or performance of any Debt, lease, dividend or other obligation (“primary obligations”) of any other Person (the “primary obligor”) in any manner, whether directly or indirectly, including (i) the direct or indirect guaranty, endorsement (other than for collection or deposit in the Ordinary Course of Business), co-making, discounting with recourse or sale with recourse by such Person of the obligation of a primary obligor, (ii) the obligation to make take-or-pay or similar payments, if required,

regardless of nonperformance by any other party or parties to an agreement, (iii) any obligation of such Person, whether or not contingent, (A) to purchase any such primary obligation or any Property constituting direct or indirect security therefor, (B) to advance or supply funds (1) for the purchase or payment of any such primary obligations or (2) to maintain working capital or equity capital of the primary obligor or otherwise to maintain the net worth or solvency of the primary obligor, (C) to purchase Property, Securities or services primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation or (D) otherwise to assure or hold harmless the holder of such primary obligation against loss in respect thereof; provided, however, that the term “Contingent Obligation” shall not include any product warranties extended in the Ordinary Course of Business. The amount of any Contingent Obligation shall be deemed to be an amount equal to the stated or determinable amount of the primary obligation with respect to which such Contingent Obligation is made (or, if less, the maximum amount of such primary obligation for which such Person may be liable pursuant to the terms of the instrument evidencing such Contingent Obligation) or, if not stated or determinable, the maximum reasonably anticipated liability with respect thereto (assuming such Person is required to perform thereunder), as determined by such Person in good faith.

Control or controlled by or under common control - possession, directly or indirectly, of the power to direct or cause the direction of management or policies (whether through ownership of voting securities, by contract or otherwise, but not solely by being an officer or director of that Person); provided, however, that in the event any Person which beneficially owns, directly or indirectly, 30% or more (in number of votes) of the Equity Interest having ordinary Voting Power with respect to a corporation shall be conclusively presumed to control such corporation.

Cure Proceeds - as defined in **Section 9.3.3**.

Cure Right - as defined in **Section 9.3.3**.

Current Maturities of Funded Debt - all principal payments in respect of Funded Debt scheduled to be made in the twelve (12) month period following the date of determination.

Debt - as applied to a Person means, without duplication: (i) all items which in accordance with GAAP would be included in determining total liabilities as shown on the liability side of a balance sheet of such Person as of the date as of which Debt is to be determined, including Capitalized Lease Obligations; (ii) all Contingent Obligations of such Person; (iii) all letters of credit or letter of credit guaranties outstanding for the account of such Person and, without duplication, all reimbursement obligations in connection therewith; and (iv) in the case of Borrowers (without duplication), the Obligations. The Debt of a Person shall include any recourse Debt of any partnership or joint venture in which such Person is a general partner or joint venturer.

Default - an event or condition the occurrence of which would, with the lapse of time or the giving of notice, or both, become an Event of Default.

Default Rate - on any date, a rate per annum that is equal to 2% in excess of the rate otherwise applicable to the Term Loans on such date.

Deposit Accounts - all of a Person's demand, time, savings, passbook, money market or other depository accounts, and all certificates of deposit, maintained by such Person with any bank, savings and loan association, credit union or other depository institution.

Deposit Account Assignment - the Collateral Assignment of Deposit Accounts to be executed by Borrowers on or before the Closing Date in favor of Agent for itself and the Pro Rata benefit of Lenders as security for the Obligations.

Disqualified Capital Stock - shall mean any Capital Stock of any Person issued after the date hereof which, by its terms or by the terms of any security into which it is convertible or for which it is exchangeable or exercisable at the option of the holder, or upon the happening of any event other than a change of control, matures or is mandatorily redeemable pursuant to sinking fund obligation or otherwise, or is redeemable for cash, property or securities constituting Indebtedness at the option of the holder thereof, in whole or in part, or would require the mandatory payment of dividends (other than dividends payable in Capital Stock (other than Disqualified Capital Stock)) on or prior to the date that is twelve (12) months following the Maturity Date.

Disregarded Subsidiary - any Subsidiary of a Borrower with an aggregate value of total assets, as of the Closing Date, of less than \$50,000 and Willoughby & Taylor, LLC, a Delaware limited liability company.

Distribution - in respect of any entity, (i) any payment of dividends or other distributions on Equity Interests of the entity (except distributions in such Equity Interests) and (ii) any purchase, redemption or other acquisition or retirement for value of any Equity Interests of the entity or any Affiliate of the entity unless made contemporaneously from the Net Proceeds of the sale of Equity Interests.

Document - shall have the meaning given to "document" in the UCC.

Dollars and the sign \$ - lawful money of the United States of America.

Domestic Subsidiary - a Subsidiary of an Obligor (other than a Subsidiary that is a Borrower) that is incorporated under the laws of a state of the United States or the District of Columbia.

Dominion Account - a special account established by a Borrower at Bank of America or another bank acceptable to Agent, over which Agent has exclusive control for withdrawal purposes.

EB - as defined in the introductory paragraph.

Electronic Chattel Paper - shall have the meaning given to "electronic chattel paper" in the UCC.

Eligible Assignee - a Person that is (i) a Lender, U.S. based Affiliate of a Lender or Approved Fund; (ii) any other Person approved by EB (which approval shall not be unreasonably withheld, delayed or conditioned, and shall be deemed given if no objection is made within five

(5) Business Days after notice of the proposed assignment) and Agent; and (iii) during any Event of Default, any Person acceptable to Agent in its discretion.

Environmental Laws - all Applicable Laws (including all programs, permits and guidance promulgated by regulatory agencies), relating to public health (but excluding occupational safety and health, to the extent regulated by OSHA) or the protection or pollution of the environment, including CERCLA, the Resource Conservation and Recovery Act ([42 U.S.C. §§ 6991-6991j](#)) and the Clean Water Act ([33 U.S.C. §§ 1251 et seq.](#)).

Environmental Notice - a notice from any Governmental Authority or other Person of noncompliance with, investigation of a violation of, litigation relating to, or potential fine or liability under any Environmental Law, or with respect to any Environmental Release, environmental pollution or hazardous materials, including any complaint, summons, citation, order, claim, demand or request for correction, remediation or otherwise.

Environmental Release - a release as defined in CERCLA or under any applicable Environmental Laws.

Equipment - shall have the meaning given to “equipment” in the UCC and shall include all of a Borrower’s machinery, apparatus, equipment, fittings, furniture, fixtures, motor vehicles and other tangible personal Property (other than Inventory) of every kind and description, whether now owned or hereafter acquired by a Borrower and wherever located, and all parts, accessories and special tools therefor, all accessions thereto, and all substitutions and replacements thereof.

Equity Interest - the interest of (i) a shareholder in a corporation, (ii) a partner (whether general or limited) in a partnership (whether general, limited or limited liability), (iii) a member in a limited liability company, or (iv) any other Person having any other form of equity security or ownership interest.

Equity Issuance - shall mean the issuance by any Obligor to any Person that is not an Obligor of any Capital Stock, including any Capital Stock that is issued pursuant to the exercise of any option, warrant or other conversion (including a conversion of any debt securities to equity), or the receipt by any Obligor of a capital contribution from any Person that is not an Obligor; other than any issuance of Capital Stock by SportCo to its equity holders, or any receipt by an Obligor of a cash common equity contribution, in each case, solely to finance Capital Expenditures permitted hereunder; provided that the foregoing shall not be deemed to imply that any such issuance is permitted under this Agreement. The term “Equity Issuance” shall not include any issuance pursuant to the exercise of any option, warrant or other sale of Capital Stock of SportCo to members of the management of the Borrowers pursuant to an employment agreement, employee option plan, stock option plan or other employee benefits program.

ERISA - the Employee Retirement Income Security Act of 1974 and all rules and regulations from time to time promulgated thereunder.

ERISA Affiliate - any trade or business (whether or not incorporated) under common control with an Obligor within the meaning of Section 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 - (a) a Reportable Event with respect to a Pension Plan; (b) a failure to make any required contribution to a Plan in a timely fashion; (c) a failure to comply with all applicable requirements under the Pension Funding Rules or the application for or receipt of a waiver of the minimum funding standards under the Pension Funding Rules by any Obligor or ERISA Affiliate; (d) the creation of any Lien in favor of the PBGC or a Plan on the assets of any Obligor or ERISA Affiliate; (e) a withdrawal by any Obligor or 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; (f) a complete or partial withdrawal by any Obligor or ERISA Affiliate from a Multiemployer Plan or notification that a Multiemployer Plan is in reorganization; (g) the filing of a notice of intent to terminate, the treatment of a Plan amendment as a termination under Section 4041 or 4041A of ERISA, or the commencement of proceedings by the PBGC to terminate a Pension Plan or Multiemployer Plan; (h) the determination that any Pension Plan or Multiemployer Plan is considered an at risk plan or a plan in critical or endangered status under the Code, ERISA or the Pension Protection Act of 2006; (i) an event or condition which constitutes grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan or Multiemployer Plan; or (j) the imposition of any liability under Title IV of ERISA, other than for PBGC premiums due but not delinquent under Section 4007 of ERISA, upon any Obligor or ERISA Affiliate.

Eurocurrency Liabilities - shall have the meaning ascribed thereto in Regulation D issued by the Board of Governors.

Event of Default - as defined in **Section 11** of the Agreement.

Excess Cash Flow - shall mean, with respect to any Fiscal Year of the Borrowers on a Consolidated basis, an amount equal to (a) Adjusted EBITDA, exclusive of any adjustments made pursuant to subsection (v) or (x) of the definition thereof, for such Fiscal Year; minus (b) any cash charges added back thereto pursuant to the definition thereof for such Fiscal Year; minus (c) the sum of (i) Consolidated Capital Expenditures made in cash during such Fiscal Year to the extent made not in violation of this Agreement, plus (ii) Consolidated Interest Expense paid in cash during such Fiscal Year, plus (iii) the amount of any Taxes paid in cash during such Fiscal Year, (iv) Consolidated Scheduled Debt Payments made in cash during such Fiscal Year to the extent made not in violation of this Agreement, plus (v) increases in working capital (excluding cash and Cash Equivalents) for such Fiscal Year plus (vi) at the Obligors' option an amount up to 100% of the voluntary prepayments of the Term Loans made pursuant to **Section 4.3.1** or **4.3.2** during such Fiscal Year plus (vii) the amount of any payments under the Expense Reimbursement Agreement paid in cash in accordance with **Section 9.2.4** during such Fiscal Year.

Excluded Account - as defined in **Section 6.2**.

Excluded Equity - any voting stock in excess of 65% of the voting stock of any Foreign Subsidiary to the extent that a pledge of more than 65% of the voting Equity Interests of such Foreign Subsidiary could result in material incremental income tax liability as a result of the application of Section 956 of the Code, taking into account actual or anticipated repatriation of funds, foreign tax credits and other relevant factors. For the purposes of this definition, "voting

stock” means, as to any issuer, the issued and outstanding shares of each class of capital stock or other ownership interests of such issuer entitled to vote (within the meaning of Treasury Regulations § 1.956-2(c)(2)).

Excluded Property - the collective reference to (i) all Excluded Equity, (ii) any permit, lease, license, contract, instrument or other agreement held by any Obligor that prohibits or requires the consent of any Person other than Borrowers and their Affiliates as a condition to the creation by such Obligor of a Lien thereon, or any permit, lease, license, contract, instrument or other agreement held by any Obligor to the extent that any requirement of law applicable thereto prohibits the creation of a Lien thereon, but only, in each case, to the extent, and for so long as, such prohibition is not terminated or rendered unenforceable or otherwise deemed ineffective by the UCC or any other requirement of law and (iii) Equipment owned by any Obligor that is subject to a purchase money Lien or a capital lease if the contract or other agreement in which such Lien is granted (or in the documentation providing for such capital lease) prohibits or requires the consent of any Person other than Borrowers or their Affiliates as a condition to the creation of any other Lien on such Equipment; provided, however, “Excluded Property” shall not include any proceeds, substitutions or replacements of Excluded Property (unless such proceeds, substitutions or replacements would constitute Excluded Property).

Excluded Tax - with respect to Agent, any Lender or any other recipient of a payment to be made by or on account of any Obligation, (a) Taxes imposed on or measured by its overall net income (however denominated), and franchise Taxes imposed on it (in lieu of net income taxes), in each case, (i) by the jurisdiction (or any political subdivision thereof or therein) under the laws of which such recipient is organized or in which its principal office is located or, in the case of any Lender, in which its applicable Lending Office is located or (ii) by any other jurisdiction as a result of a present or former connection between such recipient and the jurisdiction imposing such Tax (other than connections arising from such recipient having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Loan Document or sold or assigned an interest in any of its rights or obligations under the Loan Documents); (b) any branch profits taxes imposed by the United States or any similar tax imposed by any other jurisdiction in which EB is located; (c) any backup withholding tax required by the Code to be withheld from amounts payable to a Lender that has failed to comply with **Section 4.10**; (d) in the case of a Foreign Lender, any United States withholding tax that is (i) required pursuant to laws in force at the time such Lender becomes a Lender (or designates a new Lending Office) hereunder, or (ii) attributable to such Lender’s failure or inability (other than as a result of a Change in Law) to comply with **Section 4.10**, except in the case of both (i) and (ii), to the extent that such Foreign Lender (or its assignor, if any) was entitled, at the time of designation of a new Lending Office (or assignment), to receive additional amounts from Borrowers with respect to such withholding tax, and (e) any U.S. federal withholding Taxes imposed pursuant to FATCA.

Expense Reimbursement Agreement – that certain Amended and Restated Expense Reimbursement Agreement, dated as of November 16, 2009, by and between SportCo and Wellspring Capital Management LLC.

Extraordinary Expenses - all costs, expenses, fees (including fees incurred to Agent Professionals) or advances that Agent or any Lender may suffer or incur, whether prior to or after the occurrence of an Event of Default, and whether prior to, after or during the pendency of an Insolvency Proceeding of an Obligor, on account of or in connection with (i) the audit, inspection, repossession, storage, repair, appraisal, insuring, completion of the manufacture of, preparing for sale, advertising for sale, selling, collecting or otherwise preserving or realizing upon any Collateral; (ii) the defense of Agent's Lien upon any Collateral or the priority thereof or any adverse claim with respect to the Term Loans, the Loan Documents or the Collateral asserted by any Obligor, any receiver or trustee for any Obligor or any creditor or representative of creditors of any Obligor; (iii) the settlement or satisfaction of any Liens upon any Collateral (whether or not such Liens are Permitted Liens); (iv) the collection or enforcement of any of the Obligations; (v) the negotiation, documentation, and closing of any restructuring or forbearance agreement with respect to the Loan Documents or Obligations; (vi) amounts advanced by Agent pursuant to **Section 7.1.3** of the Agreement; (vii) the enforcement of any of the provisions of any of the Loan Documents; or (viii) any payment under a guaranty, indemnity or other payment agreement provided by Agent or (with Agent's consent) any Lender, which is reimbursable to Agent or such Lender by Borrowers pursuant to **Section 2.4.2** of the Agreement. Such costs, expenses and advances may include transfer fees, Other Taxes, storage fees, insurance costs, permit fees, utility reservation and standby fees, legal fees, appraisal fees, brokers' fees and commissions, auctioneers' fees and commissions, accountants' fees, environmental study fees, wages and salaries paid to employees of a Borrower or independent contractors in liquidating any Collateral, travel expenses, all other fees and expenses payable or reimbursable by Borrowers or any other Obligor under any of the Loan Documents, and all other fees and expenses associated with the enforcement of rights or remedies under any of the Loan Documents, but excluding compensation paid to employees (including inside legal counsel who are employees) of Agent.

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

Federal Funds Rate - the weighted average of interest rates on overnight federal funds transactions with members of the Federal Reserve System arranged by federal funds brokers on the applicable Business Day (or on the preceding Business Day, if the applicable day is not a Business Day), as published by the Federal Reserve Bank of New York on the next Business Day.

FEIN - with respect to any Person, the Federal Employer Identification Number of such Person.

First Priority Agent – has the meaning ascribed to “Senior Agent” in the Subordination Agreement.

First Priority Debt – has the meaning ascribed to “Senior Liabilities” in the Subordination Agreement, including any amendments or refinancings in whole or in part, thereof, in accordance with the terms of the Subordination Agreement.

First Priority Lenders - has the meaning ascribed to “Senior Creditors” in the Subordination Agreement.

First Priority Loan Agreement - has the meaning ascribed to “Senior Loan Agreement” in the Subordination Agreement.

First Priority Loan Documents - has the meaning ascribed to “Senior Loan Documents” in the Subordination Agreement.

Fiscal Month – each period of one month, commencing on the first day of a Fiscal Year.

Fiscal Year - the fiscal year of each Borrower and its Subsidiaries for accounting and tax purposes, which shall begin on January 1 of each calendar year and end on December 31 of each calendar year, and when preceded by the designation of a calendar year (e.g., 2007 Fiscal Year) means the fiscal year of such Person ended on December 31 of such designated calendar year.

Fixed Charges - for any period, the sum of Borrowers’ (i) Interest Expense during such period, plus (ii) on the date of determination, Current Maturities of Funded Debt.

FLSA - the Fair Labor Standards Act of 1938.

Foreign Lender – any Lender that is not a citizen or resident of the United States, a corporation, partnership or other entity created or organized in or under the laws of the United States (or any jurisdiction thereof), or any estate or trust that is subject to federal income taxation regardless of the source of its income.

Foreign Subsidiary - a Subsidiary that is not a Domestic Subsidiary.

Full Payment – with respect to any Obligations, the full and indefeasible cash payment thereof (other than contingent obligations to the extent no claim giving rise thereto has been asserted), including any interest, fees and other charges accruing during an Insolvency Proceeding (whether or not allowed in the proceeding).

Full Payment of the First Priority Debt – has the meaning ascribed to “Discharge of Senior Priority Liabilities” in the Subordination Agreement.

Funded Debt - collectively, without duplication, (i) the aggregate principal amount of Debt for Money Borrowed, including Capitalized Lease Obligations and all First Priority Debt and (ii) all Debt outstanding under any revolving credit, line of credit or renewals thereof), notwithstanding that any such Debt is created within one year of the expiration of such agreement.

GAAP - generally accepted accounting principles in the United States of America in effect from time to time.

General Intangibles - all general intangibles of a Borrower, whether now owned or hereafter created or acquired by a Borrower, including all choses in action, causes of action, company or other business records, inventions, blueprints, designs, patents, patent applications,

trademarks, trademark applications, trade names, trade secrets, service marks, goodwill, brand names, copyrights, registrations, licenses, franchises, customer lists, permits, tax refund claims, computer programs, operational manuals, internet addresses and domain names, insurance refunds and premium rebates, all claims under guaranties, security interests or other security held by or granted to a Borrower to secure payment of any of any of a Borrower's Accounts by an Account Debtor, all rights to indemnification, and all other intangible property of a Borrower of every kind and nature (other than Accounts).

Goods - shall have the meaning given to "goods" in the UCC.

Governing Body - shall mean, with respect to any Person, the board of directors, board of managers, board of representatives, board of advisors or similar governing body of such Person.

Governmental Approvals - all authorizations, consents, approvals, licenses (including, without limitation, all federal firearms licenses) and exemptions of, registrations and filings with, and reports to, all Governmental Authorities.

Governmental Authority - any federal, state, municipal, national, foreign or other governmental department, commission, board, bureau, court, agency or instrumentality or political subdivision thereof or any entity or officer exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to any government or any court, in each case whether associated with a state of the United States, the District of Columbia or a foreign entity or government.

Guaranties – the Holdings Guaranty, the SportCo Guaranty and each other guaranty executed by a Guarantor in support of the Obligations.

Guarantor Payment - as defined in **Section 4.11.3**.

Guarantors – Holdings, SportCo and each other Person who guarantees payment or performance of any Obligation.

Hazardous Materials - (a) any petroleum or petroleum products, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation, dielectric fluid containing levels of polychlorinated biphenyls, radon gas and mold; (b) any chemicals, materials, pollutant or substances defined as or included in the definition of "hazardous substances", "hazardous waste", "hazardous materials", "extremely hazardous substances", "restricted hazardous waste", "toxic substances", "toxic pollutants", "contaminants", "pollutants" or words of similar import, under any applicable Environmental Law; and (c) any other chemical, material or substance, the exposure to, or release of which is prohibited, limited or regulated by any governmental authority or for which liability or standards of conduct are imposed pursuant to, any Environmental Law.

Hedging Agreement - an agreement relating to any swap, cap, floor, collar, option, forward, cross right or obligation, or combination thereof or similar transaction, with respect to interest rate, foreign exchange, currency, commodity, credit or equity risk.

Holdings – United Sporting Companies, Inc., a Delaware corporation.

Holdings Guaranty – that certain Guaranty dated as of the date hereof and made by Holdings, as the same may be amended, modified or replaced in accordance with the terms hereof.

Indemnified Amount - in the case of Agent Indemnitees, the amount of any loss, cost, expenses or damages suffered or incurred by Agent Indemnitees and against which Lenders or any Obligor have agreed to indemnify and Agent Indemnitees pursuant to the terms of the Agreement or any of the other Loan Documents; and in the case of Lender Indemnitees, the amount of any loss, cost, expenses or damages suffered or incurred by Lender Indemnitees and against which Lender or any Obligor have agreed to indemnify Lender Indemnitees pursuant to the terms of the Agreement or any of the other Loan Documents;

Indemnified Taxes - Taxes other than Excluded Taxes.

Indemnitees - the Agent Indemnitees and the Lender Indemnitees.

Insolvency Proceeding - any action, case or proceeding commenced by or against a Person, or any agreement of such Person, for (i) the entry of an order for relief under any chapter of the Bankruptcy Code or other insolvency, moratorium or debt adjustment law (whether state, federal or foreign), (ii) the appointment of a receiver, trustee, liquidator or other custodian for such Person or any part of its Property, (iii) an assignment or trust mortgage for the benefit of creditors of such Person, or (iv) the liquidation, dissolution or winding up of the affairs of such Person.

Instrument - shall have the meaning given to “instrument” in the UCC.

Intellectual Property - all intellectual and similar Property of every kind and description, including inventions, designs, patents, patent applications, copyrights, trademarks, service marks, trade names, mask works, trade secrets, confidential or proprietary information, know-how, software and databases and all embodiments or fixations thereof and related documentation, registrations and franchises, all books and records describing or used in connection with the foregoing and all licenses, or other rights to use any of the foregoing.

Intellectual Property Claim - the assertion by any Person of a claim (whether asserted in writing, by action, suit or proceeding or otherwise) that a Borrower’s ownership, use, marketing, sale or distribution of any Inventory, Equipment, Intellectual Property or other Property is violative of any ownership or right to use any Intellectual Property of such Person.

Interest Expense - for any period, the total interest expense of Borrowers payable in cash during such period determined in accordance with GAAP.

Interest Payment Date - shall mean each March 31, June 30, September 30 and December 31 of each year, commencing with December 31, 2012.

Inventory - shall have the meaning given to “inventory” in the UCC and shall include all goods intended for sale by a Borrower, to be furnished by a Borrower under contracts of service, or for display or demonstration; and work in process and all raw materials and other materials and supplies of every nature and description used or which might be used in connection with the

manufacture, printing, packing, shipping, advertising, selling, leasing or furnishing of such goods or otherwise used or consumed in a Borrower's business ("Work-In-Process and Raw Materials"); and all Documents evidencing and General Intangibles relating to any of the foregoing, whether now owned or hereafter acquired by a Borrower.

Investment Property - shall have the meaning given to "investment property" in the UCC and shall include all Securities (whether certificated or uncertificated), security entitlements, securities accounts, commodity contracts and commodity accounts.

IPO - shall mean a successfully completed firm underwritten public offering of the Capital Stock of EB or SportCo (or any direct or indirect parent of EB or SportCo) pursuant to an effective registration under the Securities Act resulting in the sale of more than 25% of such entity's Capital Stock.

IRS - the United States Internal Revenue Service.

Jerry – as defined in the introductory paragraph.

Landlord Agreements - an agreement duly executed in favor of Agent, in form and content acceptable to Agent, by which an owner or mortgagee of premises upon which any Property of an Obligor is located agrees to waive or subordinate any Lien it may have with respect to such Property in favor of Agent's Lien therein and to permit Agent to enter upon such premises and to remove such Property or to use such premises to store or dispose of such Property.

Lender Indemnitee - a Lender in its capacity as a lender under the Agreement and its present and future officers, directors, employees, agents and attorneys.

Lenders – Prospect, Summit, and any other Person who may from time to time become a "Lender" under the Agreement.

Lending Office - the office designated as such by the applicable Lender at the time it becomes party to this Agreement or thereafter by notice to EB.

LIBOR Rate – means (i) the British Bankers Association LIBOR Rate ("BBA LIBOR"), as published by Reuters (or other commercially available source designated by Agent); or (ii) if BBA LIBOR is not available for any reason, the interest rate at which Dollar deposits in the approximate amount of the LIBOR Loan would be offered by Bank of America's London branch to major banks in the London interbank Eurodollar market, in each case for an interest period of one (1) month. Each determination by Agent of any LIBOR Rate shall, in the absence of any manifest error, be conclusive.

License - any license or agreement under which an Obligor is authorized to use Intellectual Property in connection with any manufacture, marketing, distribution or disposition of Collateral, any use of Property or any other conduct of its business.

Lien - any interest in Property securing an obligation owed to, or a claim by, a Person other than the owner of the Property, whether such interest is based on common law, statute or

contract. The term “Lien” shall also include reservations, exceptions, encroachments, easements, rights-of-way, covenants, conditions, restrictions, leases and other title exceptions and encumbrances affecting Real Estate. For the purpose of the Agreement, a Borrower shall be deemed to be the owner of any Property which it has acquired or holds subject to a conditional sale agreement or other arrangement pursuant to which title to the Property has been retained by or vested in some other Person for security purposes.

Loan Documents - the Agreement, the Other Agreements and the Security Documents.

Margin Stock - shall have the meaning ascribed to it in Regulation U and of the Board of Governors.

Material Adverse Effect - the effect of any event, condition, action, omission or circumstance, which, alone or when taken together with other events, conditions, actions, omissions or circumstances occurring or existing concurrently therewith, (i) has a material adverse effect upon the business, operations, Properties or condition (financial or otherwise) of Borrowers, taken as a whole; (ii) has or could be reasonably expected to have any material adverse effect whatsoever upon the validity or enforceability of the Agreement or any of the other Loan Documents; (iii) has any material adverse effect upon the value of the whole or any material part of the Collateral, the Liens of Agent with respect to the Collateral or the priority of any such Liens; (iv) materially impairs the ability of any other Obligor to perform its obligations under this Agreement or any of the other Loan Documents, including repayment of any of the Obligations when due; or (v) materially impairs the ability of Agent or any Lender to enforce or collect the Obligations or realize upon any of the Collateral in accordance with the Loan Documents and Applicable Law.

Material Contract - an agreement to which an Obligor is a party (other than the Loan Documents) if (i) such agreement is deemed to be a material contract as provided in Regulation S-K promulgated by the SEC under the Securities Act of 1933 or (ii) the breach, termination, cancellation or nonperformance of or failure to renew such agreement could reasonably be expected to have a Material Adverse Effect.

Maturity Date – May 16, 2018.

Maximum Rate - the maximum non-usurious rate of interest permitted by Applicable Law that at any time, or from time to time, may be contracted for, taken, reserved, charged or received on the Debt in question or, to the extent that at any time Applicable Law may thereafter permit a higher maximum non-usurious rate of interest, then such higher rate. Notwithstanding any other provision hereof, the Maximum Rate shall be calculated on a daily basis (computed on the actual number of days elapsed over a year of three hundred and sixty (360) days.

Money Borrowed - as applied to any Person, without duplication, (i) Debt for money borrowed on the Consolidated balance sheet of such Person prepared in accordance with GAAP; (ii) Debt arising from the lending of money by any other Person to such Person; (iii) Debt, whether or not in any such case arising from the lending of money by another Person to such Person, (A) which is represented by notes payable or drafts accepted that evidence extensions of credit, (B) which constitutes obligations evidenced by bonds, debentures, notes or similar

instruments, or (C) upon which interest charges are customarily paid (other than accounts payable) or that was issued or assumed as full or partial payment for Property; (iv) Debt that constitutes a Capitalized Lease Obligation; (v) all letters of credit or letter of credit guaranties outstanding for the account of such Person and, without duplication, all reimbursement obligations in connection therewith and (vi) Debt of such Person under any guaranty of obligations that would constitute Debt for Money Borrowed under clauses (ii) through (iv) hereof, if owed directly by such Person.

Moody's - Moody's Investors Services, Inc.

Mortgage - a mortgage, deed of trust or deed to secure debt in which a Borrower grants a Lien on its Real Estate to Agent, as security for the Obligations.

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

Net Book Value - Cost minus accumulated depreciation that is calculated (i) in accordance with GAAP and (ii) consistently with Borrowers' accounting practices in place on the Closing Date.

Notes - each promissory note executed by Borrowers at Agent's request to evidence any of the Obligations.

Notice of Borrowing - as defined in **Section 3.1.1(i)** of the Agreement.

Notice of Conversion/Continuation - as defined in **Section 2.1.2(ii)** of the Agreement.

Notice of Grant of Security Interest in Intellectual Property - the notice delivered by Borrowers on the Closing Date to be filed in the United States Patent and Trademark Office.

Obligations - in each case, whether now in existence or hereafter arising, (i) the principal of, and interest and premium, if any, on, the Term Loan; and (ii) all other Debts, covenants, duties and obligations (including Contingent Obligations) now or at any time or times hereafter owing by any Obligor to Agent or any Lender under or pursuant to the Agreement or any of the other Loan Documents, whether evidenced by any note or other writing, whether arising from any extension of credit, opening of a letter of credit, acceptance, loan, guaranty, indemnification or otherwise and whether direct or indirect, absolute or contingent, due or to become due, primary or secondary, or joint or several, including all interest, charges, expenses, fees or other sums (including Extraordinary Expenses) chargeable to any or all Obligors hereunder or under any of the Loan Documents.

Obligor - Each Borrower, each Guarantor and each other Person that is at any time liable for the payment of the whole or any part of the Obligations or that has granted in favor of Agent a Lien upon any of such Person's assets to secure payment of any of the Obligations.

Observer - as defined in **Section 9.1.10** of the Agreement.

Office Accounts – those certain deposit accounts (account numbers 2076700001962 and 2010000028973) administered by Wells Fargo Bank, National Association and owned by EB.

Ordinary Course of Business - with respect to any transaction involving any Person, the ordinary course of such Person's business, as conducted by such Person in accordance with past practices and reasonable adjustments thereto and undertaken by such Person in good faith and not for the purpose of evading any covenant or restriction in any Loan Document.

Organization Documents - with respect to any Person, its charter, certificate or articles of incorporation, bylaws, articles of organization, operating agreement, members agreement, partnership agreement, voting trust, or similar agreement or instrument governing the formation or operation of such Person.

Original Lender – means each of Prospect and Summit for as long as such Person owns and controls at least fifty percent (50%) of (A) the Term Loans being made by it hereunder on the Closing Date, minus (B) any prepayments of principal amounts of such Term Loans.

OSHA - the Occupational Safety and Hazard Act of 1970.

Other Agreements - the Notes, the Subordination Agreement, the Structuring Fee Letters and any and all agreements, instruments and documents (other than the Agreement and the Security Documents), heretofore, now or hereafter executed by a Borrower or Borrowers, any Obligor or any other Person and delivered to Agent or any Lender in respect of the transactions contemplated by the Agreement.

Other Taxes - all present or future stamp or documentary taxes or any other excise or property taxes, charges or similar levies arising from any payment made under any Loan Document or from the execution, delivery or enforcement of, or otherwise with respect to, any Loan Document.

Outdoor - as defined in the introductory paragraph.

Participant - as defined in **Section 13.2.1**.

Participant Register - as defined in **Section 13.2.1**.

Patriot Act - the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, [115 Stat. 272](#) (2001).

Payment Intangibles - shall have the meaning given to “payment intangible” in the UCC.

Payment Items - all checks, drafts, or other items of payment payable to a Borrower, including proceeds of any of the Collateral.

PBGC - the Pension Benefit Guaranty Corporation or any successor thereto.

Pension Act - the Pension Protection Act of 2006.

Pension Funding Rules - the rules of the Code and ERISA regarding minimum required contributions (including any installment payment thereof) to Pension Plans and set forth in, with respect to plan years ending prior to the effective date of the Pension Act, Section 412 of the Code and Section 302 of ERISA, each as in effect prior to the Pension Act and, thereafter, Section 412, 430, 431, 432 and 436 of the Code and Sections 302, 303, 304 and 305 of ERISA.

Pension Plan - 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 any Obligor or ERISA Affiliate or to which the Obligor or ERISA Affiliate contributes or has an obligation to contribute, or in the case of a multiple employer or other plan described in Section 4064(a) of ERISA, has made contributions at any time during the preceding five plan years.

Permitted Contingent Obligations - Contingent Obligations arising from endorsements of Payment Items for collection or deposit in the Ordinary Course of Business; Contingent Obligations arising from guaranties of the Debt (to the extent permitted under **Section 9.2.3**) of one Borrower for the benefit of its Subsidiaries or another Borrower; Contingent Obligations of a Borrower and its Subsidiaries existing as of the Closing Date, including extensions and renewals thereof that do not increase the amount of such Contingent Obligations as of the date of such extension or renewal; Contingent Obligations incurred in the Ordinary Course of Business with respect to surety bonds, appeal bonds, performance bonds and other similar obligations; Contingent Obligations arising under indemnity agreements to title insurers to cause such title insurers to issue to Agent title insurance policies; Contingent Obligations with respect to customary indemnification obligations in favor of purchasers in connection with dispositions of Equipment permitted under **Section 7.4.2** of the Agreement; and other Contingent Obligations not to exceed \$230,000 in the aggregate at any time.

Permitted Lien - a Lien of a kind specified in **Section 9.2.5** of the Agreement.

Person - an individual, partnership, corporation, limited liability company, limited liability partnership, joint stock company, land trust, business trust, or unincorporated organization, or a Governmental Authority.

Plan - a Multiemployer Plan or a Pension Plan.

Pledge and Security Agreement – that certain Pledge and Security Agreement dated as of the date hereof, by and among SportCo, Holdings, Borrowers and Agent, as the same may be amended, modified or replaced in accordance with the terms hereof.

Prepayment Premium – shall mean, without duplication, (i) with respect to any voluntary prepayment made pursuant to **Section 4.3.1** or **Section 4.3.2** other than in connection with an IPO, (x) if such prepayment is made after the first anniversary of the Closing Date and on or prior to the second anniversary of the Closing Date, an amount equal to three percent (3.0%) of the principal balance of the Term Loans being prepaid, (y) if such prepayment is made after the second anniversary of the Closing Date and on or prior to the third anniversary of the Closing Date, an amount equal to two percent (2.0%) of the principal balance of the Term Loans being prepaid, and (z) if such prepayment is made after the third anniversary of the Closing Date and

on or prior to the fourth anniversary of the Closing Date, an amount equal to one percent (1.0%) of the principal balance of the Term Loans being prepaid, and (ii) with respect to any voluntary prepayment made pursuant to **Section 4.3.1** in connection with an IPO, or a mandatory prepayment made pursuant to **Section 4.3.4**, **Section 4.3.5**, **Section 4.3.8** or **Section 4.3.9**, if such prepayment is made after the first anniversary of the Closing Date and on or prior to the fourth anniversary of the Closing Date, an amount equal to one percent (1.0%) of the principal balance of the Term Loans being prepaid.

Pro Rata - a share of or in all liabilities, payments, proceeds, collections, Collateral and Extraordinary Expenses, which share for any Lender on any date shall be a percentage (expressed as a decimal, rounded to the ninth decimal place) arrived at by dividing the amount of the Term Loans of such Lender on such date by the aggregate amount of the Term Loans of all Lenders on such date.

Projections - Borrowers' forecasted (i) Consolidated profit and loss statements, cash flow statements, and capitalization statements, depicted on a month-by-month basis, all prepared on a consistent basis with Borrowers' historical financial statements, together with (ii) appropriate supporting details and a statement of underlying assumptions.

Properly Contested - in the case of any Debt of an Obligor (including any Taxes) that is not paid as and when due or payable by reason of such Obligor's bona fide dispute concerning its liability to pay same or concerning the amount thereof, (i) such Debt is being properly contested in good faith by appropriate proceedings promptly instituted and diligently conducted; (ii) such Obligor has established appropriate reserves as shall be required in conformity with GAAP; (iii) the non-payment of such Debt will not have a Material Adverse Effect; (iv) no Lien is imposed upon any of such Obligor's assets with respect to such Debt unless such Lien is at all times junior and subordinate in priority to the Liens in favor of Agent (except only with respect to property taxes that have priority as a matter of applicable state law) and enforcement of such Lien is stayed during the period prior to the final resolution or disposition of such dispute; (v) if the Debt results from, or is determined by the entry, rendition or issuance against an Obligor or any of its assets of a judgment, writ, order or decree, enforcement of such judgment, writ, order or decree is stayed pending a timely appeal or other judicial review; and (vi) if such contest is abandoned, settled or determined adversely (in whole or in part) to such Obligor, such Obligor forthwith pays such Debt and all penalties, interest and other amounts due in connection therewith.

Property - any interest in any kind of property or asset, whether real, personal or mixed and whether tangible or intangible.

Prospect – means Prospect Capital Corporation, together with its Affiliates and Approved Funds that are assignees of any Loan Documents, or any rights or obligations thereunder, in accordance with **Section 13.3.1**.

Prospect Structuring Fee Letter – that certain letter by and between EB and Prospect dated as of the date hereof whereby EB agrees to pay to Prospect its portion of the structuring fee referenced in **Section 2.2**.

Purchase Money Debt - (a) Debt (other than the Obligations) for payment of any of the purchase price of any fixed assets; (b) Debt (other than the Obligations) incurred within 10 days before or after acquisition of any such fixed assets, for the purpose of financing any portion of the purchase price thereof and actually used for such purpose; and (c) any renewals, extensions or refinancings (but not increases) thereof.

Purchase Money Lien - a Lien that secures Purchase Money Debt, encumbering only the fixed assets acquired with such Debt and constituting a Capital Lease or a purchase money security interest under the UCC.

Real Estate - all right, title and interest (whether as owner, lessor or lessee) in any real Property or any buildings, structures, parking areas or other improvements thereon.

Register - as defined in **Section 13.3.1**.

Regulation D - Regulation D of the Board of Governors.

Reimbursement Date - as defined in **Section 1.3.2(i)** of the Agreement.

Related Real Estate Documents - with respect to any Real Estate subject to a Mortgage, the following, in form and substance reasonably satisfactory to Agent and received by Agent for review at least 10 days prior to the effective date of the Mortgage: (a) a mortgagee title policy (or binder therefor) covering Agent's interest under the Mortgage, in a form and amount and by an insurer reasonably acceptable to Agent, which must be fully paid on such effective date; (b) such assignments of leases, estoppel letters, attornment agreements, consents, waivers and releases as Agent may reasonably request with respect to other Persons having an interest in the Real Estate; (c) an as-built survey of the Real Estate, containing a metes-and-bounds property description and certified by a licensed surveyor reasonably acceptable to Agent; (d) a life-of-loan flood hazard determination and, if the Real Estate is located in a flood plain, an acknowledged notice to borrower and flood insurance in an amount, with endorsements and by an insurer reasonably acceptable to Agent; (e) upon request of Agent, an environmental assessment, prepared by environmental engineers reasonably acceptable to Agent, and accompanied by such reports, certificates, studies or data as Agent may reasonably require, which shall all be in form and substance reasonably satisfactory to Required Lenders; (f) a favorable opinion of counsel to the Borrowers from each jurisdiction in which Real Estate subject to a Mortgage is located, in form and substance satisfactory to Agent and from a Person reasonably acceptable to Agent (it being understood and agreed that an opinion in the form of those delivered on the Closing Date shall be acceptable); and (g) such other documents, instruments or agreements as Agent may reasonably require with respect to any environmental risks regarding the Real Estate.

Rentals - as of the date of determination, all payments which the lessee is required to make by the terms of any lease.

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

Required Lenders – Lenders holding Term Loans representing in excess of 50% of the aggregate principal amount of all Term Loans then outstanding; provided, that, (a) at any time

when Prospect and Summit both remain as Original Lenders, “Required Lenders” shall mean both such Original Lenders together with additional Lenders (to the extent required) to represent in excess of 50% of the aggregate Term Loans then outstanding, and (b) at any time when either Prospect or Summit remains as an Original Lender, “Required Lenders” shall mean either such Original Lender together with additional Lenders (to the extent required) to represent in excess of 50% of the aggregate Term Loans then outstanding.

Restricted Investment - any acquisition of Property by a Borrower or any of its Subsidiaries in exchange for cash or other Property, whether in the form of an acquisition of Equity Interests or Debt, or the purchase or acquisition by a Borrower or any Subsidiary of any other Property, or a loan, advance, capital contribution or subscription, except acquisitions of the following: (i) fixed assets to be used in the Ordinary Course of Business of a Borrower or any Subsidiary; (ii) goods held for sale or lease or to be used in the manufacture of goods or the provision of services by a Borrower or any Subsidiary in the Ordinary Course of Business; (iii) Current Assets arising from the sale or lease of goods or the rendition of services in the Ordinary Course of Business of a Borrower or any Subsidiary; (iv) investments in Subsidiaries to the extent existing on the Closing Date; and (v) Cash Equivalents to the extent they are not subject to rights of offset in favor of any Person other than Agent or a Lender; and (vi) loans and other advances of money to the extent not prohibited by **Section 9.2.2**.

Restrictive Agreement - an agreement (other than any of the Loan Documents) that, if and for so long as an Obligor or any Subsidiary of such Obligor is a party thereto, would prohibit, condition or restrict such Obligor’s or Subsidiary’s right to incur or repay Debt for Money Borrowed (including any of the Obligations); grant Liens upon any of such Obligor’s or Subsidiary’s assets (except in connection with the acquisition of such asset and including Liens granted in favor of Agent pursuant to the Loan Documents); declare or make Distributions; amend, modify, extend or renew any agreement evidencing Debt for Money Borrowed (including any of the Loan Documents); or repay any Debt owed to another Obligor.

Royalties - all royalties, fees, expense reimbursement and other amounts payable by a Borrower under a License.

S&P - Standard & Poor’s Ratings Services, a Standard & Poor’s Financial Services LLC business, and its successors.

SEC - Securities and Exchange Commission.

Secured Parties - Agent, each Lender and each Affiliate of a Lender to the extent such Affiliate holds Obligations hereunder.

Security - shall have the same meaning as in Section 2(1) of the Securities Act of 1933.

Security Documents - the Notices of Grant of Security Interest in Intellectual Property, the Deposit Account Assignments, the Business Interruption Insurance Assignment, the Guaranties, the Pledge and Security Agreement, the Related Real Estate Documents for all Real Estate subject to a Mortgage and all other mortgages, instruments and agreements now or at any time hereafter securing the whole or any part of the Obligations.

Senior Officer - the chairman of the board of directors, chairman of the executive committee, the president or the chief financial officer of, or in-house legal counsel to, a Borrower.

Simmons - as defined in the introductory paragraph.

Software - shall have the meaning given to “software” in the UCC.

Solvent - as to any Person, such Person (i) owns Property whose fair saleable value is greater than the amount required to pay all of such Person’s Debts (including contingent Debts), (ii) is able to pay all of its Debts as such Debts mature, (iii) has capital sufficient to carry on its business and transactions and all business and transactions in which it is about to engage, and (iv) is not “insolvent” within the meaning of Section 101(32) of the Bankruptcy Code.

SportCo – SportCo Holdings, Inc., a Delaware corporation.

SportCo Guaranty – that certain Guaranty dated as of the date hereof and made by SportCo, as the same may be amended, modified or replaced in accordance with the terms hereof.

Statutory Reserves - on any date, the percentage (expressed as a decimal) established by the Board of Governors which is the then stated maximum rate for all reserves (including any emergency, supplemental or other marginal reserve requirements) applicable to any member bank of the Federal Reserve System in respect to Eurocurrency Liabilities (or any successor category of liabilities under Regulation D). Such reserve percentage shall include those imposed pursuant to said Regulation D. The Statutory Reserve shall be adjusted automatically on and as of the effective date of any change in such percentage.

Structuring Fee Letters – means the Prospect Structuring Fee Letter and the Summit Structuring Fee Letter, collectively.

Subordinated Debt - Debt incurred by a Borrower that is expressly subordinate and junior in right of payment to Full Payment of all Obligations, and is on terms (including maturity, interest, fees, repayment, covenants and subordination) satisfactory to Agent and Required Lenders.

Subordination Agreement - the Intercreditor and Subordination Agreement of even date herewith by and among First Priority Agent, the lenders party to the First Priority Debt Documents, Agent and the Lenders as the same may be amended, modified or replaced in accordance with the terms thereof.

Subsidiary - any Person in which more than 50% of its outstanding Voting Securities or more than 50% of all Equity Interests is owned directly or indirectly by a Borrower, by one or more other Subsidiaries of a Borrower or by a Borrower and one or more other Subsidiaries.

Summit – means Summit Partners Credit Fund, L.P., Summit Partners Credit Fund A-1, L.P., Summit Investors I, LLC, and Summit Investors I (UK), LP, collectively, together with

their respective Affiliates and Approved Funds that are assignees of any Loan Documents, or any rights or obligations thereunder, in accordance with **Section 13.3.1**.

Summit Structuring Fee Letter – that certain letter by and between Summit Partners Credit Advisors, L.P., Summit and EB, dated as of the date hereof whereby EB agrees to pay Summit’s portion of the structuring fee referenced in **Section 2.2** to Summit Partners Credit Advisors, L.P.

Supporting Obligations - shall have the meaning given to “supporting obligations” in the UCC.

Tangible Chattel Paper - shall have the meaning given to “tangible chattel paper” in the UCC.

Taxes - all present or future taxes, levies, imposts, duties, deductions, withholdings (including backup withholding), assessments, fees or other charges imposed by any Governmental Authority, including any interest, additions to tax or penalties applicable thereto.

Term Loan – means a term loan issued hereunder.

Transactions - means, collectively, (i) the execution by the Obligor and their Subsidiaries of the Agreement and the other Loan Documents to which they are or are intended to be a party as of the Closing Date, and the making of Term Loans on the Closing Date, (ii) the execution by the Obligor and their Subsidiaries of the First Priority Debt Documents to which they are or are intended to be a party as of the Closing Date, and issuance of the First Priority Debt on the Closing Date, (iii) payment of the Closing Date Distribution, (iv) the Distribution by EB to Holdings (for further Distribution to SportCo) and the repayment in full of the Wellspring Debt from such Distribution and termination of the Wellspring Debt Documents and (v) the payment of the fees and expenses incurred in connection with the foregoing.

Transferee - as defined in **Section 13.3.3** of the Agreement.

UCC - the Uniform Commercial Code (or any successor statute) as adopted and in force in the State of New York or, when the laws of any other state govern the method or manner of the perfection or enforcement of any security interest in any of the Collateral, the Uniform Commercial Code (or any successor statute) of such state.

Upstream Payment - a payment or distribution of cash or other Property by a Subsidiary to a Borrower, whether in repayment of Debt owed by such Subsidiary to Borrower, to pay dividends on account of a Borrower’s ownership of Equity Interests or otherwise.

Value - with reference to the value of Inventory or Equipment, value determined on the basis of the lower of cost or market of such Inventory or Equipment in accordance with GAAP, with the cost thereof calculated on a first-in, first-out basis determined in accordance with GAAP, and excluding any portion of cost attributable to intercompany profit among Borrowers and their Affiliates.

Voting Power - with respect to any Person, the power ordinarily (without the occurrence of a contingency) to elect the members of the Board of Directors (or persons performing similar functions) of such Person.

Voting Securities - Equity Interests of any class or classes of a corporation or other entity the holders of which are ordinarily, in the absence of contingencies, entitled to elect a majority of the corporate directors or Persons performing similar functions.

Wells Fargo - Wells Fargo Bank, National Association.

Wellspring – Wellspring Capital Partners IV, L.P., a Delaware limited partnership, and its Affiliates.

Wellspring Debt - the Debt of SportCo evidenced by that certain Amended and Restated Subordinated Term Loan and Guarantee Agreement, dated as of November 16, 2009, by and between SportCo and Wellspring Capital Partners IV, L.P., a Delaware limited partnership, in the aggregate principal amount outstanding of \$35,000,000, together with all related documents and all amendments, supplements, restatements, replacements and modifications thereof.

Accounting Terms. Unless otherwise specified herein, all terms of an accounting character used in the Agreement shall be interpreted, all accounting determinations under the Agreement shall be made, and all financial statements required to be delivered under the Agreement shall be prepared in accordance with GAAP, applied on a basis consistent with the most recent audited Consolidated financial statements of Borrowers and their Subsidiaries heretofore delivered to Agent and Lenders and using the same method for inventory valuation as used in such audited financial statements, except for any change required by GAAP.

Other Terms. All other terms contained in the Agreement shall have, when the context so indicates, the meanings provided for by the UCC to the extent the same are used or defined therein.

Certain Matters of Construction. The terms “herein,” “hereof” and “hereunder” and other words of similar import refer to the Agreement as a whole and not to any particular section, paragraph or subdivision. Any pronoun used shall be deemed to cover all genders. In the computation of periods of time from a specified date to a later specified date, the word “from” means “from and including” and the words “to” and “until” each means “to but excluding.” The section titles, table of contents and list of exhibits appear as a matter of convenience only and shall not affect the interpretation of the Agreement. All references to statutes and related regulations shall include any amendments of same and any successor statutes and regulations; to any of the Loan Documents shall include any and all modifications thereto and any and all restatements, extensions or renewals thereof; to any Person shall mean and include the successors and permitted assigns of such Person; to “including” and “include” shall be understood to mean “including, without limitation” (and, for purposes of the Agreement and each other Loan Document, the parties agree that the rule of *ejusdem generis* shall not be applicable to limit a general statement, which is followed by or referable to an enumeration of specific matters to matters similar to the matters specifically mentioned); or to the time of day shall mean the time of day on the day in question in New York, New York, unless otherwise

expressly provided in the Agreement. A Default or an Event of Default shall be deemed to exist at all times during the period commencing on the date that such Default or Event of Default occurs to the date on which such Default or Event of Default is waived in writing by Agent pursuant to the Agreement or, in the case of a Default, is cured within any period of cure expressly provided in this Agreement; and an Event of Default shall “continue” or be “continuing” until such Event of Default has been waived in writing by Agent. All calculations of Value shall be in Dollars, all Term Loans shall be funded in Dollars and all Obligations shall be repaid in Dollars. Whenever the phrase “to the best of Borrower’s knowledge” or words of similar import relating to the knowledge or the awareness of a Borrower are used in the Agreement or other Loan Documents, such phrase shall mean and refer to (i) the actual knowledge of a Senior Officer of such Borrower or (ii) the knowledge that a Senior Officer would have obtained if they had engaged in good faith and diligent performance of his duties. Whenever in the Agreement and the other Loan Documents reference is made to attorneys’ fees and expenses that are incurred by Agent or a Lender and that are to be reimbursed to Agent or a Lender by Borrowers, such reference shall be understood to mean the reasonable attorneys’ fees and expenses which are incurred by Agent or such Lender for services actually rendered by attorneys selected by Agent or such Lender on Agent’s or such Lender’s behalf.

EXHIBIT 2

in its discretion may answer questions of law certified to it by any federal court of the United States . . . when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

S.C. App. Ct. R. 244(a). The certification order must set forth: (1) “a statement showing fully the nature of the controversy in which the questions arose,” (2) “all findings of fact relevant to the questions certified,” and (3) “the questions of law to be answered.” S.C. App. Ct. R. 244(b).

II. NATURE OF THE CONTROVERSY

The United States filed a criminal complaint in the United States District Court for the District of South Carolina against Wilson and AB&C on April 4, 2012. *See United States v. Wilson* (“*Wilson I*”), No. 8:12-cr-00320-JMC, ECF Nos. 1, 1-1 (D.S.C.). According to the criminal complaint, based upon an investigation by the United States Secret Service, Wilson and/or AB&C would encourage clients to invest in silver investment accounts wherein clients would not take physical possession of the precious metals purchased, but rather Wilson/AB&C would purportedly hold the client’s silver at a Delaware depository. *Id.* Records revealed that Wilson was not actually purchasing a sufficient amount of silver to cover the orders placed by his clients and would also alter client account statements to reflect trades of silver that never occurred, thereby resulting in fraudulent account statements showing that clients owned large quantities of silver when, in fact, no silver had been purchased and no silver trades had occurred. *Id.*

On July 30, 2012, Wilson and AB&C pled guilty to two counts of mail fraud stemming from their involvement in a criminal Ponzi scheme involving hundreds of victims and millions of dollars. *See id.*, ECF Nos 44, 45. On November 13, 2012, Wilson was sentenced to a 235 month term of imprisonment. *See id.*, ECF Nos. 61, 67. On that same date, AB&C was sentenced to a five year term of probation and a fine was imposed. *See id.*, ECF Nos. 64, 68. Wilson and AB&C

were ordered to pay restitution in the amount of \$57,401,009.00. *See id.*, ECF Nos. 61, 64. On August 12, 2014, Wilson was indicted on one count of obstruction of justice related to his efforts to secrete assets from the government and the court-appointed Receiver. *See United States v. Wilson* (“*Wilson II*”), No. 6:14-cr-00571-JMC, [ECF No. 1](#) (D.S.C.). On October 6, 2014, Wilson entered another guilty plea, and on December 10, 2014 was sentenced to an additional term of imprisonment. *See id.*, ECF Nos. 50, 51, 74.

In an action related to the criminal prosecutions against Wilson and AB&C, the court entered an order, originally by text order on June 13, 2012 and amended on July 25, 2012, October 17, 2012, February 14, 2013 and October 29, 2015 (“appointment order”) appointing the Receiver and setting forth the duties of the Receiver related to Wilson and AB&C and other so-defined AB&C receivership entities. *See Wilson I*, No. 8:12-cr-00320-JMC, [ECF No. 31](#); *In re Receiver for Ronnie Gene Wilson & Atlantic Bullion & Coin, Inc.*, No. 8:12-cv-02078-JMC, ECF Nos. 1, 21, 43, 164. The appointment authorizes the Receiver, among other things, to locate and manage assets previously acquired by and/or in the name/possession of the AB&C receivership entities and to proceed against individuals and others that the Receiver may claim to have “wrongfully, illegally, or otherwise improperly be in possession of . . . proceeds directly or indirectly traceable from investors in the Ponzi scheme.” *In re Receiver*, No. 8:12-cv-02078-JMC, [ECF No. 164](#). The Receiver filed the appointment order on August 6, 2012 in the United State District Court for the Southern District of Florida pursuant to [28 U.S.C. § 754](#).

The Receiver filed the instant action on February 6, 2015 against Defendant to recover all profits received by Defendant on his purported silver investments with AB&C. (*See* [ECF No. 1](#)). The Receiver asserts claims for fraudulent conveyance pursuant to the Statute of Elizabeth, S.C.

Code Ann. § 27-23-10 (2014) and/or the Florida Uniform Fraudulent Transfer Act (“FUFTA”), Fla. Stat. Ann. § 726.101 to 726.21, and unjust enrichment. (*See id.*)

Currently before the court are cross-motions for summary judgment related to the Receiver’s claims for relief under the Statute of Elizabeth, the FUFTA, and unjust enrichment. (*See* ECF Nos. 70, 71.) The Receiver, in his motion and response to Defendant’s motion, argues that under South Carolina choice of law rules, South Carolina law applies to both his claims for fraudulent conveyance and unjust enrichment. (*See* ECF Nos. 70, 73, 79.) Defendant, on the other hand, argues that under South Carolina choice of law rules Florida law governs both claims. (*See* ECF Nos. 71, 74, 77.) The court’s July 5, 2017 order addressed seven of the arguments raised by Defendant in his motion, but reserved decision on Defendant’s remaining arguments and on the Receiver’s motion in its entirety until the court could seek certification to the South Carolina Supreme Court on choice of law rules needed to determine if the substantive law of Florida or South Carolina applies. (*See* ECF No. 95.)

III. RELEVANT FINDINGS OF FACT

The relevant facts related to the certification of questions to the South Carolina Supreme Court include:

1. Dodds was living in Greenville, South Carolina, when he first met Wilson.
2. Dodds decided to invest in an individual silver account with AB&C in 1996, while he was a resident of Florida.
3. The account was in Dodds’ name, and AB&C would mail statements to Dodds’ address in Florida or Michigan.
4. Dodds moved from South Carolina to Florida sometime in the mid to late 1980s, prior to his first investment with or withdrawal from AB&C, and he is currently a resident of Florida.

5. Dodds' first two deposits (made on February 29, 1996, and December 20, 2000) were made by checks written from a Wachovia account in Greenville, South Carolina. The subsequent deposits were made from outside of South Carolina.

6. Dodds would either write or call AB&C or Wilson from outside of South Carolina to request a withdrawal of funds, and the funds would be mailed to Dodds in the form of a check.

7. Dodds on occasion would meet with Wilson in Wilson's office after Dodds' first investment, mostly for personal reasons, although on at least one occasion he instructed Wilson to buy more silver.

8. AB&C, at all times relevant, was owned by Wilson and operated out of an office located at 203 and 205 Siloam Road, Easley, South Carolina.

9. AB&C's operating account, at all times relevant, was either at Regions Bank in Greenville, South Carolina (from 1993 to 2005), Southern First in Greenville, South Carolina (from 2005 to 2012), or Cornerstone National Bank in Easley South Carolina (in 2011).

10. The vast majority of Dodds' withdrawals were deposited in Florida, and all of Dodds' accounts in which his AB&C withdrawals were deposited were accounts outside of South Carolina, including Northern Trust Bank, Wells Fargo in Florida, and Morgan Keegan.

11. The last withdrawal check requested by Dodds from AB&C was made payable and sent to American Opinion Foundation and deposited into a bank account outside of South Carolina.

12. Dodds was not required to fill out or initiate any paperwork when a withdrawal from the AB&C account was requested or when it was made.

IV. CERTIFIED QUESTIONS OF LAW

In its July 5, 2017 order, the court concluded that the question of which law—that of Florida or South Carolina—should apply to the Receiver's fraudulent conveyance claim under South

Carolina choice of law rules is a question of South Carolina state law that may be determinative of the fraudulent conveyance claim pending in this matter and that it appears that there is no controlling precedent on the question in the decisions of the South Carolina Supreme Court. (*See ECF No. 95 at 23-30.*) The court likewise concluded that the question of which law—that of Florida or South Carolina—should apply to the Receiver’s unjust enrichment claim under South Carolina choice of law rules is a question of South Carolina state law that may be determinative of the unjust enrichment claim pending in this matter and that it appears that there is no controlling precedent on the question in the Supreme Court’s decisions. (*See id.* at 30-36.) Based upon the foregoing, the court respectfully requests the South Carolina Supreme Court to address the following certified questions:

1. Under South Carolina choice of law rules, the substantive and procedural law of which jurisdiction applies to the Receiver’s fraudulent conveyance claim?
2. Under South Carolina choice of law rules, the substantive and procedural law of which jurisdiction applies to the Receiver’s unjust enrichment claim?

V. CONCLUSION

Based on the foregoing, the court **CERTIFIES** the foregoing questions to the South Carolina Supreme Court. The clerk is **DIRECTED** to forward a copy of this order to the South Carolina Supreme Court under this court’s official seal, together with copies of any portions of the record requested by the South Carolina Supreme Court.

IT IS SO ORDERED.



United States District Court Judge

August 2, 2017
Columbia, South Carolina

EXHIBIT 3

The Supreme Court of South Carolina

Beattie B. Ashmore, in his capacity as court-appointed
receiver for Ronnie Gene Wilson and Atlantic Bullion
and Coin, Inc., Plaintiff,

v.

Jim Dodds, Defendant.

Appellate Case No. 2017-001652

ORDER

By order dated April 16, 2018, the Honorable A. Marvin Quattlebaum, Jr.,
dismissed the civil action related to this case. In light of this dismissal, this Court
is treating the certified questions as being withdrawn and this case is hereby ended.



FOR THE COURT C.J.

Columbia, South Carolina
April 18, 2018

cc: Lewis W. Tollison, III, Esquire
Lauren Sharpton Price, Esquire
Bradford Neal Martin, Esquire
Laura Wilcox Howle Teer, Esquire
Thomas Edward Vanderbloemen, Esquire
The Honorable J. Michelle Childs
The Honorable A. Marvin Quattelbaum
Clerk, United States District Court for the District of South Carolina