

Subordination and Intercreditor Agreements

by
Robert R. Rabalais
Vinson & Elkins LLP

I. The vocabulary of “Subordination.”

The vocabulary of “subordination” requires familiarity with the following concepts:

A. Equitable Subordination.

“Equitable Subordination” is “distinctly a power of federal bankruptcy courts, as courts of equity, to subordinate the claims of one creditor to those of others.”¹

It is employed *only* when the following three conditions are met:

- “1. the claimant must have engaged in inequitable conduct;
2. the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
3. equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code.”²

Moreover, “a claim should be subordinated only to the extent necessary to offset the harm which the debtor or its creditors have suffered as a result of the inequitable conduct.”³

Equitable Subordination is codified in Section 510 of the Federal Bankruptcy Code.

B. Contractual Subordination.

This is subordination agreed among two or more classes of creditors to a common debtor. While freedom of contract recognizes any number of variations to which the parties may agree, the two most common categories are “debt subordination” and “lien subordination.” Some agreements can cover both payment and lien subordination.

- i. Debt Subordination. This creates at least two classes of debt, one junior or subordinate to the other.
 - a. UCC 1-310—An obligation may be issued as subordinated to the performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of any obligation by agreement with *either the person obligated or another creditor of the person obligated*. Subordination does not create a security

interest as against either the common debtor or a subordinated creditor.⁴

- b. Note that the subordination may be in favor of a creditor who is not a party to the subordination agreement. This is common where the debt of a particular creditor is subordinated to an entire class of “senior” debt and is common in public bond deals.
- ii. Lien Subordination. In pure lien subordination, no differentiation is made in the classification of the debt, only in the relative priorities of the liens securing the debt of various creditors.
 - a. UCC 9-339—“This article does not preclude subordination by agreement [of security interests] by a person entitled to priority.”
- iii. Are these Contracts Enforceable? Yes. Sections 1-310 and 9-339 of the Uniform Commercial Code recognize their enforceability under applicable state law. Likewise, these agreements are enforceable under the Federal Bankruptcy Code. Section 510(a) of the Federal Bankruptcy Code provides that “[a] subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.”

C. Subordination by Operation of Law.

- i. Secured vs. Unsecured; Liquidation Priorities as a matter of law. Basic concepts of bankruptcy and corporate law recognize that companies in liquidation pay secured creditors, unsecured creditors, preferred equity and lastly common equity (subject to priority established by a bankruptcy court via equitable subordination, if applicable, or agreement of the parties).
- ii. The “Absolute Priority Rule.”

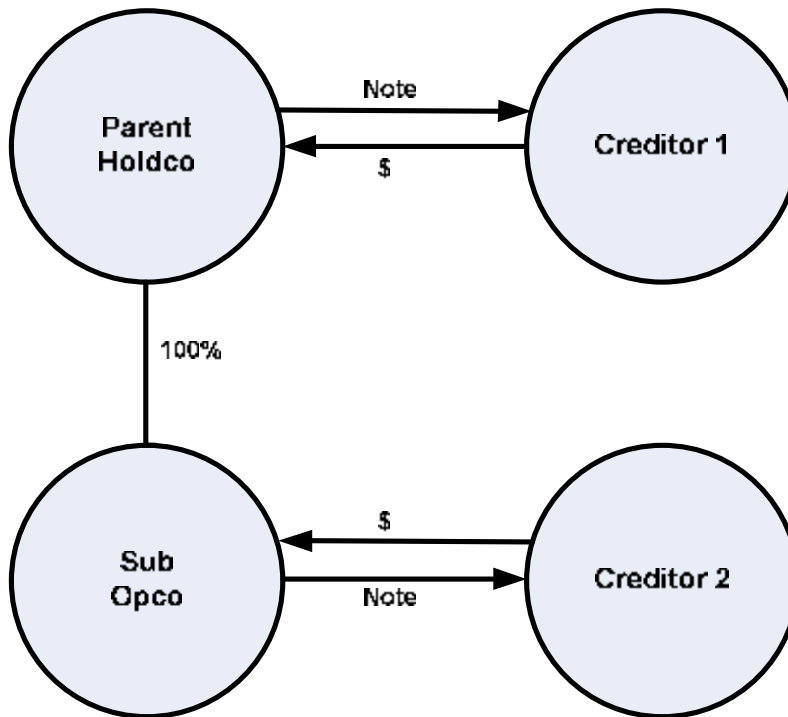
The nomenclature to describe this principle is the “absolute priority rule.” This rule “required that creditors . . . be paid before the stockholders could retain [equity interests] for any purpose whatever. [It is] codified as part of the ‘fair and equitable’ requirement of 11 U.S.C. § 1129(b). Under the statute, a plan is fair and equitable with respect to an impaired, dissenting class of unsecured claims if (1) it pays the class’s claims in full, or if (2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan ‘on account of’ such claims or interests. . . . The absolute priority rule, as codified, ensures that ‘the holder of any claim or interest that is junior to the claims of [an impaired dissenting] class will not receive or retain under the plan on account of such junior claim or interest in any property.’ 11 U.S.C. § 1129(b)(2)(B)(ii). The plain language of the statute makes it clear that a plan cannot give property to junior claimants over the objection of a more senior class that is impaired”⁵

D. Subordination by Tenor.

This is a comparison of the relative maturities of two different debt instruments with the instrument having the earlier maturity being “senior by virtue of its tenor” because it must be paid by its terms prior to the instrument with the later maturity. As the simplest example, a borrower has a three year, senior first lien revolver and a subordinated unsecured term loan. The term loan had an initial tenor of 7 years, but now is currently maturing in 18 months. Because of its shorter maturity, the subordinated unsecured term loan is “senior by virtue of its tenor.” As a result, senior lenders should always strive to “ladder” maturities. How tight should the ladder rungs be? It depends on the circumstances. Many lenders consider 90 days for non-affiliate debt and 1 year and 1 day for affiliate debt as the minimum acceptable intervals because of preference rules.⁶ We, however, frequently look to longer intervals between the maturities because a senior lender’s exit strategy may include a refinancing by new lenders. Intervals which are too tight eliminate this exit strategy.

E. Structural Subordination.

- i. Corollary of Subordination by Operation of Law. The concept is that claims of a creditor against a subsidiary where the operating assets are located are paid prior to the claims of creditors having only claims against a parent or holding company. The vocabulary is that those claims are “structurally remote” from the operating assets being separated from the claims of the parent creditors by one or more layers of corporations.
- ii. Example. The following is the simplest illustration:



In this example, if all operating assets are at Sub Opco, the debt of Parent Holdco to Creditor 1 is structurally subordinated to the debt of Sub Opco to Creditor 2 because the debt of Creditor 2 must be repaid in full in a liquidation prior to any distributions being made to Parent Holdco to repay Creditor 1's debt.

F. Statutory Subordination and Priming Liens. These are the familiar statutory or common law liens and preferences that are given priority as a matter of law by the statute or jurisprudence creating them. These would include Federal Tax Liens, mechanic's liens, materialmen's liens, oil field service liens and maritime liens.

G. Inadvertent Subordination and the Use of "Subject to"—*In re Century Offshore Mgmt. Corp.*, 119 F.3d 409 (6th Cir. 1997).

Although not a new case, *Century Offshore* is not well known outside the bankruptcy bar. The case involved the use of the phrase "subject to" in several places including the borrower's title representation and lien priority representation, which used the customary language "mortgagee has a first priority lien *subject to* Permitted Encumbrances." The court interpreted the phrase "subject to" to mean "subordinate to" (although that was not necessarily the clear intent of the parties in this case and arguably not what practitioners who use this language really contemplate). As such, the perfected "first priority" mortgage lien was held to be contractually subordinated to an unperfected lien created under a joint operating agreement which, in the absence of the contractual subordination, would have been inferior. The court wrote:

"Our holding rests on the principle that even if the default rule under Louisiana's race recording statute would ordinarily allow a third party with notice—perhaps even actual notice—to rely solely on the public records in ranking its lien, this default rule may be avoided by the parties by contract: The public records doctrine does not prevent the third party from contractually agreeing by express language to subordinate its interest to interests that would otherwise be inferior. . . . In three places, [BMO's] contract with Century (the Mortgage) states that its interest is "*subject to*" the Operating Agreement. . . . It follows from this language that BMO and Century intended BMO's security interest to be inferior to the interests created in the Operating Agreement."

Our practice now is to avoid the use of "subject to" and instead use language to the effect "provided that certain Permitted Liens may encumber the Mortgaged Property, but the permitted existence of these Liens is not intended to create any priority or subordination to the extent not otherwise permitted by applicable law."

The other problem with the use of "subject to Permitted Liens" is that it is too broad, i.e. certain liens may be permitted but only in very narrow applications. The use of "subject to Permitted Liens" suggests that any Permitted Lien could be acceptable. We often seek to be specific as to those Permitted Liens which can encumber our mortgaged properties or generally make reference to this qualification by the use of "certain Permitted Liens may encumber".

II. Contractual Subordination; Sample Language and Issues.

A. Payment Subordination vs. Lien Subordination.

B. Payment Subordination.

i. No Payment.

The Borrower shall not make, and no Subordinated Lender shall accept, receive or collect, any direct or indirect payment or distribution of any kind or character (in cash, securities, other property, by setoff, or otherwise) of any properties or assets of the Borrower or any Subsidiary on account of the Subordinated Obligations.

ii. Payment of Interest, but nothing else.

Same language as above, but insert at end: “other than regularly scheduled payments of interest.”

iii. Payment of Scheduled Interest/Principal.

Same language as above, but insert at end: “other than regularly scheduled payments of interest and principal.”

iv. Conditional Payment of Interest or Principal.

Same language as above, but insert at end: “other than regularly scheduled payments of interest and principal provided that [alternate conditions]:

no Default or Event of Default under the Senior Loan Documents exists as of the date of such payment;

the Borrower’s ratio of Interest Expense to EBITDA is not greater than [3.5] to 1.0 as of the most recently ended fiscal quarter for which financial statements are available prior to the date of the proposed payment;

the Borrower has unused availability under the Revolving Credit Facility of \$xx or more; and

[any other appropriate conditions].”

v. Payment Blockage Rights.

Where payment of interest and/or principal is permitted, payment is typically subject to conditions (as noted above) that no payments be made on the subordinated debt if the senior debt is not paid or is in default. These are commonly known as “blockage rights.” The scope of blockage can vary significantly from transaction to transaction. Customarily, payments of interest and/or principal on the subordinated debt are absolutely prohibited if payments of interest and principal are not being made in respect of the senior debt. Where the senior debt is being paid, but “non-payment defaults” exist in respect of the senior debt, blockage rights would confer optionality to the holder of the senior debt to prevent payments of interest and/or principal on the subordinated debt. This would be known as “invoking payment blockage.” While blockage for

payment defaults is typically perpetual (for so long as the senior debt payment default exists), the blockage period for non-payment defaults is customarily for a limited duration (which is frequently 180 days). Sample language:

“if (a) a Payment Default has occurred and (b) the Subordinated Administrative Agent or other representative shall have received a Payment Default Notice, then neither the Borrower nor any Guarantor may make, and no Subordinated Lender shall accept, receive or collect, any direct or indirect payment or distribution of any kind or character (in cash, securities, other property, by setoff, or otherwise other than *Permitted Reorganization Securities*) of any properties or assets of the Borrower or any Subsidiary on account of the Subordinated Obligations during the 179th day after receipt of such Non-Payment Default Notice.”

vi. Disgorgement of Payments.

The companion remedy to blockage is disgorgement. If the subordinated creditor receives a payment on its subordinated debt it was not contractually entitled to, then it must disgorge that payment to the senior creditor. Sample language:

“In the event that, notwithstanding the foregoing, either the Borrower or any Subsidiary shall make any payment or distribution to any Subordinated Lender prohibited by the foregoing provisions of this Agreement, then such payment or distribution shall be held in trust for the benefit of and immediately shall be paid over to the holders of the Senior Indebtedness for application against the Senior Indebtedness remaining unpaid until such Senior Indebtedness is paid in full *in cash.*”

vii. Permitted Payments and Disgorgement of Payments.

Note the use of “*Permitted Reorganization Securities*” and “*in cash.*” Not all agreements will require “in cash,” meaning the disgorgement of non-cash payments by the subordinated creditor could lead to the possibility that the senior creditor receives more than it was owed (although it would have to return any excess). This construct also creates a risk that the conversion to cash of the property received will result in an amount of cash less than the subordinated creditor’s perceived value of the asset.

Example: A common debtor in bankruptcy has senior bank debt and subordinated debt. The bankruptcy plan has partial cash repayment to the senior bank and non-cash repayment to both the senior and subordinated debt in form of common stock. The use of “in cash” would require disgorgement and conversion to cash of the common shares received by the subordinated creditors prior to any distributions of any assets to the subordinated debt.

Some disgorgement provisions permit the subordinated creditor to retain “permitted reorganization securities” which are securities subordinated to the senior claims at least to the same extent as the current subordinated claim. Thus, for this to result in a different outcome, the senior bank would have to receive preferred stock in lieu of common.⁷

viii. Seller Notes and Rights of Set Off.

In certain cases, such as seller notes given by a buyer to a seller in an acquisition, the seller note is frequently required to ensure the seller has a liability against the buyer to act as credit support for the buyer’s indemnity obligations to the seller under the purchase and sale agreement. Even if an Event of Default exists (or the other conditions to permit a repayment are met), a senior lender should arguably permit a set off of these indemnity obligations against principal of the subordinated note. This would be affected with the same language as above, but with the addition of:

“other than by the set off of amounts due under Section [___] of that certain Purchase and Sale Agreement dated [____], 200[___] between the Borrower and the Subordinated Lender.”

One can debate whether it is appropriate to permit the seller note to be reduced by the indemnity obligation owed or whether a senior lender should require the buyer to pay the obligation in cash and keep it to off-set senior obligations. Our view is that set off should be permitted.

C. Other Issues.

i. Scope of Senior Debt or Subordinated Debt—all debt vs. specific debt.

These definitions are often “all obligations and liabilities of the Borrower to [x], including without limitation, the obligations of the Borrower under that certain promissory note dated of even date in the original principal amount of \$xx.”

This definition is extremely broad and may be inappropriate in some circumstances where the business agreement is to subordinate a specific obligation of one creditor to another specific obligation and not future or different concurrent obligations. Other obligations which may be appropriately included within the scope of “Senior Obligations” could be obligations of the borrower to the senior lender under interest rate swap agreements, commodity price swap agreements, money management facilities, etc.

One specific item to consider is reimbursement for fees and expenses of professionals (*e.g.* attorneys) retained by the subordinated creditors. As drafted, most subordination agreements would preclude payment of professionals representing the subordinated creditors by the borrower.

Specific attention should be paid to exclude this from the scope of the subordinated debt or the restrictions on payment.

Example: Company X has two divisions, a drilling division and a drilling supply division. It seeks to sell the drilling division to focus on its supply business and intends to do business in the future with the new drilling company. Buyer asks seller (Company X) to take a 2-year seller note to cover potential indemnities under the purchase and sale agreement. Bank which is financing a portion of the acquisition/sales price requires the seller note to be subordinated and provides a subordination agreement that states the subordinated obligations are:

“any and all indebtedness, obligations and liabilities (whether for principal, interest, fees, indemnifications or otherwise) now or hereafter owing by the Borrower or any Subsidiary to Subordinated Lender (Company X) howsoever arising.”

This language has the effect of subordinating not merely the principal and interest associated with the seller note, but also all obligations under or in connection with the Purchase and Sale Agreement and any account payable that the buyer/drilling company may have to seller/Company X as a result of its ordinary course of selling inventory to the drilling company. Here, subordination would arguably be appropriately limited to the seller note.

ii. Degree of Subordination; “Back-Door” Blockage.

Are payments to be permitted on the subordinated debt and if so under what, if any, conditions?

If “blockage rights” are to be conferred, when and under what limitations (if any)? When will blockage end or will it be perpetual?

Some subordinated creditors will negotiate specific limitations on the right of senior creditors to invoke blockage, but will not look at the negative covenants the senior creditors negotiate with the common debtor. Those covenants may contain absolute restrictions on payment of principal or interest or may contain conditions to payment that are inconsistent with the blockage provisions in the subordination agreement. Counsel for the subordinated creditors should also review those provisions for conformity.

iii. Limitations on Amount of Senior Debt.

Are there caps on the amount of permitted senior debt that can be incurred without subordinated lender consent? The cap could be an absolute cap of \$xx or a formulaic cap based upon some leverage test.

D. Lien Subordination.

i. In a “Lien Only” subordination, all debt is pari-passu absent the existence of liens. This means the two classes of debt would share equally on all assets of the common debtor which are not collateral.

ii. Sample Language.

All Liens granted by the Borrower, or, if applicable, any Guarantor, which at any time secure the Second Lien Obligations are hereby made, and will at all times prior to the full payment or discharge of the First Lien Obligations be, subject and subordinate to all Liens granted by the Borrower or any Guarantor which at any time secure the First Lien Obligations, which subordination shall be effective whether or not all such Liens securing the First Lien Obligations have been properly recorded, filed and otherwise perfected prior to all such Liens securing any Second Lien Obligation and regardless of the relative priority of such Liens as determined without regard to this Agreement.

iii. Common Features.

a. Agreement not to challenge liens.

Frequently, the holders of the 1st lien will require that once the subordination agreement is executed, the holders of the 2nd lien will not contest the contractually agreed priorities. Typical language follows:

“Each Second Lien Lender agrees that it will not initiate, join in or prosecute any claim, action or other proceeding challenging the validity or enforceability of the First Lien Obligations or the Liens securing the First Lien Obligations.”

However, the language may further provide language to the effect that:

“regardless of whether the Liens securing the First Lien Obligations shall be unperfected, such perfection shall lapse or otherwise be determined to be void or voidable.”

This presents allocation of risk issues—allocating the risk of proper initial perfection, as well as the risk of continued monitoring of perfection—on the 2nd lien creditors. Is this actually lien subordination affecting payment subordination?

b. Remedies Standstill.

1. Remedies standstills are designed to give the borrower and the creditors a reasonable period of time following a default to work out or restructure the defaulted obligations and

restore the borrower to going concern status or, in the alternate, to enforce the 1st lien without interference by the 2nd lien. The idea is that for this period of time the 2nd lien (sometimes both classes) agree not to pursue any remedies it may otherwise have under its loan documents or available at law.

People often use the terms “standstill” and “payment blockage” interchangeably, although conceptually they are different and distinct.

2. Sample Language.

The Second Lien Creditors will not exercise or seek to exercise any rights or remedies (including setoff) with respect to any Collateral (including, without limitation, the exercise of any right under any lockbox agreement, account control agreement, letter in-lieu, bailee’s letter or similar agreement or arrangement to which the Second Lien Administrative Agent or any Second Lien Creditor is a party), or institute any action or proceeding with respect to such rights or remedies against the Collateral (including any action of foreclosure); provided, however, that the Second Lien Administrative Agent may exercise any or all such rights and remedies after (1) the passage of a period of 179 days from the date of delivery of a notice in writing to the First Lien Representative that an Event of Default (as defined in the Second Lien Term Loan Agreement) has occurred (with respect to each individual Event of Default, each a “Standstill Period”) which notice may only be delivered following the occurrence of and during the continuation of an Event of Default (as defined in the Second Lien Term Loan Agreement) or (2) upon payment in full in cash of all First Lien Obligations; provided, further, however, notwithstanding anything herein to the contrary, in no event shall the Second Lien Administrative Agent or any Second Lien Creditor exercise or continue to exercise any rights or remedies with respect to the Collateral if, notwithstanding the expiration of any outstanding Standstill Period, the First Lien Representative or First Lien Creditors shall have commenced and are diligently pursuing the exercise of any of their rights or remedies with respect to all or any material portion of the Collateral (prompt notice of such exercise to be given to the Second Lien Representative);

3. Duration. These vary and may differ based upon industry precedents and the nature of the collateral. In our experience, 180 days is common.

4. Exceptions to Standstill. Typically, exceptions are permitted to (i) preserve value of collateral that may threaten to speedily decline, (ii) assert, protect, preserve or vote in respect of a claim in a bankruptcy proceeds, or (iii) taking action to receive permitted reorganization securities.
- c. Automatic Release of 2nd Lien. Traditional “silent second” lien intercreditors typically required the 2nd lien to release its lien automatically and unconditionally if the 1st lien released its lien. The idea was that if the 1st lien could extinguish the 2nd lien via foreclosure, then the 2nd lien should not be able to block a consensual sale approved by the 1st lien. Sound logic, assuming the use of sales proceeds is to retire (permanently) the 1st lien debt (as is typically provided by the 2nd lien asset sale covenant). Consequently, newer intercreditor agreements condition the automatic release in a number of ways, including the requirement that asset sale proceeds be used consistent with the 2nd lien asset sale covenant.
- d. 1st Lien Collateral Agent as Bailee for 2nd Lien for Possessory Collateral. Where possession or “control” is necessary or desirable for perfection of a security interest, typically the intercreditor agreement will provide that the 1st lien collateral agent will hold the relevant collateral as bailee for the 2nd lien solely for the purpose of conferring “control” to them to effect perfection of the 2nd lien lender’s lien or security interest.
- e. Bankruptcy Issues.
 1. Are they enforceable?
 2. The analysis is that under Section 510(a) of the Federal Bankruptcy Code, subordination agreements are enforceable to the extent enforceable under applicable non-bankruptcy law. But where the intercreditor provision seeking to be enforced exists only under the Federal Bankruptcy Code (and may vary rights that exist under state law), does Section 510(a) validate these provisions? This is a topic of much academic debate and little consistency exists among the various decisions addressing these issues. For a number of articles discussing this issue in a variety of cases, see end note ⁸.
- f. Disgorgement of 2nd Lien Proceeds.

Many intercreditor agreements will contain language such as:

“So long as the Discharge of Senior Indebtedness has not occurred, any Collateral or proceeds thereof (together with assets or proceeds

subject to Liens referred to in the final sentence of Section [__]) received by the Second Lien Agent or any Second Lien Claimholders in connection with the exercise of any right or remedy (including set off) with respect to the Collateral shall be segregated and held in trust and forthwith paid over to the First Lien Agent for the benefit of the First Lien Claimholders in the same form as received, with any necessary endorsements, or as a court of competent jurisdiction may otherwise direct.”

We frequently see this, but again, is it appropriate? Foreclosure of the 2nd lien should not affect the 1st lien, so why is disgorgement appropriate?

III. Intercreditor Agreements.

A. Classes.

- i. 1st/2nd Lien Intercreditors—common pool of collateral—I have 1st; you have 2nd.
 - a. Example. Senior Revolving Credit Agreement with Bank A; facility is secured by all assets of the Borrower. Second Lien Term Loan Agreement secured by a 2nd lien on all assets of the Borrower.
- ii. Mutually exclusive Collateral Pools—What’s mine is mine and what’s yours is yours.
 - a. Example. Working Capital Lender has lien on inventory, accounts receivable and proceeds. Equipment Lender finances and has a lien on all equipment and fixtures and proceeds. The two creditors acknowledge and agree on limits of collateral and a procedure for tracing proceeds.
 - b. Issues.
 1. Does Working Capital Lender need equipment (which is not its collateral) to process inventory to realize value?
 2. Does Equipment Lender have going concern issues to realize full value of equipment?
 3. In these cases, even though our collateral pools are mutually exclusive, we may be co-dependent on the other creditor’s collateral to maximize value of our collateral and ensure a full recovery. In these cases, mutual standstills and purchase options may be reasonable to consider.
- iii. 1st/2nd Lien Intercreditors with Reciprocal Pools.

- a. Example. Working Capital Lender has first lien on inventory, accounts receivable and proceeds and second lien on fixtures and equipment and proceeds. Equipment Lender has purchase money equipment and fixtures and proceeds and second lien on inventory, accounts receivable and proceeds.
 - b. Issues. Same as above.
- iv. Shared 1st Lien with Payment Priorities.
- a. Example. A single credit facility with three tranches, a 3-year revolver, a 5-year term loan A and a 7-year term loan B. The mortgages also secure the borrower's hedging obligations. The mortgages/credit agreement provides for a waterfall that provides that all debt (in liquidation, after acceleration or maturity) shares pro rata or alternatively, that one class of creditor is senior or junior to another, *e.g.* settlement/termination payments under swap agreements.
 - b. Issues.
 - 1. Voting. Everyone votes ratably, but if your revolver is undrawn, do the revolving lenders vote their outstandings (\$0.00) or their full commitments even though unfunded?
 - 2. Swaps. How do you determine the quantum of the swap lender's vote (or do they vote at all)?
 - 3. Conflicts between Classes. Where there is not unity of interest, different classes may have different interests in certain voting situations.
- iv. Syndicated Loans--Embedded Intercreditor Provisions.
- a. Single Class. Most syndicated credit facilities actually contain intercreditor provisions between the lenders party to the syndicated credit agreement. Where the agreement only has one class of creditor, the only significant intercreditor agreements are voting and sharing of payments ratably in accordance with outstandings.
 - b. Two or More Classes. Where two or more classes or facilities are included, the classes may possess or have divergent interests unless the agreement requires unity of interest (meaning each lender holds a ratable share of each class of debt). If voting is not by class and no unity of interest exists, conflicts may arise between the classes.

B. Issues.

- i. 2nd Lien Purchase Options. These provisions confer to the holder of the subordinated debt the right to purchase (usually for par) the senior debt to

enable the holder of the subordinated debt to manage the overall restructuring or liquidation to ensure maximum recovery on the subordinated debt.

- a. Option Triggering Events. These vary from any default under the 2nd lien debt documents to acceleration of the 1st lien debt. Typically, the borrower may have more interest in a more robust triggering event if the 2nd lien debt holders are subject to a remedy standstill and the 1st lien holders are viewed as less inclined to quickly pursue remedies.
- ii. Limits on amendments, modifications to documents. What limitations will one class impose on the borrower and the other class (or permit to be imposed by a negative covenant)? Possibilities include limits on increasing the interest rate, shortening (or occasionally lengthening) maturities, adding covenants or collateral, adding amortization, etc.

IV. Forms.

- A. Sample Form of Subordination Agreement (Payment/Non-affiliate Debt)
- B. Sample Form of Terms of Subordination for Hi-Yield Debt. Range Resources Corporation Senior Subordinated Securities.
- C. Form of Seller Subordinated Note.
- D. ABA Model Intercreditor Agreement (First and Second Lien Loans). <http://www.abanet.org/dch/committee.cfm?com=CL190029> (see link)

¹ *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 633 (2nd Cir. 1995).

² *Matter of SI Restructuring, Inc.*, 532 F.3d 355, 360 (5th Cir. 2008) (citing *In re Mobile Steel Corp.*, 563 F.2d 692, 700 (5th Cir. 1977)).

³ *Id.* at 360-61 (citing *In re Mobile Steel Corp.*, 563 F.2d at 701).

⁴ (emphasis added). Section 1-310 was formerly 1-209 (and remains so in New York). The Official Comments to Section 1-310 offer a helpful discussion of payment subordination concepts.

⁵ *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 512-13 (3rd Cir. 2005).

⁶ See 11 U.S.C. § 547 (2008).

⁷ Carve out language allowing for permitted reorganization securities (sometimes also referred to as “permitted junior securities”) is popularly referred to as an “X-Clause.” For judicial interpretation of X-Clauses see the following: *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2nd Cir. 2005); *In re PWS Holding Corp.*, 228 F.3d 224 (3rd Cir. 2000); *In re Envirodyne Indus., Inc.*, 29 F.3d 301 (7th Cir. 1994); and *In re Dura Auto. Sys., Inc.*, 379 B.R. 257 (Bankr. D. Del. Dec. 7, 2007).

⁸ Additional references for this topic include: David Line Batty and Jo Ann J. Brighton, *Silent Second Liens—Will Bankruptcy Courts Keep The Peace?*, 14 J. Bankr. L. & Prac. 4 Art. 4 (2005); Jo Ann J. Brighton, *Silent Second Lien Financings: Popular Lending Structure May Give Rise to Enforcement Problems. Part I: What Is a Silent Second Lien Financing?*, ABI J., Feb. 2005, at 22; Jo Ann J. Brighton and Mark N. Berman, *Second-Lien Financings: Enforcement of Intercreditor Agreements in Bankruptcy. Part I: More Questions than Answers.* 25 ABI J., Feb. 2006, at 38; John C. Murray, *Enforceability of Intercreditor Agreements in Bankruptcy*, 16 Prob. & Prop. July-Aug. 2002, at 42; Bruce H. White, *Subordination Agreements and Voting Rights: Will Your Intercreditor Agreement Be Enforced?* 20 ABI J., July-Aug. 2001, at 32.

A

SUBORDINATION AGREEMENT

This Subordination Agreement (this “Agreement”), dated as of [_____], is among [_____], as Administrative Agent (in such capacity, with its successors and assigns, the “Senior Administrative Agent”) for the Senior Revolving Lenders, [_____], as the subordinated administrative agent (in such capacity, with its successors and assigns, the “Subordinated Administrative Agent”) for the Term Lenders, and [_____] (the “Borrower”) [and certain of its Subsidiaries (the “Guarantors”)].

WHEREAS, the Borrower, the Senior Administrative Agent and other Senior Revolving Lenders are entering into the Senior Revolving Credit Agreement as of the date hereof, pursuant to which such financial institutions have agreed, subject to the terms and conditions thereof, to make loans and extend other financial accommodations to the Borrower; and

WHEREAS, it is a condition precedent to the obligations of the Senior Revolving Lenders under the Senior Revolving Credit Agreement that the Borrower and the Subordinated Administrative Agent for itself and the Term Lenders execute and deliver this Agreement;

NOW THEREFORE, in consideration of the foregoing and the mutual covenants herein contained and other good and valuable consideration, the existence and sufficiency of which are expressly recognized by all of the parties hereto, and to induce the Senior Revolving Lenders to execute the Senior Revolving Credit Documents, the parties agree as follows:

ARTICLE I Defined Terms.

Section 1.01 Each capitalized term used in this Agreement, but not defined herein, shall have the meaning ascribed such term in the Senior Revolving Credit Agreement.

Section 1.02 The following terms have the following meanings when used in this Agreement:

“Blockage Period” means a Non-Payment Blockage Period or a Payment Blockage Period.

“Eligible Swap Agreement” means any present or future Swap Agreement between the Borrower or any Subsidiary and any Senior Revolving Lender or any Affiliate of any Senior Revolving Lender. For the avoidance of doubt, a Swap Agreement ceases to be an Eligible Swap Agreement if the Person that is the counterparty to the Borrower under a Swap Agreement ceases to be a Senior Revolving Lender under the Senior Revolving Credit Agreement (or, in the case of an Affiliate of a Senior Revolving Lender, the Person affiliated therewith ceases to be a Senior Revolving Lender under the Senior Revolving Credit Agreement).

“Enforcement Action” means, with respect to any Subordinated Obligations or Senior Indebtedness: any enforcement of any right or remedy including any enforcement or foreclosure of Liens granted by the Borrower or any Subsidiary to secure any or all of such Subordinated Obligations or Senior Indebtedness, any enforcement or foreclosure of Liens on any capital stock or other equity interests in the Borrower or any Subsidiary which may be granted by the

Borrower or its Subsidiaries or any holder of equity in the Borrower to secure any or all of such Subordinated Obligations or Senior Indebtedness, or any other efforts to collect proceeds from the Borrower's or any of its Subsidiary's assets or properties (including proceeds of production) to satisfy the Subordinated Obligations or Senior Indebtedness, including, without limitation, the commencement, or the joining with any other creditor of the Borrower or any Subsidiary in the commencement of any Insolvency Proceeding against the Borrower or any Subsidiary; provided, that none of the following shall constitute an Enforcement Action: (a) acceleration of any of the Subordinated Obligations, (b) acceleration of any of the Senior Indebtedness, (c) actions by any Term Lender to obtain possession of or receive Reorganization Securities, or (d) taking any action described above during the existence of any Insolvency Proceeding subject to the jurisdiction of a court of competent authority.

"Insolvency Proceeding" shall mean (a) any voluntary or involuntary case, action, or proceeding before any Governmental Authority having jurisdiction over the applicable Person or its assets relating to bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up, or relief of debtors, or (b) any general assignment for the benefit of creditors, composition, marshaling of assets for creditors, or other similar arrangement in respect of its creditors generally or any substantial portion of its creditors; in each case whether undertaken under U.S. Federal, state, or foreign law.

"Non-Payment Blockage Period" means, with respect to any Non-Payment Default, the period from and including the date of receipt by the Term Lenders or the Subordinated Administrative Agent or other representative of a Non-Payment Default Notice relating thereto until the first to occur of (a) the date upon which the Senior Indebtedness has been paid in full in cash, all commitments of any holder of Senior Indebtedness to make loans or extensions of credit have terminated, and all letters of credit issued by any holder of Senior Indebtedness have expired, terminated or been fully collateralized in cash, (b) the 179th day after receipt of such Non-Payment Default Notice, (c) the date on which the Non-Payment Default which is the subject of such Non-Payment Default Notice has been waived in writing by the applicable holder or holders of the Senior Indebtedness or an agent or representative on their behalf, cured, or ceased to exist, or (d) the date upon which the Person(s) giving such Non-Payment Default Notice notify the Term Lenders or the Subordinated Administrative Agent or other representative in writing of the termination of such Non-Payment Blockage Period.

"Non-Payment Default" means the occurrence of any Borrowing Base Deficiency (as defined in the Senior Revolving Credit Agreement) or other event under any Senior Revolving Document evidencing Senior Indebtedness, not constituting a Payment Default, which gives the holder(s) of such Senior Indebtedness, or an agent or representative acting on behalf of such holder(s), the right to cause the maturity of such Senior Indebtedness to be accelerated immediately without any further notice (except such notice as may be required to effect such acceleration) or the expiration of any applicable grace period.

"Non-Payment Default Notice" means a written notice from or on behalf of the Senior Indebtedness Representative that a Non-Payment Default has occurred and is continuing which identifies such Non-Payment Default and specifically designates such notice as a "Non-Payment Default Notice".

“Payment Blockage Period” means, with respect to any Payment Default or Senior Indebtedness Acceleration, the period from and including the date of receipt by the Term Lenders or the Subordinated Administrative Agent of a Payment Default Notice relating thereto until the first to occur of (a) the date upon which the Senior Indebtedness has been paid in full in cash, all commitments of any holder of Senior Indebtedness to make loans or extensions of credit have terminated, and all letters of credit issued by any holder of Senior Indebtedness have expired, terminated or been fully collateralized in cash, (b) if such Payment Default Notice relates to a Payment Default, the date on which the Payment Default which is the subject of such Payment Default Notice has been waived in writing by the applicable holder or holders of the Senior Indebtedness or an agent or representative on their behalf, cured or ceased to exist, or if such Payment Default Notice relates to a Senior Indebtedness Acceleration, the date on which such acceleration is rescinded, annulled or ceased to exist, or (c) the day upon which the Person(s) giving such Payment Default Notice notify the Term Lenders or the Subordinated Administrative Agent or other representative in writing of the termination of such Payment Blockage Period.

“Payment Default” means a default by the Borrower or any Guarantor in the payment of any amount owing with respect to the Senior Indebtedness, whether with respect to principal, interest, premium, letter of credit reimbursement obligations, commitment fees or letter of credit fees or otherwise when the same becomes due and payable, whether at maturity or at a date fixed for payment of an installment or prepayment or by declaration or acceleration or otherwise.

“Payment Default Notice” means a written notice from or on behalf of the Senior Indebtedness Representative that either (i) a Payment Default with respect to such Senior Indebtedness has occurred and is continuing, or (ii) a Senior Indebtedness Acceleration.

“Reorganization Securities” means (a) debt securities that are issued pursuant to an Insolvency Proceeding the payment of which is subordinate and junior at least to the extent provided in this Agreement to the payment of the Senior Indebtedness outstanding at the time of the issuance thereof (including any refinancing of Senior Indebtedness pursuant to an Insolvency Proceeding) and to the payment of all debt securities issued in exchange for such Senior Indebtedness in such Insolvency Proceeding (whether such subordination is effected by the terms of such securities, an order or decree issued in such Insolvency Proceeding, by agreement of the Term Lenders or otherwise), or (b) equity securities that are issued pursuant to an Insolvency Proceeding; provided, in either case, that such securities are authorized by an order or decree made by a court of competent jurisdiction in such Insolvency Proceeding.

“Senior Indebtedness” means and includes (a) all principal indebtedness for loans now outstanding or hereafter incurred, and all letter of credit reimbursement obligations now existing or hereafter arising, under the Senior Revolving Credit Agreement, provided that the aggregate outstanding principal amount of Senior Indebtedness under this clause (a) shall not exceed \$[___],000,000 at any time, and provided further, that if the aggregate principal amount of Senior Indebtedness (constituting principal and letter of credit reimbursement obligations) shall exceed \$[___],000,000, then the subordination of the Term Notes as contemplated by this Agreement to the Senior Indebtedness of \$[___],000,000 or less shall not be impaired, (b) all amounts now or hereafter owing to any of the Senior Revolving Lenders or any of their Affiliates under any Eligible Swap Agreement, (c) all interest accruing on the Senior Indebtedness described in the

preceding clauses (a) and (b), and (d) all other monetary obligations (whether now outstanding or hereafter incurred) for which the Borrower or any Guarantor is responsible or liable as obligor, guarantor or otherwise under or pursuant to any of the Senior Revolving Credit Documents including, without limitation, all fees, penalties, yield protections, breakage costs, damages, indemnification obligations, reimbursement obligations, and expenses (including, without limitation, fees and expenses of counsel to the Senior Indebtedness Representative and the Senior Revolving Lenders) together with interest on the foregoing to the extent provided for in the Senior Revolving Credit Documents. The interest described in the preceding clause (c) and the premiums and penalties described in the preceding clause (d) include, without limitation, all interest accruing after the commencement of any Insolvency Proceeding under the terms of the Senior Revolving Credit Documents whether or not such interest constitutes an allowed claim in any such Insolvency Proceeding.

“Senior Indebtedness Acceleration” means with respect to the Senior Indebtedness that the holder or holders of such Senior Indebtedness, or an agent or representative on behalf of such holder or holders, have caused the maturity of such Senior Indebtedness to be accelerated.

“Senior Indebtedness Default” means a Payment Default or a Non-Payment Default.

“Senior Indebtedness Representative” means (a) initially, [____], as administrative agent for the Senior Revolving Lenders under the Senior Revolving Credit Agreement or (b) such other Person selected by the Majority Lenders (as such term is defined in the Senior Revolving Credit Agreement) to replace [____] or the then Senior Indebtedness Representative.

“Senior Revolving Credit Agreement” means that certain Credit Agreement dated as of [____], among the Borrower, [____], as Senior Administrative Agent and the financial institutions listed therein from time to time as Senior Revolving Lenders, as from time to time renewed, extended, amended, supplemented, or restated in accordance with the terms hereof, and any agreements representing the refinancing, replacement, or substitution in whole or in part of the revolving credit loans and letter of credit liabilities made or incurred under such Senior Revolving Credit Agreement, provided that the terms of such refinancing, replacement or substitution and the financing documentation entered into in connection therewith are consistent with the terms of the Senior Revolving Credit Agreement and other Senior Revolving Credit Documents in effect prior to such refinancing, replacement or substitution or could have been included in such Senior Revolving Credit Documents by an amendment or other modification that would not be prohibited by the terms of this Agreement.

“Senior Revolving Credit Documents” means, collectively, (a) the Senior Revolving Credit Agreement and the Eligible Swap Agreements, (b) any note, bond or other instrument evidencing Senior Indebtedness, (c) all mortgages, security agreements, pledge agreements or financing statements evidencing, creating or perfecting any Lien to secure the Senior Indebtedness in any way, (d) all guarantees of the Senior Indebtedness, (d) all other documents, instruments or agreements relating to the Senior Indebtedness now or hereafter executed or delivered by and among the Borrower, any Subsidiary, the Senior Indebtedness Representative or any Senior Revolving Lender, including without limitation each of the other “Loan Documents” as such term is defined in the Senior Revolving Credit Agreement, and (e) all renewals,

extensions, amendments, modifications or restatements of the foregoing, to the extent not prohibited by the terms of this Agreement.

“Senior Revolving Lenders” means all Persons which now or hereafter constitute a “Lender” under the Senior Revolving Credit Agreement and their respective successors and assigns, and all Persons refinancing any Senior Indebtedness and their respective successors and assigns.

“Standstill Period” means the period beginning with the commencement of a Blockage Period and ending on the earliest of (a) the date when the Senior Indebtedness Default giving rise to such Blockage Period has been cured or waived in writing, (b) the date of the repayment in full in cash of the Senior Indebtedness, (c) the date that is 179 days after the commencement of a Blockage Period, (d) the end of the Non-Payment Blockage Period applicable to a Non-Payment Default, (e) the date on which the Senior Indebtedness shall have been declared due and payable prior to its stated maturity or any holder of Senior Indebtedness commences proceedings to collect any Senior Indebtedness or realize upon any material part of the collateral for any Senior Indebtedness and (f) the date upon which any Insolvency Proceeding is commenced.

“Subordinated Obligations” means any and all indebtedness (whether for principal, interest, fees, indemnifications or otherwise, but not expenses) now or hereafter owing by the Borrower or any Subsidiary under or in connection with the Term Loan Agreement, the Term Notes, any mortgage, guaranty or other security instrument given in connection therewith, and any letter agreement or other agreement providing for payment of fees in connection therewith.

“Term Lenders” means all Persons which now or hereafter constitute a “Lender” under the Term Loan Agreement and their respective successors and assigns, and all Persons refinancing any Subordinated Obligations and their respective successors and assigns.

“Term Loan Agreement” means [_____].

“Term Loan Documents” means, collectively, (a) the Term Loan Agreement, (b) the Term Notes and any other note, bond or other instrument evidencing Subordinated Obligations, (c) all mortgages, security agreements, pledge agreements or financing statements evidencing, creating or perfecting any Lien to secure the Term Loan Agreement and the Term Notes in any way, (d) all guarantees thereof, (e) all other documents, instruments or agreements relating to the Term Loan Agreement or the Term Note now or hereafter executed or delivered by and among the Borrower, any Subsidiary, the Subordinated Administrative Agent or any Term Lender, including without limitation each of the other the “Loan Documents” as such term is defined in the Term Loan Agreement, and (f) all renewals, extensions, amendments, modifications or restatements of the foregoing, provided that the terms of such refinancing, replacement or substitution and the financing documentation entered into in connection therewith are consistent with the terms of the Term Loan Agreement and other Term Loan Documents in effect prior to such refinancing, replacement or substitution or could have been included in such Term Loan Documents by an amendment or other modification that would not be prohibited by the terms of this Agreement.

“Term Loan Agreement Event of Default” means the occurrence of an Event of Default as defined in the Term Loan Agreement.

“Term Notes” means each promissory note issued under the Term Loan Agreement evidencing the term loans made pursuant to the term thereof, as from time to time renewed, extended, amended, supplemented, or restated, and any agreements representing the refinancing, replacement, or substitution in whole or in part thereof.

ARTICLE II Subordination

Section 2.01 Subordination of Obligations. The Borrower and each Subsidiary covenant and agree, and each Term Lender covenants and agrees, that the payment of the Subordinated Obligations shall, to the extent set forth in this Agreement, be subordinate and junior and subject in right of payment to the prior payment in full in cash of all Senior Indebtedness, whether outstanding on the date hereof or hereafter created, incurred, assumed or guaranteed.

Section 2.02 Payment Default or Acceleration. Except under circumstances when the terms of Section 2.05 of this Agreement are applicable, if (a) a Payment Default or Senior Indebtedness Acceleration shall have occurred and be continuing and (b) the Term Lenders or the Subordinated Administrative Agent or other representative shall have received a Payment Default Notice, then neither the Borrower nor any Guarantor may make, and no Term Lender shall accept, receive or collect, any direct or indirect payment or distribution of any kind or character (in cash, securities, other Property, by setoff, or otherwise other than Reorganization Securities) of any properties or assets of the Borrower or any Subsidiary on account of the Subordinated Obligations during the Payment Blockage Period; provided, however, that in the case of any payment on or in respect of any Subordinated Obligation that would (in the absence of any such Payment Default Notice) have been due and payable on any date (a “Scheduled Payment Date”) during such Payment Blockage Period pursuant to the terms of the Term Notes as in effect on the date hereof, the provisions of this Section 2.02 shall not prevent the making and acceptance of such payment (a “Scheduled Payment”), together with any additional default interest as is due on the Term Notes, on or after the date immediately following the termination of such Payment Blockage Period. In the event that, notwithstanding the foregoing, either the Borrower or any Subsidiary shall make any payment or distribution to any Term Lender prohibited by the foregoing provisions of this Section 2.02, then and in such event such payment or distribution shall be held in trust for the benefit of and immediately shall be paid over to the holders of the Senior Indebtedness or the Senior Indebtedness Representative for application against the Senior Indebtedness remaining unpaid until such Senior Indebtedness is paid in full in cash. Any Payment Default Notice shall be deemed received by the Term Lenders upon the date of actual receipt by the Term Lenders or the Subordinated Administrative Agent of such Payment Default Notice in writing.

Section 2.03 Non-Payment Default. Except under circumstances when the terms of Section 2.01 or Section 2.05 of this Agreement are applicable, if (a) a Non-Payment Default shall have occurred and be continuing, (b) the Term Lenders or the Subordinated Administrative Agent or other representative shall have received a Non-Payment Default Notice, and (c) no

Non-Payment Default Notice shall have been given within the 360-day period immediately preceding the giving of such Non-Payment Default Notice, then neither the Borrower nor any Guarantor may make, and no Term Lender shall accept, receive or collect, any direct or indirect payment or distribution of any kind or character (in cash, securities, other Property, by setoff, or otherwise other than Reorganization Securities) of any properties or assets of the Borrower or any Subsidiary on account of that portion of the Subordinated Obligations that constitutes principal under the Term Loan Agreement during the Non-Payment Blockage Period If any Scheduled Payment or portion thereof that is not timely made on any Scheduled Payment Date during such Non-Payment Blockage Period pursuant to the terms of the Term Notes as in effect on the date hereof or as amended, then the provisions of this Section 2.03 shall not prevent the making and acceptance of such Scheduled Payment, together with any additional default interest as is due on the Term Notes, on or after the date immediately following the termination of such Non-Payment Blockage Period. In the event that, notwithstanding the foregoing, the Borrower or any Subsidiary shall make any payment or distribution to any Term Lender prohibited by the foregoing provisions of this Section 2.03, then and in such event such payment or distribution shall be held in trust for the benefit of and immediately shall be paid over to the holders of the Senior Indebtedness or the Senior Indebtedness Representative for application against the Senior Indebtedness remaining unpaid until such Senior Indebtedness is paid in full in cash. Any Non-Payment Default Notice shall be deemed received by the Term Lenders upon the date of actual receipt by the Term Lenders or the Subordinated Administrative Agent or other representative of such Non-Payment Default Notice in writing.

Section 2.04 Standstill. At any time that the Term Lenders are not permitted to receive payments on the Subordinated Obligations pursuant to either Section 2.01 or Section 2.03 of this Agreement, the Term Lenders and the Subordinated Administrative Agent or other representative of the Term Lenders will not commence any Enforcement Action relative to the Borrower or any Subsidiary during the Standstill Period. Upon the termination of the Standstill Period, the Term Lenders may exercise all rights or remedies they may have in law or equity; provided, however, that if a Standstill Period terminates pursuant to clause (e) thereof, no Term Lender and no agent or representative thereof shall exercise any remedies against, or attempt to foreclose upon, garnish, sequester or execute upon, any Property constituting collateral for the Senior Indebtedness (other than to file or record any judgment Liens it may have obtained against such collateral) during the period that such Standstill Period would have been in effect but for termination pursuant to clause (e) of the definition of “Standstill Period;” provided further, that the Payment Blockage Period or the Non-Payment Blockage Period, as the case may be, if not also terminated, shall continue for its full period notwithstanding the termination of the Standstill Period. Notwithstanding the foregoing, no Standstill Period may be commenced while any other Standstill Period exists or within 180 days following the termination of any prior Standstill Period (provided that this sentence shall not relieve any Term Lender of its obligation to provide notice under Section 2.09 of this Agreement).

Section 2.05 Insolvency; Bankruptcy; Etc. In the event of the institution of any Insolvency Proceeding relative to the Borrower or any Subsidiary, then:

(a) The holders of the Senior Indebtedness shall be entitled to receive payment in full in cash of the Senior Indebtedness before the Term Lenders are entitled to receive any direct or indirect payment or distribution of any kind or character, whether in cash,

Property or securities (other than Reorganization Securities) on account of the Subordinated Obligations.

(b) Any direct or indirect payment or distribution of any kind or character, whether in cash, Property or securities, by setoff or otherwise, which may be payable or deliverable in such proceedings in respect of the Subordinated Obligations but for the provisions of this Agreement shall be paid or delivered by the Person making such payment or distribution, whether the Borrower, a Subsidiary of the Borrower, a trustee in bankruptcy, a receiver, a liquidating trustee, or otherwise, directly to the holders of the Senior Indebtedness or the Senior Indebtedness Representative, to the extent necessary to make payment in full in cash of all Senior Indebtedness remaining unpaid; provided, however, that no such delivery or other turnover of any Reorganization Securities issued to the Subordinated Administrative Agent or the Term Lenders shall be made to any holders of the Senior Indebtedness. In the event that, notwithstanding the foregoing provisions of this Section 2.05, any Term Lender shall have received any such payment or distribution of any kind or character, whether in cash, Property or securities, by setoff or otherwise, before all Senior Indebtedness is paid in full in cash, which is to be paid to the holders of the Senior Indebtedness under the foregoing provisions of this Section 2.05, then and in such event such payment or distribution shall be held in trust for the benefit of and immediately shall be paid over to the holders of the Senior Indebtedness or the Senior Indebtedness Representative for application to the payment of all Senior Indebtedness remaining unpaid until all such Senior Indebtedness shall have been paid in full in cash.

(c) If no proof of claim is filed in any Insolvency Proceeding with respect to any Subordinated Obligations by the tenth day prior to the bar date for any such proof of claim, the Senior Indebtedness Representative may, after notice to the Term Lenders or the Subordinated Administrative Agent or other representative, file such a proof of claim on behalf of the Term Lenders, and each Term Lender hereby irrevocably appoints the Senior Indebtedness Representative as its agent and attorney-in-fact for such limited purpose; provided, that the foregoing shall not confer to the holder of any Senior Indebtedness the right to vote on behalf of the Term Lenders in any Insolvency Proceedings.

Section 2.06 No Impairment. No right of any present or future holder of Senior Indebtedness to enforce subordination as herein provided shall at any time in any way be prejudiced or impaired by any act or failure to act on the part of the Borrower or any Subsidiary or by any non-compliance by the Borrower or any Subsidiary with the terms, provisions, and covenants of this Agreement, the Term Loan Agreement or the Term Notes, regardless of any knowledge thereof any such Term Lender may have or be otherwise charged with. The provisions of this Agreement shall be enforceable directly by any present or future holder of the Senior Indebtedness and/or the Senior Indebtedness Representative.

Section 2.07 Rights of Creditors; Subrogation. The provisions of this Agreement are for the purpose of defining the relative rights of the holders of the Senior Indebtedness on the one hand, and the Term Lenders on the other hand, and nothing herein shall impair, as between the Borrower and the Guarantors and the Term Lenders, the obligation of the Borrower and the Guarantors, which are unconditional and absolute, to pay to the Term Lenders the principal thereof and interest thereon in accordance with their terms and the provisions thereof, nor shall anything herein, except as otherwise provided in Section 2.04 of this Agreement, prevent the

Term Lenders from exercising all remedies otherwise permitted by applicable law or hereunder upon default under the Term Loan Agreement or under the Term Notes (including the right to demand payment and sue for performance thereof and of the Term Notes and to accelerate the maturity thereof as provided by the terms of the Term Notes), subject to the rights of holders of the Senior Indebtedness under this Agreement. Upon payment in full of the Senior Indebtedness in cash and termination of the commitments of any holder of the Senior Indebtedness to make loans or extensions of credit, and expiration or termination of all letters of credit issued by any holder of the Senior Indebtedness, the Term Lenders shall, to the extent of any payments or distributions paid or delivered to the holders of the Senior Indebtedness or otherwise applied to the Senior Indebtedness pursuant to the provisions of this Agreement, be subrogated to the rights of the holders of the Senior Indebtedness to receive payments or distributions of assets of the Borrower or any Guarantor made on Senior Indebtedness (and any security therefor) until the Subordinated Obligations shall be paid in full (and, for this purpose, no such payments or distributions paid or delivered to the holders of the Senior Indebtedness or otherwise applied to the Senior Indebtedness shall be deemed to have discharged the Subordinated Obligations), and, for the purposes of such subrogation, no payments to the holders of the Senior Indebtedness of any cash, assets, stock, or obligations to which the Term Lenders would be entitled except for the provisions of this Agreement shall, as between the Borrower and the Guarantors, any of their respective creditors (other than the holders of the Senior Indebtedness), and the Term Lenders, be deemed to be a payment by the Borrower or any Guarantor to or on account of Senior Indebtedness. The fact that failure to make any payment on account of the Subordinated Obligations is caused by reason of the operation of any provision of this Agreement shall not be construed as preventing the occurrence of a Term Loan Agreement Event of Default.

Section 2.08 Payments on Senior Indebtedness. In the event that any Term Lender determines in good faith that evidence is required with respect to the right of any holder of the Senior Indebtedness to participate in any payment or distribution pursuant to this Agreement or the amount of such participation, such Term Lender may request such Person to furnish evidence to the reasonable satisfaction of such Term Lender as to the amount of Senior Indebtedness held by such Person, the extent to which such Person is entitled to participate in such payment or distribution and any other facts pertinent to the rights of such Person under this Agreement, and if such evidence is not furnished, such Term Lender may defer any payment to such Person pending judicial determination as to the right of such Person to receive such payment; provided that, upon the written request of such Person to such Term Lender, such payment shall be made to the court having jurisdiction over such judicial determination or to another Person mutually satisfactory to such Person and such Term Lender, as escrowee, to be held and invested pending such judicial determination in accordance with such instructions as shall be mutually satisfactory to such Person and such Term Lender and upon such judicial determination becoming final and non-appealable to be distributed in accordance therewith to the Person entitled thereto.

Section 2.09 Notice of Acceleration, Enforcement Action.

(a) Each Term Lender agrees that in the event any Term Loan Agreement Event of Default shall occur, and as a result thereof, any Term Lender or the Subordinated Administrative Agent or other representative of such Term Lender accelerates maturity of the Term Notes, then such Term Lender or the Subordinated Administrative Agent or other representative shall give prompt (and in any event within three (3) Business Days) notice thereof

in writing to the holders of the Senior Indebtedness or the Senior Indebtedness Representative. Neither the Borrower nor any Subsidiary may pay the Term Notes until ten (10) Business Days after the Senior Indebtedness Representative receives the notice described above and, after that ten (10) Business Day period, may pay the Term Notes, and the Term Lenders may receive or collect such payment, only if the provisions of this Agreement do not prohibit such payment at that time.

(b) Each Term Lender agrees that in the event any Term Loan Agreement Event of Default shall occur, and as a result thereof, any Term Lender or the Subordinated Administrative Agent or other representative of such Term Lender intends to commence any Enforcement Action, then such Term Lender or the Subordinated Administrative Agent or other representative shall first deliver notice thereof in writing to the Senior Indebtedness Representative both (i) not less than ten (10) days prior to taking any such Enforcement Action, and (ii) one (1) Business Day after such Enforcement Action is taken.

Section 2.10 Reinstatement. The provisions of this Agreement shall remain in force and effect until the indefeasible payment in full of all Senior Indebtedness and the termination of all commitments of any holder of the Senior Indebtedness to make loans or extensions of credit, and expiration or termination of all letters of credit issued by any holder of the Senior Indebtedness. To the extent any payment of or distribution in respect of the Senior Indebtedness (whether by or on behalf of the Borrower or any of its Subsidiaries, as proceeds of security or enforcement of any right of set off or otherwise) is declared to be fraudulent or preferential, set aside or required to be paid to the Borrower or any Subsidiary or any receiver, trustee in bankruptcy, liquidating trustee, agent or other similar person under any bankruptcy, insolvency, receivership, fraudulent conveyance or similar law, then if such payment or distribution is recovered by, or paid over to, the Borrower or any Subsidiary or such receiver, trustee in bankruptcy, liquidating trustee, agent or other similar Person, the Senior Indebtedness or part thereof originally intended to be satisfied shall be deemed to be reinstated and outstanding as if such payment has not occurred and the provisions of this Agreement shall continue to be applicable in respect of said reinstated Senior Indebtedness.

Section 2.11 Rights of Holders of the Senior Indebtedness. The holders of the Senior Indebtedness may, at any time and from time to time subject to the terms of the Senior Indebtedness, without the consent of or notice to the Term Lenders or the Subordinated Administrative Agent or other representative of the Term Lenders, without incurring responsibility to the Term Lenders and without impairing or releasing the subordination or other benefits provided in this Agreement or the obligations hereunder of the Term Lenders to the holders of the Senior Indebtedness, do any one or more of the following: (a) except as provided below, change the manner, place or terms of payment or extend the time of payment of, or renew, increase, alter or amend, Senior Indebtedness or any instrument evidencing the same or any covenant or agreement under which Senior Indebtedness is outstanding or secured or any liability of any obligor thereon; (b) sell, exchange, release or otherwise deal with any property pledged, mortgaged or otherwise securing Senior Indebtedness; (c) settle or compromise any Senior Indebtedness or any liability of any obligor thereon or release any Person liable in any manner for the payment of Senior Indebtedness; and (d) waive any default under Senior Indebtedness and exercise or refrain from exercising any rights or remedies against the

Borrower, any Subsidiary or any other Person. The foregoing provisions are not intended to permit a change to the definition of “Senior Indebtedness”.

Section 2.12 Identity of Term Lenders for Notice Purposes. For purposes of any notice required or permitted to be given hereunder by the holders of the Senior Indebtedness or the Senior Indebtedness Representative to the Term Lenders, or any of them, the holders of the Senior Indebtedness and the Senior Indebtedness Representative shall be entitled to rely, conclusively, on the identity and address of each Term Lender as set forth in the Term Loan Agreement or as otherwise set forth in the most recent notice received by the Senior Indebtedness Representative from a Term Lender referring to the Term Loan Agreement for purposes of providing the identity and address of each Term Lender. The Term Lenders agree that any notices required to be given to the Term Lenders shall be effective if such notice is given to the Subordinated Administrative Agent or other representative of the Term Lenders. For so long as the Subordinated Obligations are outstanding, the Term Lenders agree to designate and maintain an agent or other representative for such purposes.

Section 2.13 Liens.

(a) All Liens granted by the Borrower, or, if applicable, any Guarantor, which at any time secure the Term Loan Agreement, any Term Note or any other Term Loan Document are hereby made, and will at all times prior to the full payment or discharge of the Senior Indebtedness be, subject and subordinate to all Liens granted by the Borrower or any Guarantor which at any time secure the Senior Indebtedness, which subordination shall be effective whether or not all such Liens securing Senior Indebtedness have been properly recorded, filed and otherwise perfected prior to all such Liens securing any Term Note and regardless of the relative priority of such Liens as determined without regard to this Agreement. For so long as any Term Note is outstanding, as between the Term Lenders and the holders of the Senior Indebtedness, only the Senior Indebtedness shall be deemed to be secured by any Liens granted under the Senior Revolving Credit Documents.

(b) Each Term Lender agrees that it will not initiate, join in or prosecute any claim, action or other proceeding challenging the validity or enforceability of the Senior Indebtedness or the Liens securing the Senior Indebtedness. Furthermore, each Term Lender agrees that if the Senior Indebtedness Representative shall take any Enforcement Action respecting any collateral under the Senior Indebtedness, that the Term Lenders will not enjoin or otherwise interfere with such Enforcement Action.

(c) The Subordinated Administrative Agent agrees to promptly release all Liens granted by the Borrower, or, if applicable, any Guarantor, which at any time secure the Term Loan Agreement, any Term Note or any other Term Loan Document if such release is authorized by the terms of the Senior Revolving Credit Documents.

Section 2.14 Legend.

(a) Each Term Note shall be conspicuously inscribed with a legend substantially in the form and substance as follows:

PAYMENT OF THIS INSTRUMENT SHALL, TO THE EXTENT SET FORTH IN THE SUBORDINATION AGREEMENT DATED [_____] BY AND AMONG [_____] , [_____] , AS SENIOR ADMINISTRATIVE AGENT, [_____] , AS SUBORDINATED ADMINISTRATIVE AGENT AND PARTIES THERETO, BE SUBORDINATE AND JUNIOR IN RIGHT OF PAYMENT TO THE PRIOR PAYMENT IN FULL OF ALL SENIOR INDEBTEDNESS, THE PROVISIONS OF WHICH INTERCREDITOR AGREEMENT BEING INCORPORATED HEREIN AND BY THIS REFERENCE BEING MADE A PART HEREOF.

(b) The Borrower and each Term Lender or the Subordinated Administrative Agent or other representative of the Term Lenders shall cause each mortgage, security agreement and other instrument securing all or any part of the Subordinated Obligations executed and delivered after the date hereof to be conspicuously inscribed with a legend substantially in the form and substance as follows:

ALL LIENS GRANTED BY THIS INSTRUMENT SHALL, TO THE EXTENT SET FORTH IN THE SUBORDINATION AGREEMENT DATED [_____] BY AND AMONG [_____] , [_____] , AS SENIOR ADMINISTRATIVE AGENT, [_____] , AS SUBORDINATED ADMINISTRATIVE AGENT AND PARTIES THERETO, BE SUBORDINATE AND JUNIOR TO ALL LIENS GRANTED BY GRANTOR TO SECURE THE SENIOR INDEBTEDNESS REGARDLESS OF THE RELATIVE PRIORITY OF SUCH LIENS, SUCH INTERCREDITOR AGREEMENT BEING INCORPORATED HEREIN AND BY THIS REFERENCE BEING MADE A PART HEREOF.

Section 2.15 Successors and Assigns. Each Term Lender acknowledges and agrees that the provisions of this Agreement are, and are intended to be, an inducement and a consideration to each holder of the Senior Indebtedness to make, extend and continue the Senior Indebtedness; and each holder of the Senior Indebtedness shall be deemed conclusively to have relied upon the provisions of this Agreement in permitting the Borrower to incur the Subordinated Obligations and in making, extending, continuing and/or acquiring such Senior Indebtedness. This Agreement shall pass to and be fully binding upon the successors and assigns of each Term Lender and shall inure to the benefit of the present and future holders of the Senior Indebtedness and the Senior Indebtedness Representative and their respective successors and assigns (including without limitation any Person refinancing any Senior Indebtedness).

ARTICLE III RELIANCE; WAIVERS; ETC.

Section 3.01 Reliance. The Senior Revolving Credit Documents are deemed to have been executed and delivered, and all extensions of credit thereunder are deemed to have been made or incurred, in reliance upon this Agreement. The Subordinated Administrative Agent

expressly waives all notice of the acceptance of and reliance on this Agreement by the Senior Revolving Lenders.

Section 3.02 No Warranties or Liability. The Subordinated Administrative Agent and the Senior Administrative Agent acknowledge and agree that neither has made any representation or warranty with respect to the execution, validity, legality, completeness, collectibility or enforceability of any Senior Revolving Credit Document. Except as otherwise provided in this Agreement, the Subordinated Administrative Agent and the Administrative Agent will be entitled to manage and supervise their respective extensions of credit to the Borrower in accordance with law and their usual practices, modified from time to time as they deem appropriate.

Section 3.03 No Waivers. Except as provided in Section 5.03, no right or benefit of any party hereunder shall at any time in any way be prejudiced or impaired by any act or failure to act on the part of such party or any other party hereto or by any noncompliance by the Borrower or any of its Subsidiaries with the terms and conditions of any of the Senior Revolving Credit Documents.

ARTICLE IV OBLIGATIONS UNCONDITIONAL

Section 4.01 Senior Indebtedness Unconditional. All rights of the Senior Administrative Agent and the Senior Revolving Lenders hereunder, and all agreements and obligations of each of the Subordinated Administrative Agent and Term Lenders, the Borrower and the Guarantors under the Senior Revolving Credit Documents (to the extent applicable) hereunder, shall remain in full force and effect irrespective of:

- (a) any lack of validity or enforceability of any Senior Revolving Credit Document;
- (b) any change in the time, place or manner of payment of, or in any other term of, all or any portion of the Senior Indebtedness, or any amendment, waiver or other modification, whether by course of conduct or otherwise, or any refinancing, replacement, refunding or restatement of any Senior Revolving Credit Document;
- (c) prior to the Senior Indebtedness having been paid in full in cash and all commitments to lend thereunder terminated and all letters of credit thereunder terminated or cash collateralized, any exchange, release, voiding, avoidance or non-perfection of any security interest in any collateral, or any release, amendment, waiver or other modification, whether by course of conduct or otherwise, or any refinancing, replacement, refunding or restatement of all or any portion of the Senior Indebtedness or any guarantee thereof; or
- (d) any other circumstances that otherwise might constitute a defense available to, or a discharge of, the Borrower or any Guarantor in respect of the Senior Indebtedness, or the Subordinated Administrative Agent, the Borrower or any Guarantor, to the extent applicable, in respect of this Agreement.

ARTICLE V
MISCELLANEOUS

Section 5.01 Conflicts. In the event of any conflict between the provisions of this Agreement and the provisions of any Senior Revolving Credit Document or the Term Loan Documents, the provisions of this Agreement shall govern.

Section 5.02 Continuing Nature of Provisions; Termination. This Agreement shall continue to be effective and shall not be revocable by any party hereto, until, but shall automatically terminate and be of no further force or effect on, the earlier to occur of (a) the date upon which the Senior Indebtedness has been paid in full in cash, all commitments of any holder of Senior Indebtedness to make loans or extensions of credit have terminated, and all letters of credit issued by any holder of Senior Indebtedness have expired, terminated or been fully collateralized in cash and (b) to the extent not in violation of this Agreement, the date that the Subordinated Obligations have been paid in full. This is a continuing agreement and the Senior Revolving Lenders and the Senior Administrative Agent may continue, at any time and without notice to the other parties hereto, to extend credit and other financial accommodations, lend monies and provide indebtedness to, or for the benefit of, Borrower or any Guarantor on the faith hereof.

Section 5.03 Amendments; Waivers. No amendment, waiver or modification of any of the provisions of this Agreement shall be effective unless the same shall be in writing and signed by the Senior Administrative Agent, the Subordinated Administrative Agent and, only if the rights or duties of the Borrower or any Guarantor are directly affected thereby, such Person.

Section 5.04 Information Concerning Financial Condition of the Borrower. The Subordinated Administrative Agent and the Senior Administrative Agent each hereby assume responsibility for keeping itself informed of the financial condition of the Borrower and each of the Guarantors and all other circumstances bearing upon the risk of nonpayment of the Senior Indebtedness or the Subordinated Obligations. The Subordinated Administrative Agent and the Senior Administrative Agent hereby agree that no party shall have any duty to advise any other party of information known to it regarding such condition or any such circumstances. In the event the Subordinated Administrative Agent or the Senior Administrative Agent, in its sole discretion, undertakes at any time or from time to time to provide any information to any other party to this Agreement, it shall be under no obligation (a) to provide any such information to such other party or any other party on any subsequent occasion, (b) to undertake any investigation not a part of its regular business routine, or (c) to disclose any other information.

Section 5.05 Governing Law. This Agreement shall be construed in accordance with and governed by the law of the State of [New York], except as otherwise required by mandatory provisions of law and except to the extent that remedies provided by the laws of any jurisdiction other than the State of [New York] are governed by the laws of such jurisdiction.

Section 5.06 Submission to Jurisdiction; Waiver of Jury Trial.

(a) Each party hereto hereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of the courts of the State of [New York]

and of the United States District Court for the Southern District of [New York], and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in such [New York] State court or, to the extent permitted by law, in such Federal court. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing in this Agreement shall affect any right that any Senior Revolving Lender may otherwise have to bring any action or proceeding relating to this Agreement or any Senior Revolving Credit Documents against the Borrower or any Guarantor or its properties in the courts of any jurisdiction.

(b) The Borrower and the Subordinated Administrative Agent hereby irrevocably and unconditionally waive, to the fullest extent they may legally and effectively do so (i) any objection they may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement in any court referred to in paragraph (a) of this Section 5.06 and (ii) the defense of an inconvenient forum to the maintenance of such action or proceeding.

(c) Each party to this Agreement irrevocably consents to service of process in the manner provided for notices in Section 5.07. Nothing in this Agreement will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

(d) EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (i) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (ii) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Section 5.07 Notices. Unless otherwise specifically provided herein, any notice or other communication herein required or permitted to be given shall be in writing and may be personally served, telecopied, or sent by overnight express courier service or United States mail and shall be deemed to have been given when delivered in person or by courier service, upon receipt of a telecopy or five (5) days after deposit in the United States mail (certified, with postage prepaid and properly addressed). For the purposes hereof, the addresses of the parties hereto (until notice of a change thereof is delivered as provided in this Section) shall be as set forth below each party's name on the signature pages hereof, or, as to each party, at such other address as may be designated by such party in a written notice to all of the other parties.

Section 5.08 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and each of the Senior Revolving Lenders and Subordinated Administrative Agent and their respective successors and assigns, and nothing herein is intended, or shall be construed to give, any other Person any right, remedy or claim under, to or in respect of this Agreement or any collateral. All references to any Person shall include such Person as debtor-in-possession and any receiver or trustee for such Person in any Insolvency Proceeding.

Section 5.09 Headings. Section headings used herein are for convenience of reference only, are not part of this Agreement and shall not affect the construction of, or be taken into consideration in interpreting, this Agreement.

Section 5.10 Severability. Any provision of this Agreement held to be invalid, illegal or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability without affecting the validity, legality and enforceability of the remaining provisions hereof; and the invalidity of a particular provision in a particular jurisdiction shall not invalidate such provision in any other jurisdiction.

Section 5.11 Counterparts; Integration; Effectiveness. This Agreement may be executed in counterparts (and by different parties hereto on different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. Delivery of an executed counterpart of a signature page of this Agreement by telecopy shall be effective as delivery of a manually executed counterpart of this Agreement. This Agreement shall become effective when it shall have been executed by each party hereto.

Section 5.12 Consent to Incurrence of Senior Indebtedness. Notwithstanding any provision of the Subordinated Obligations to the contrary, the Subordinated Administrative Agent consents to the incurrence of the Senior Indebtedness in amounts up to the caps on the principal amount thereof set forth in the definition of Senior Indebtedness.

[Signature Pages Begin on the Next Page]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

[_____] , as
Administrative Agent for and on behalf of the
Senior Revolving Lenders

By: _____
Name:
Title:

By: _____
Name:
Title:

Address for Notices:

with a copy to:

[_____], as Administrative Agent
for and on behalf of the Term Lenders

By: _____
Name:
Title:

By: _____
Name:
Title:

Address for Notices:

with a copy to:

[_____]

By: _____

Name:

Title:

Address for Notices:

with a copy to:

B

RANGE RESOURCES CORPORATION

As Issuer

MOUNTAIN FRONT PARTNERS, LLC
PINE MOUNTAIN ACQUISITION, INC.
PMOG HOLDINGS, INC.
RANGE ENERGY I, INC.
RANGE HOLDCO, INC.
RANGE OPERATING NEW MEXICO, INC.
RANGE OPERATING TEXAS, L.L.C.
RANGE PRODUCTION COMPANY
RANGE RESOURCES—APPALACHIA, LLC
RANGE RESOURCES—PINE MOUNTAIN, INC.
RANGE TEXAS PRODUCTION, L.L.C.
REVC HOLDCO, LLC
STROUD ENERGY GP, LLC
STROUD ENERGY LP, LLC
STROUD ENERGY, LTD.
STROUD ENERGY MANAGEMENT GP, LLC
STROUD OIL PROPERTIES, LP

As Guarantors

SENIOR SUBORDINATED DEBT SECURITIES

INDENTURE

Dated as of May 6, 2008

THE BANK OF NEW YORK TRUST COMPANY, N.A.

As Trustee

“*Depository*” means the depository of each Global Security, which will initially be DTC.

“*Designated Senior Debt*” means (i) the Credit Agreement and (ii) any other Senior Debt permitted under this Indenture the principal amount of which is \$25 million or more and that has been designated by the Company as “Designated Senior Debt.”

“*Disqualified Stock*” means any Capital Stock to the extent that, by its terms (or by the terms of any security into which it is convertible or for which it is exchangeable), or upon the happening of any event, matures or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, or redeemable at the option of the holder thereof, in whole or in part, on or prior to the date that is 91 days after the date on which the Securities mature.

“*Dollar-Denominated Production Payments*” means production payment obligations recorded as liabilities in accordance with GAAP, together with all undertakings and obligations in connection therewith.

“*DTC*” means The Depository Trust Company, a New York corporation, and its successors.

“*DTC Legend*” means the legend set forth in Exhibit A.

“*Equity Interests*” means Capital Stock and all warrants, options or other rights to acquire Capital Stock (but excluding any debt security that is convertible into, or exchangeable for, Capital Stock).

“*Exchange Act*” means the Securities Exchange Act of 1934, as amended.

“*Fixed Charge Coverage Ratio*” means with respect to any Person for any period, the ratio of the Consolidated Cash Flow of such Person for such period to the Fixed Charges of such Person for such period. In the event that the Company or any of its Restricted Subsidiaries incurs, assumes, guarantees or redeems any Indebtedness (other than revolving credit borrowings) or issues preferred stock subsequent to the commencement of the period for which the Fixed Charge Coverage Ratio is being calculated but prior to the date on which the calculation of the Fixed Charge Coverage Ratio is made (the “Calculation Date”), then the Fixed Charge Coverage Ratio shall be calculated giving pro forma effect to such incurrence, assumption, guarantee or redemption of Indebtedness, or such issuance or redemption of preferred stock, as if the same had occurred at the beginning of the applicable four-quarter reference period. In addition, for purposes of making the computation referred to above, (i) acquisitions that have been made by the referent Person or any of its Restricted Subsidiaries, including through mergers or consolidations and including any related financing transactions, during the four-quarter reference period or subsequent to such reference period and on or prior to the Calculation Date (including, without limitation, any acquisition to occur on the Calculation Date) shall be deemed to have occurred on the first day of the four-quarter reference period and Consolidated Cash Flow for such reference period shall be calculated without giving effect to clause (iii) of the proviso set forth in the definition of Consolidated Net Income, (ii) the net proceeds of Indebtedness incurred or Disqualified Stock issued by the referent Person pursuant to the first paragraph of Section 4.09 hereof during the four-quarter reference period or subsequent to such reference period and on or prior to the Calculation Date shall be deemed to

ARTICLE 10 SUBORDINATION

Section 10.01. *Agreement to Subordinate.*

The Company and each Subsidiary Guarantor agree, and each Holder by accepting a Security and the related Guarantees agrees, that (i) the Indebtedness evidenced by (a) the Securities, including, but not limited to, the payment of principal of, premium, if any, and interest on the Securities, and any other payment Obligation of the Company in respect of the Securities (including any obligation to repurchase the Securities) is subordinated in right of payment, to the extent and in the manner provided in this Article, to the prior payment in full in cash of all Senior Debt of the Company (whether outstanding on the date hereof or hereafter created, incurred, assumed or guaranteed), and (b) the Guarantees and other payment Obligations in respect of the Guarantees are subordinated in right of payment, to the extent and in the manner provided in this Article, to the prior payment in full in cash of all Senior Debt of each Subsidiary Guarantor and (ii) the subordination is for the benefit of the Holders of Senior Debt.

Section 10.02. *Certain Definitions.*

“*Bankruptcy Law*” means the Bankruptcy Code or any similar Federal or state law for the relief of debtors.

“*Representative*” means the indenture trustee or other trustee, agent or representative for any Senior Debt.

“*Senior Debt*” means (i) Indebtedness of the Company or any Subsidiary of the Company under or in respect of any Credit Facility, whether for principal, interest (including interest accruing after the filing of a petition initiating any proceeding pursuant to any Bankruptcy Law, whether or not the claim for such interest is allowed as a claim in such proceeding), reimbursement obligations, fees, commissions, expenses, indemnities or other amounts and (ii) any other Indebtedness of the Company or any Subsidiary of the Company permitted under the terms of this Indenture, unless the instrument under which such Indebtedness is incurred expressly provides that it is on a parity with or subordinated in right of payment to the Securities; *provided* that the Company’s 7³/₈% Senior Subordinated Notes due 2013, 6³/₈% Senior Subordinated Notes due 2015, 7¹/₂% Senior Subordinated Notes due 2016 and 7¹/₂% Senior Subordinated Notes due 2017 outstanding on the date of this Indenture shall be deemed to rank on parity with the Securities and shall not be Senior Debt. Notwithstanding anything to the contrary in the foregoing sentence, Senior Debt will not include (w) any liability for federal, state, local or other taxes owed or owing by the Company, (x) any Indebtedness of the Company to any of its Subsidiaries or other Affiliates, (y) any trade payables or (z) any Indebtedness that is incurred in violation of this Indenture (other than Indebtedness under (i) the Credit Agreement or (ii) any other Credit Facility that is incurred on the basis of a representation by the Company to the applicable lenders that it is permitted to incur such Indebtedness under this Indenture).

A “*distribution*” may consist of cash, securities or other property, by set-off or otherwise.

All Designated Senior Debt now or hereafter existing and all other Obligations relating thereto shall not be deemed to have been paid in full unless the holders or owners thereof shall have received payment in full in cash (or other form of payment consented to by the holders of such Designated Senior Debt) with respect to such Designated Senior Debt and all other Obligations with respect thereto.

Section 10.03. *Liquidation; Dissolution; Bankruptcy.*

(a) Upon any payment or distribution of property or securities to creditors of the Company in a liquidation or dissolution of the Company or in a bankruptcy, reorganization, insolvency, receivership or similar proceeding relating to the Company or its property, or in an assignment for the benefit of creditors or any marshalling of the Company's assets and liabilities:

(1) the holders of Senior Debt of the Company shall be entitled to receive payment in full in cash of all Obligations in respect of such Senior Debt (including interest after the commencement of any such proceeding at the rate specified in the applicable Senior Debt, whether or not a claim for such interest would be allowed in such proceeding) before the Holders of Securities shall be entitled to receive any payment or distribution with respect to the Securities and related Obligations (except in each case that Holders of Securities may receive securities that are subordinated at least to the same extent as the Securities to Senior Debt and any securities issued in exchange for Senior Debt and payments made from any defeasance trust created pursuant to Section 8.05 hereof provided that the applicable deposit does not violate Article 8 or 10 of this Indenture); and

(2) until all Obligations with respect to Senior Debt of the Company (as provided in subsection (a)(1) above) are paid in full in cash, any payment or distribution to which the Holders of Securities and the related Guarantees would be entitled shall be made to holders of Senior Debt of the Company (except that Holders of Securities and the related Guarantees may receive securities that are subordinated at least to the same extent as the Securities to Senior Debt and any securities issued in exchange for Senior Debt and payments made from any defeasance trust created pursuant to Section 8.05 hereof *provided* that the applicable deposit does not violate Article 8 or 10 of this Indenture).

(b) Upon any payment or distribution of property or securities to creditors of a Subsidiary Guarantor in a liquidation or dissolution of such Subsidiary Guarantor or in a bankruptcy, reorganization, insolvency, receivership or similar proceeding relating to such Subsidiary Guarantor or its property, or in an assignment for the benefit of creditors or any marshalling of such Subsidiary Guarantor's assets and liabilities:

(1) the holders of Senior Debt of such Subsidiary Guarantor shall be entitled to receive payment in full in cash of all Obligations in respect of such Senior Debt (including interest after the commencement of any such proceeding at the rate specified in the applicable Senior Debt, whether or not a claim for such interest would be allowed in such proceeding) before the Holders of Securities and the related Guarantees shall be entitled to receive any payment or distribution with respect to the Guarantee made by such Subsidiary Guarantor (except in each case that Holders of Securities and the related Guarantees may receive securities that are subordinated at least to the same extent as the Securities to Senior Debt and any securities issued in exchange for Senior Debt and payments made from any defeasance trust created pursuant to Section 8.05 hereof *provided* that the applicable deposit does not violate Article 8 or 10 of this Indenture); and

(2) until all Obligations with respect to Senior Debt of such Subsidiary Guarantor (as provided in subsection (b)(1) above) are paid in full in cash, any payment

or distribution to which the Holders of Securities and the related Guarantees would be entitled shall be made to holders of Senior Debt of such Subsidiary Guarantor (except that Holders of Securities and the related Guarantees may receive securities that are subordinated at least to the same extent as the Securities to Senior Debt and any securities issued in exchange for Senior Debt and payments made from any defeasance trust created pursuant to Section 8.05 hereof *provided* that the applicable deposit does not violate Article 8 or 10 of this Indenture).

Under the circumstances described in this Section 10.03, the Company, any Subsidiary Guarantor or any receiver, trustee in bankruptcy, liquidating trustee, agent or other similar person making any payment or distribution of cash or other property or securities is authorized or instructed to make any payment or distribution to which the Holders of the Securities and the related Guarantees would otherwise be entitled (other than securities that are subordinated at least to the same extent as the Securities to Senior Debt and any securities issued in exchange for Senior Debt and payments made from any defeasance trust referred to in the second parenthetical clause of each of clauses (a)(1), (b)(1), (a)(2) and (b)(2) above, which shall be delivered or paid to the Holders of Securities as set forth in such clauses) directly to the holders of the Senior Debt of the Company and any Subsidiary Guarantor, as applicable, (*pro rata* to such holders on the basis of the respective amounts of Senior Debt of the Company and any Subsidiary Guarantor, as applicable, held by such holders) or their Representatives, or to any trustee or trustees under any other indenture pursuant to which any such Senior Debt may have been issued, as their respective interests appear, to the extent necessary to pay all such Senior Debt in full, in cash or cash equivalents after giving effect to any concurrent payment, distribution or provision thereof or to or for the holders of such Senior Debt.

To the extent any payment of or distribution in respect of Senior Debt (whether by or on behalf of the Company or any Subsidiary Guarantor, as proceeds of security or enforcement of any right of setoff or otherwise) is declared to be fraudulent or preferential, set aside or required to be paid to any receiver, trustee in bankruptcy, liquidating trustee, agent or other similar Person under any bankruptcy, insolvency, receivership, fraudulent conveyance or similar law, then if such payment or distribution is recovered by, or paid over to, such receiver, trustee in bankruptcy, liquidating trustee, agent or other similar Person, the Senior Debt or part thereof originally intended to be satisfied shall be deemed to be reinstated and outstanding as if such payment had not occurred. To the extent the obligation to repay any Senior Debt is declared to be fraudulent, invalid or otherwise set aside under any bankruptcy, insolvency, receivership, fraudulent conveyance or similar law, then the obligation so declared fraudulent, invalid or otherwise set aside (and all other amounts that would come due with respect thereto had such obligation not been so affected) shall be deemed to be reinstated and outstanding as Senior Debt for all purposes hereof as if such declaration, invalidity or setting aside had not occurred.

Section 10.04. *Default on Designated Senior Debt.*

The Company and the Subsidiary Guarantors may not make any payment (whether by redemption, purchase, retirements, defeasance or otherwise) upon or in respect of the Securities and the related Guarantees (other than securities that are subordinated at least to the same extent as the Securities to Senior Debt and any securities issued in exchange for Senior Debt and payments and other distributions made from any defeasance trust created pursuant to Section 8.05 hereof if the applicable deposit does not violate Article 8 or 10 of this Indenture) until all

principal and other Obligations with respect to the Senior Debt of the Company have been paid in full if:

(i) a default in the payment of any principal of, premium, if any, or interest on Designated Senior Debt occurs; or

(ii) any other default occurs and is continuing with respect to Designated Senior Debt that permits, or with the giving of notice or passage of time or both (unless cured or waived) would permit, holders of the Designated Senior Debt as to which such default relates to accelerate its maturity and the Trustee receives a notice of the default (a “*Payment Blockage Notice*”) from the Company or the holders of any Designated Senior Debt. If the Trustee receives any such Payment Blockage Notice, no subsequent Payment Blockage Notice shall be effective for purposes of this Section unless and until 360 days shall have elapsed since the date of commencement of the payment blockage period resulting from the immediately prior Payment Blockage Notice. No nonpayment default in respect of any Designated Senior Debt that existed or was continuing on the date of delivery of any Payment Blockage Notice to the Trustee shall be, or be made, the basis for a subsequent Payment Blockage Notice.

The Company shall resume payments on and distributions in respect of the Securities and any Subsidiary Guarantor shall resume making payments and distributions pursuant to the Guarantees upon:

(1) in the case of a default referred to in Section 10.04(i) hereof the date upon which the default is cured or waived, or

(2) in the case of a default referred to in Section 10.04(ii) hereof, the earliest of (1) the date on which such nonpayment default is cured or waived, (2) the date the applicable Payment Blockage Notice is retracted by written notice to the Trustee and (3) 90 days after the date on which the applicable Payment Blockage Notice is received unless (A) the maturity of any Designated Senior Debt has been accelerated or (B) a Default or Event of Default under Section 6.01(9) *or* (10) has occurred and is continuing,

if this Article otherwise permits the payment, distribution or acquisition at the time of such payment or acquisition.

Section 10.05. *Acceleration of Securities.*

If payment of the Securities is accelerated because of an Event of Default, the Company shall promptly notify holders of Senior Debt of the acceleration.

Section 10.06. *When Distribution Must be Paid Over.*

In the event that the Trustee or any Holder receives any payment or distribution of or in respect of any Obligations with respect to the Securities or the Guarantees at a time when such payment or distribution is prohibited by Section 10.03 or Section 10.04 hereof, such payment or distribution shall be held by the Trustee (if the Trustee has actual knowledge that such payment or distribution is prohibited by Section 10.03 or Section 10.04) or such Holder, in trust for the benefit of, and shall be paid forthwith over and delivered to, the holders of Senior Debt as their interests may appear or their Representative under the indenture or other agreement (if any) pursuant to which such Senior Debt may have been issued, as their respective interests may appear, for application to the payment of all Obligations with respect to Senior Debt remaining

unpaid to the extent necessary to pay such Obligations in full in accordance with their terms, after giving effect to any concurrent payment or distribution to or for the holders of Senior Debt.

With respect to the holders of Senior Debt, the Trustee undertakes to perform only such obligations on the part of the Trustee as are specifically set forth in this Article 10, and no implied covenants or obligations with respect to the holders of Senior Debt shall be read into this Indenture against the Trustee. The Trustee shall not be deemed to owe any fiduciary duty to the holders of Senior Debt, and, except as provided in Section 10.12, shall not be liable to any such holders if the Trustee shall pay over or distribute to or on behalf of Holders of Securities or the Company, the Subsidiary Guarantors or any other Person money or assets to which any holders of Senior Debt shall be entitled by virtue of this Article 10, except if such payment is made as a result of the willful misconduct or gross negligence of the Trustee.

Section 10.07. Notice by Company.

The Company and the Subsidiary Guarantors shall promptly notify the Trustee and the Paying Agent of any facts known to the Company or any Subsidiary Guarantor that would cause a payment of any Obligations with respect to the Securities or the related Guarantees to violate this Article, but failure to give such notice shall not affect the subordination of the Securities and the related Guarantees to the Senior Debt as provided in this Article.

Section 10.08. Subrogation.

After all Senior Debt is paid in full and until the Securities are paid in full, Holders of Securities and the related Guarantees shall be subrogated (equally and ratably with all other Indebtedness *pari passu* with the Securities and the Guarantees) to the rights of holders of Senior Debt to receive distributions and payments applicable to Senior Debt to the extent that distributions and payments otherwise payable to the Holders of Securities and the related Guarantees have been applied to the payment of Senior Debt. A payment or distribution made under this Article to holders of Senior Debt that otherwise would have been made to Holders of Securities and the related Guarantees is not, as between the Company and Holders of Securities, a payment by the Company on the Securities.

Section 10.09. Relative Rights.

This Article defines the relative rights of Holders of Securities and the related Guarantees and holders of Senior Debt. Nothing in this Indenture shall:

- (1) impair, as between the Company and Holders of Securities, the obligation of the Company, which is absolute and unconditional, to pay principal of and interest on the Securities in accordance with their terms;
- (2) affect the relative rights of Holders of Securities and the related Guarantees and creditors of the Company other than their rights in relation to holders of Senior Debt; or
- (3) prevent the Trustee or any Holder from exercising its available remedies upon a Default or Event of Default, subject to the rights of holders and owners of Senior Debt to receive distributions and payments otherwise payable to Holders of Securities and the related Guarantees.

If the Company fails because of this Article to pay principal of or interest on a Security on the due date, the failure is still a Default or Event of Default.

Section 10.10. *Subordination May Not be Impaired by Company or the Subsidiary Guarantors.*

No right of any present or future holders of any Senior Debt to enforce subordination as provided in this Article 10 will at any time in any way be prejudiced or impaired by any act or failure to act on the part of the Company or any Subsidiary Guarantor or by any act or failure to act, in good faith, by any such holder, or by any noncompliance by the Company or any Subsidiary Guarantor with the terms of this Indenture, regardless of any knowledge thereof that any such holder of Senior Debt may have or otherwise be charged with. The provisions of this Article 10 are intended to be for the benefit of, and shall be enforceable directly by, the holders of Senior Debt.

Section 10.11. *Payment, Distribution or Notice to Representative.*

Whenever a payment or distribution is to be made or a notice given to holders of Senior Debt, the distribution may be made and the notice given to their Representative.

Upon any payment or distribution of assets or securities of the Company or any Subsidiary Guarantor referred to in this Article 10, the Trustee and the Holders of Securities and the related Guarantees shall be entitled to rely upon any order or decree made by any court of competent jurisdiction or upon any certificate of such Representative or of the liquidating trustee or agent or other Person making any payment or distribution to the Trustee or to the Holders of Securities and the related Guarantees for the purpose of ascertaining the Persons entitled to participate in such payment or distribution, the holders of the Senior Debt and other Indebtedness of the Company or any Subsidiary Guarantor, the amount thereof or payable thereon, the amount or amounts paid or distributed thereon and all other facts pertinent thereto or to this Article 10.

Section 10.12. *Rights of Trustee and Paying Agent.*

Notwithstanding the provisions of this Article 10 or any other provision of this Indenture, the Trustee shall not be charged with knowledge of the existence of any facts that would prohibit the making of any payment or distribution by the Trustee, and the Trustee and the Paying Agent may continue to make payments on the Securities and the Guarantees, unless the Trustee shall have received at its Corporate Trust Office at least one Business Day prior to the date of such payment written notice of facts that would cause the payment of any Obligations with respect to the Securities or Guarantees to violate this Article, which notice shall specifically refer to Section 10.03 or 10.04 hereof. Only the Company or a Representative may give the notice. Nothing in this Article 10 shall impair the claims of, or payments to, the Trustee under or pursuant to Section 7.07 hereof.

The Trustee in its individual or any other capacity may hold Senior Debt with the same rights it would have if it were not Trustee. Any Agent may do the same with like rights.

Section 10.13. *Authorization to Effect Subordination.*

Each Holder by the Holder's acceptance thereof authorizes and directs the Trustee on the Holder's behalf to take such action as may be necessary or appropriate to effectuate the subordination as provided in this Article 10, and appoints the Trustee to act as the Holder's attorney-in-fact for any and all such purposes. If the Trustee does not file a proper proof of claim or proof of debt in the form required in any proceeding referred to in Section 6.09 hereof at least 30 days before the expiration of the time to file such claim, each lender under the Credit

Agreement is hereby authorized to file an appropriate claim for and on behalf of the Holders of the Securities and the related Guarantees.

Section 10.14. *Amendments.*

No amendment may be made to the provisions of or the definitions of any terms appearing in this Article 10, or to the provisions of Section 6.02 relating to the Designated Senior Debt, that adversely affects the rights of any holder of Senior Debt then outstanding unless the holders of such Senior Debt (or any group or Representative authorized to give a consent) consent to such change.

Section 10.15. *No Waiver of Subordination Provisions.*

Without in any way limiting the generality of Section 10.09 of this Indenture, the holders of Senior Debt may, at any time and from time to time, without the consent of or notice to the Trustee or the Holders, without incurring responsibility to the Holders and without impairing or releasing the subordination provided in this Article 10 or the obligations hereunder of the Holders to the holders of Senior Debt, do any one or more of the following: (a) change the manner, place or terms of payment or extend the time of payment of, or renew or alter, Senior Debt or any instrument evidencing the same or any agreement under which Senior Debt is outstanding or secured; (b) sell, exchange, release or otherwise deal with any property pledged, mortgaged or otherwise securing Senior Debt; (c) release any Person liable in any manner for the collection of Senior Debt; and (d) exercise or refrain from exercising any rights against the Company and each Subsidiary Guarantor and any other Person.

C

(Seller Note)
Subordinated Promissory Note
Houston, Texas

\$ _____, 200__

[_____] a [_____] corporation, and its successors and assigns (“Maker”), for value received, promises and agrees to pay on or before [_____, 200__], unto the order of [_____] (“Payee”) in lawful money of the United States of America the principal sum of [_____] __/100 Dollars (\$_____), together with interest thereon from and after the date hereof until paid in full at the rate of [_____] percent (___%) per annum, but in no event to exceed the maximum rate of nonusurious interest allowed by law as of the date hereof.

Interest shall accrue from date hereof until this note is paid in full, and will be computed on the per annum basis of a year of 365 or 366 days, as the case may be, and the actual number of days (including the first day but excluding the last day) elapsed. Accrued interest is due and payable quarterly, commencing [_____, 200__], on the first business day of each and every succeeding January, April, July and October thereafter during the term hereof and at maturity; provided, however, that if the principal of this note is prepaid in whole or in part, at any time after the date hereof, all accrued and unpaid interest with respect to such principal amount prepaid is due and payable on the date of such prepayment.

All payments of principal and interest to be paid under this note shall be made in U.S. Dollars and may, at the option of Maker, be paid by check mailed to the registered address of the holder of this note or may be made via transfer in immediately available funds. If the due date of any payment under this note would otherwise fall on a day which is not a business day in Houston, Texas, the date for such payment shall be extended to the next succeeding business day and interest shall be payable for any principal so extended for the period of such extension.

If default is made in the payment of any installment of interest hereof, as and when the same is or becomes due and such default remains unremedied for a period of three (3) days, or if Maker shall (i) apply for or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property, (ii) make a general assignment for the benefit of its creditors, (iii) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (iv) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts, (v) fail to controvert in a timely and appropriate manner, or acquiesce in writing to, any petition filed against it in an involuntary case under the Federal Bankruptcy Code, or (vi) take any corporate action for the purpose of effecting any of the foregoing; then in any such event, the holder of this note may, without notice or demand (both of which are expressly waived by Maker), declare all sums owing hereon at once due and payable. If default is made in the payment of this note at maturity (regardless of how its maturity may be brought about) and the same is placed in the hands of an attorney for collection, or suit is filed hereon, or proceedings are had in bankruptcy, receivership or other judicial proceedings for the establishment or collection of any amount called for hereunder, or any amount payable or to be payable hereunder is collected through any such proceedings, Maker agrees and is also to pay to the holder of this note a reasonable amount as attorney’s or collection fees.

Maker is entitled to receive under certain circumstances indemnification from Payee pursuant to Section 8.1 of the Stock Purchase Agreement (the “Stock Purchase Agreement”), dated as of [_____], by and among Maker, Payee and the other Sellers named therein. Maker is hereby authorized to set-off and apply any amount to which Maker or any other Company Party (as defined in the Stock Purchase Agreement) is entitled under the terms of the Stock Purchase Agreement against amounts owing under this note, regardless of whether then due; provided, however, that if any dispute exists with respect to any such amount, then until the resolution of such dispute, the portion of the principal amount of this note equal to the amount claimed by Maker or other Company Parties shall not be paid and interest shall accrue thereon to the extent not paid when otherwise due (except interest shall not accrue on any amount that Maker is ultimately determined to have the right to set-off); provided, further, however, that to the extent some or all of such amount is finally determined to be owing to Maker, then Maker is hereby authorized to set-off and apply any such amount against amounts owing under this note. Maker agrees to promptly notify Payee after any such set-off and application.

Maker expressly waives demand and presentment for payment, notice of nonpayment, protest, notice of protest, notice of dishonor, notice of intent to accelerate the maturity hereof, notice of the acceleration of the maturity hereof, bringing of suit and diligence in taking any action to collect amounts called for hereunder and in the handling of securities at any time existing in connection herewith.

It is the intention of Maker and Payee to conform strictly to applicable usury laws. Accordingly, if the transactions contemplated hereby would be usurious under applicable law (including the laws of the State of Texas and the laws of the United States of America), then, in that event, notwithstanding anything to the contrary herein or in any agreement entered into in connection with this note, it is agreed as follows: (i) the aggregate of all consideration which constitutes interest under applicable law that is taken, reserved, contracted for, charged or received under this note or under any of the other aforesaid agreements or otherwise in connection with this note shall under no circumstances exceed the maximum amount of interest allowed by applicable law, and any excess shall be canceled automatically and, if theretofore paid, shall be credited on this note by the holder hereof (or, to the extent that this note shall have been or would thereby be paid in full, refunded to Maker); and (ii) in the event that maturity of this note is accelerated by reason of an election by the holder hereof resulting from any default hereunder or otherwise, or in the event of any required or permitted prepayment, then such consideration that constitutes interest may never include more than the maximum amount allowed by applicable law, and excess interest, if any, provided for in this note or otherwise shall be canceled automatically as of the date of such acceleration or prepayment and, if theretofore paid, shall be credited on this note (or, to the extent that this note shall have been or would thereby be paid in full, refunded to Maker).

THIS NOTE (INCLUDING, BUT NOT LIMITED TO, THE VALIDITY AND ENFORCEABILITY HEREOF) SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS.

This Note and the indebtedness evidenced hereby is expressly subordinate to the Senior Indebtedness (as defined in Annex I) of Maker, as set forth in the subordination provisions contained in Annex I hereto and incorporated herein and made a part hereof for all purposes,

whether such Senior Indebtedness is outstanding as the date hereof or thereafter incurred. Each holder of this note, by accepting the same, agrees to and shall be bound by such provisions and authorizes the holders of the Senior Indebtedness (as defined in Annex I) or the Representative (as defined in Annex I) of such holders on its behalf to take such action as may be necessary or appropriate to effectuate the subordination so provided and appoints such holders or Representative as his attorney-in-fact for such purpose.

Executed as of the date first written above.

[_____]

By:_____

Name:

Title:

Annex I
Terms of Subordination

Section 1. Definitions. As used in this Annex I, terms defined in the note shall have the meanings assigned such terms therein and the following terms shall have the following meanings, unless the context otherwise requires:

“Bank Credit Facilities” means, with respect to any Person, one or more debt facilities or commercial paper facilities with banks or other institutional lenders (including pursuant to the [_____] Credit Facility) providing for revolving credit loans, receivables financing (including through the sale of receivables to such lenders or to special purpose entities formed to borrow from such lenders against such receivables), and/or trade letters of credit, together with any extensions, revisions, amendments, modifications, refinancings or replacements thereof by a lender or syndicate of lenders.

“[_____] Credit Facility” means that certain Credit Agreement dated as of [_____] among, *inter alia*, Maker, the banks named therein and [_____], as Administrative and Collateral Agent.

“Representative” means the trustee, agent or representative expressly authorized to act in such capacity, if any, for an issue of Senior Indebtedness, and shall include any agent under any Bank Credit Facility.

“Senior Indebtedness” means the obligations of Maker with respect to any indebtedness of Maker or contingent obligations of Maker relating to indebtedness of others (including without limitation indebtedness and other obligations (whether direct or contingent, primary or secondary) under any Bank Credit Facility), whether outstanding on the date hereof or hereafter created, incurred or assumed, and any renewal, refunding, refinancing, replacement or extension thereof, unless, in the case of any particular indebtedness or obligation, the instrument creating or evidencing the same or pursuant to which the same is outstanding expressly provides that such indebtedness or obligation shall not be senior in right of payment to this note; provided however, that Senior Indebtedness of Maker shall not include (a) indebtedness of Maker to [_____] or any of its direct or indirect subsidiaries, (b) amounts owed for goods, materials or services purchased in the ordinary course of business, (c) amounts payable or any other indebtedness to employees of Maker or any subsidiary of Maker, (d) any liability for United States Federal, state, local or other taxes owed or owing by Maker, and (e) indebtedness of Maker which is expressly *pari passu* or subordinate to this note.

“Subordinated Debt” shall mean any and all indebtedness, liabilities and obligations of Maker under this note.

Section 2. Subordination

2.01 Payment Subordination upon Default. As long as any of the Senior Indebtedness is outstanding, Maker shall not make, and Payee shall not accept, payments of principal on the Subordinated Debt prior to the scheduled maturity date or payments of interest other than scheduled installments of interest on the Subordinated Debt; provided that if there shall occur and be continuing any event which with the giving of notice or lapse of time or both would

constitute a default or event of default under any Senior Indebtedness and the holders thereof shall have given Maker written notice thereof, then, unless and until such default or event of default shall have been cured or all Senior Indebtedness shall be paid in full, Payee will not ask for, sue for, take, demand, receive or accept from Maker, by set off or in any other manner, any payment or distribution on account of the Subordinated Debt nor present any instrument evidencing the Subordinated Debt for payment (other than such presentment as may be necessary to prevent discharge of other liable parties on such instrument).

2.02 No Payments Which Cause Defaults. Payee will not ask for, demand, sue for, take, receive or accept from Maker by set off or in any other manner, any payment or distribution on account of the Subordinated Debt in violation of Section 2.01 or if the making of such payment would constitute, or would result in the occurrence of, a default or event of default under any Senior Indebtedness.

2.03 Payments Received in Violation of Terms. In the event Payee shall receive any payment or distribution on account of the Subordinated Debt which it is not entitled to receive under the provisions of the foregoing Section 2.01 or 2.02, Payee will hold any amount so received in trust for the holders of the Senior Indebtedness and will forthwith turn over such payment to such holders or a Representative in the form received by Payee (together with any necessary endorsement) to be applied on the Senior Indebtedness.

2.04 Liens Subordinate. The Subordinated Debt is and shall be unsecured. Notwithstanding the foregoing, if the Subordinated Debt is ever secured by any liens on property of Maker, Payee agrees that any liens, security interests or other encumbrances upon Maker's assets securing payment of the Subordinated Debt shall be and remain inferior and subordinate to any liens, security interests and encumbrances securing payment of the Senior Indebtedness regardless of whether such encumbrances in favor of Payee or the holders of the Senior Indebtedness or a Representative presently exist or are hereafter created or attach. Without the prior written consent of the holders of the Senior Indebtedness outstanding under all Bank Credit Facilities then in effect, Payee shall not foreclose, repossess, sequester or otherwise take steps or institute any action or proceeding (judicial or otherwise, including without limitation the commencement of or joinder in any liquidation, bankruptcy, rearrangement, debtor's relief or insolvency proceeding) to enforce any lien, security interest, encumbrance, collateral right, judgment or other encumbrance on Maker's assets held by Payee.

2.05 Agreement Not to Pursue Actions. If a default or event of default under any Bank Credit Facility has occurred and is continuing, then Payee will not commence any action or proceeding against Maker to recover all or any part of the Subordinated Debt. Payee will not join with any other creditor, unless the holders of the Senior Indebtedness or the Representative of such holders shall also join, in bringing any proceedings against Maker under any bankruptcy, reorganization, readjustment of debt, arrangement of debt, receivership, liquidation or insolvency law or statute of the Federal or any state government unless and until all Senior Indebtedness shall have been paid in full. In the event of any receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization or arrangement with creditors, adjustment of debt, whether or not pursuant to the Federal Bankruptcy Code, the sale of all or substantially all of the assets, dissolution, liquidation, or any other marshaling of the assets and liabilities of Maker, Payee will at the request of the holder of any Senior Indebtedness or a Representative file

any claim, proof of claim, proof of interest or other instrument of similar character necessary to enforce the obligations of Maker in respect of the Subordinated Debt and will hold in trust for the holders of the Senior Indebtedness and pay over to such holders or the Representative of such holders, in the form received (together with any necessary endorsement), to be applied on the Senior Indebtedness, any and all monies, dividends, distributions or other assets received in any such proceedings on account of the Subordinated Debt unless and until the Senior Indebtedness shall be paid in full. In the event that Payee shall fail to take any such action requested by the holders of the Senior Indebtedness or the Representative of such holders, such person may, as attorney in fact for Payee take such action on behalf of Payee, and Payee hereby appoints each such person as his attorney in fact to demand, sue for, collect and receive any and all such monies, dividends, distributions or other assets and give acquittance therefor, and to file any claim, proof of claim, proof of interest or other instrument of similar character and to take such other proceedings in the name of the holders of any Senior Indebtedness or in the name of Payee as such holder or Representative may deem necessary or advisable for the enforcement of this Annex I; and Payee will execute and deliver such other and further powers of attorney or other instruments as may be request in order to accomplish the foregoing.

2.06 Rights of Holders of Senior Indebtedness. The holders of the Senior Indebtedness or the Representative of such holders may, at any time, and from time to time, without the consent of or notice to Payee, without incurring responsibility to Payee, without impairing or releasing any of the rights or any of the obligations of Payee under this Annex I: (a) increase the amount of the Senior Indebtedness, (b) change the amount, manner, place or terms of payment, or change or extend for any period the time of payment of, or renew or otherwise alter the Senior Indebtedness or any instrument or agreement now or hereafter executed evidencing, in connection with, as security for or providing for the issuance of any of the Senior Indebtedness in any manner, or enter into or amend in any manner any other agreement relating to the Senior Indebtedness (including provisions restricting or further restricting payments of the Subordinated Debt); (c) sell, exchange, release or otherwise deal with all or any part of any property by whomsoever at any time pledged or mortgaged to secure, howsoever securing, the Senior Indebtedness; (d) release any person liable in any manner for payment or collection of the Senior Indebtedness; (e) exercise or refrain from exercising any rights against Maker or others, including Payee; and (f) apply any sums received, paid by any person and however realized, to payment of the Senior Indebtedness in such a manner as it or they, in its or their sole discretion, may deem appropriate.

Section 3. Covenants. Payee covenants that so long as any of the Senior Indebtedness remains outstanding, Payee will: (a) execute any and all other instruments necessary as reasonably required to subordinate the Subordinated Debt to the Senior Indebtedness as herein provided; (b) not assign or transfer to others this note or any claim Payee have or may have against Maker as long as any of the Senior Indebtedness remains outstanding, unless such assignment or transfer is expressly made subject to this Annex I; (c) not ask for, sue for, take, demand, receive or accept any principal or interest on any of the Subordinated Debt, except that scheduled installments of principal and interest may be made in accordance with the express terms thereof; (d) not amend, supplement or otherwise modify the terms of the Subordinated Debt other than to decrease the rate of interest therefor, decrease the amount of any installment or to extend the maturity date thereof; (e) not ask for, take, demand, receive or accept any property as collateral security for the Subordinated Debt; and (f) promptly upon either receipt or

delivery, forward to the holders of the Senior Indebtedness under any Bank Credit Facility or their Representative a true and complete copy of any material notices or communications either received or delivered with respect to the Subordinated Debt.

Section 4. Amendments and Waivers. The acceptance of partial or delinquent payments or any forbearance, failure or delay by it in exercising any right, power or remedy hereunder shall not be deemed a waiver of any obligation of Maker or Payee, or of any right, power or remedy of the holders of the Senior Indebtedness or the Representative of such holders; and no partial exercise of any right, power or remedy shall preclude any other or further exercise thereof.