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

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**Form 10-Q**

(Mark One)

- QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**  
For the quarterly period ended January 25, 2008
- OR
- TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**  
For the transition period from      to

Commission file number 0-27130

**Network Appliance, Inc.**

*(Exact name of registrant as specified in its charter)*

**Delaware**  
*(State or other jurisdiction of  
incorporation or organization)*

**77-0307520**  
*(IRS Employer  
Identification No.)*

**495 East Java Drive,  
Sunnyvale, California 94089**  
*(Address of principal executive offices, including zip code)*

**Registrant's telephone number, including area code:**  
**(408) 822-6000**

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

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

Large accelerated filer  Accelerated filer   
Non-accelerated filer  (Do not check if a smaller reporting company) Smaller reporting company

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

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

Class	Outstanding at February 22, 2008
Common Stock	343,523,730

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## TRADEMARKS

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## PART I. FINANCIAL INFORMATION

## Item 1. Condensed Consolidated Financial Statements (Unaudited)

## NETWORK APPLIANCE, INC.

## CONDENSED CONSOLIDATED BALANCE SHEETS

(In thousands - Unaudited)

	January 25, 2008	April 27, 2007
<b>ASSETS</b>		
<b>Current Assets:</b>		
Cash and cash equivalents	\$ 776,359	\$ 489,079
Short-term investments	351,232	819,702
Accounts receivable, net of allowances of \$2,290 at January 25, 2008, and \$2,572 at April 27, 2007	462,769	548,249
Inventories	60,102	54,880
Prepaid expenses and other assets	103,837	99,840
Short-term restricted cash and investments	65,756	118,312
Short-term deferred income taxes	96,629	110,741
Total current assets	1,916,684	2,240,803
Property and Equipment, Net	661,128	603,523
Goodwill	600,845	601,056
Intangible Assets, Net	62,577	83,009
Long-Term Restricted Cash and Investments	312,617	3,639
Long-Term Deferred Income Taxes and Other Assets	225,575	126,448
	<u>\$ 3,779,426</u>	<u>\$ 3,658,478</u>
<b>LIABILITIES AND STOCKHOLDERS' EQUITY</b>		
<b>Current Liabilities:</b>		
Current portion of long-term debt	\$ 28,790	\$ 85,110
Accounts payable	119,867	144,112
Income taxes payable	12,839	53,371
Accrued compensation and related benefits	175,285	177,327
Other accrued liabilities	111,053	97,017
Deferred revenue	776,648	630,610
Total current liabilities	1,224,482	1,187,547
Long-Term Debt	250,000	—
Other Long-Term Obligations	79,599	9,487
Long-Term Deferred Revenue	564,812	472,423
	<u>2,118,893</u>	<u>1,669,457</u>
<b>Stockholders' Equity:</b>		
Common stock (343,207 shares at January 25, 2008, and 421,623 shares at April 27, 2007)	343	422
Additional paid-in capital	2,673,510	2,380,623
Treasury stock at cost (84,515 shares at January 25, 2008, and 54,593 shares at April 27, 2007)	(2,467,942)	(1,623,691)
Retained earnings	1,446,082	1,226,165
Accumulated other comprehensive income	8,540	5,502
Total stockholders' equity	<u>1,660,533</u>	<u>1,989,021</u>
	<u>\$ 3,779,426</u>	<u>\$ 3,658,478</u>

See accompanying notes to unaudited condensed consolidated financial statements.

## NETWORK APPLIANCE, INC.

## CONDENSED CONSOLIDATED STATEMENTS OF INCOME

(In thousands, except per share amounts - Unaudited)

	Three Months Ended		Nine Months Ended	
	January 25, 2008	January 26, 2007	January 25, 2008	January 26, 2007
<b>Revenues</b>				
Product	\$ 608,138	\$ 550,882	\$1,612,864	\$1,497,777
Software entitlements and maintenance	125,568	84,969	350,628	242,052
Service	150,297	93,427	401,944	263,260
Total revenues	<u>884,003</u>	<u>729,278</u>	<u>2,365,436</u>	<u>2,003,089</u>
<b>Cost of Revenues</b>				
Cost of product	250,428	211,211	654,575	585,437
Cost of software entitlements and maintenance	2,560	2,710	6,558	7,458
Cost of service	91,713	71,248	263,799	191,708
Total cost of revenues	<u>344,701</u>	<u>285,169</u>	<u>924,932</u>	<u>784,603</u>
Gross margin	<u>539,302</u>	<u>444,109</u>	<u>1,440,504</u>	<u>1,218,486</u>
<b>Operating Expenses:</b>				
Sales and marketing	279,114	236,433	779,131	636,214
Research and development	111,717	97,516	327,237	276,555
General and administrative	42,787	37,724	123,743	105,337
Restructuring recoveries	—	—	—	(74)
Gain on sale of assets	—	—	—	(25,339)
Total operating expenses	<u>433,618</u>	<u>371,673</u>	<u>1,230,111</u>	<u>992,693</u>
<b>Income from Operations</b>	<u>105,684</u>	<u>72,436</u>	<u>210,393</u>	<u>225,793</u>
<b>Other Income (Expenses), Net:</b>				
Interest income	16,964	17,086	50,295	51,220
Interest expense	(3,639)	(2,335)	(6,130)	(11,377)
Net gain (loss) on investments	(1,005)	884	12,614	(1,116)
Other income, net	(619)	533	443	3,191
Total other income, net	<u>11,701</u>	<u>16,168</u>	<u>57,222</u>	<u>41,918</u>
<b>Income Before Income Taxes</b>	<u>117,385</u>	<u>88,604</u>	<u>267,615</u>	<u>267,711</u>
<b>Provision for Income Taxes</b>	<u>15,562</u>	<u>22,090</u>	<u>47,697</u>	<u>59,597</u>
<b>Net Income</b>	<u>\$ 101,823</u>	<u>\$ 66,514</u>	<u>\$ 219,918</u>	<u>\$ 208,114</u>
<b>Net Income per Share:</b>				
Basic	<u>\$ 0.30</u>	<u>\$ 0.18</u>	<u>\$ 0.62</u>	<u>\$ 0.56</u>
Diluted	<u>\$ 0.29</u>	<u>\$ 0.17</u>	<u>\$ 0.60</u>	<u>\$ 0.53</u>
<b>Shares Used in Net Income per Share Calculations:</b>				
Basic	<u>344,275</u>	<u>371,287</u>	<u>354,799</u>	<u>371,938</u>
Diluted	<u>352,780</u>	<u>389,120</u>	<u>365,290</u>	<u>389,555</u>

See accompanying notes to unaudited condensed consolidated financial statements.

NETWORK APPLIANCE, INC.

CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS

(In thousands — Unaudited)

	Nine Months Ended	
	January 25, 2008	January 26, 2007
<b>Cash Flows from Operating Activities:</b>		
Net income	\$ 219,918	\$ 208,114
Adjustments to reconcile net income to net cash provided by operating activities:		
Depreciation	83,921	62,316
Amortization of intangible assets and patents	20,431	16,456
Stock-based compensation	113,077	124,679
Net loss (gain) on investments	(12,614)	1,116
Gain on sale of assets	—	(25,339)
Net loss on disposal of equipment	828	686
Allowance for doubtful accounts	355	186
Deferred income taxes	(74,815)	(88,483)
Deferred rent	632	979
Income tax benefit from stock-based compensation	96,990	132,459
Excess tax benefit from stock-based compensation	(47,107)	(43,463)
Changes in assets and liabilities:		
Accounts receivable	86,509	(16,091)
Inventories	(5,184)	3,495
Prepaid expenses and other assets	19,476	(7,887)
Accounts payable	(33,865)	4,446
Income taxes payable	11,045	(12,407)
Accrued compensation and related benefits	(5,022)	16,870
Other accrued liabilities	3,994	12,127
Deferred revenue	237,016	263,449
Net cash provided by operating activities	<u>715,585</u>	<u>653,708</u>
<b>Cash Flows from Investing Activities:</b>		
Purchases of investments	(929,983)	(1,938,191)
Redemptions of investments	1,084,954	2,007,726
Redemptions of restricted investments	53,747	63,236
Change in restricted cash	(1,400)	333
Proceeds from sale of assets	—	23,914
Proceeds from sales of marketable securities	18,256	—
Proceeds from sales of nonmarketable securities	898	1,774
Purchases of property and equipment	(124,847)	(112,411)
Purchases of nonmarketable securities	(4,235)	(1,333)
Purchase of businesses, net of cash acquired/(goodwill adjustment)	211	(131,241)
Net cash provided by (used in) investing activities	<u>97,601</u>	<u>(86,193)</u>
<b>Cash Flows from Financing Activities:</b>		
Proceeds from sale of common stock related to employee stock transactions	100,187	177,425
Tax withholding payments reimbursed by restricted stock	(5,851)	(4,692)
Excess tax benefit from stock-based compensation	47,107	43,463
Proceeds from revolving credit facility	262,754	—
Repayment of debt	(56,320)	(148,869)
Repayment of revolving credit facility	(13,000)	—
Repurchases of common stock	(844,251)	(605,708)
Net cash used in financing activities	<u>(509,374)</u>	<u>(538,381)</u>
<b>Effect of Exchange Rate Changes on Cash and Cash Equivalents</b>	(16,532)	(175)
<b>Net Increase in Cash and Cash Equivalents</b>	287,280	28,959
<b>Cash and Cash Equivalents:</b>		
Beginning of period	489,079	461,256
End of period	<u>\$ 776,359</u>	<u>\$ 490,215</u>
<b>Noncash Investing and Financing Activities:</b>		
Acquisition of property and equipment on account	\$ 15,849	\$ 17,157
Options assumed for acquired business	\$ —	\$ 8,369
Common stocks received from sale of assets	\$ —	\$ 9,069
<b>Supplemental Cash Flow Information:</b>		
Income taxes paid	\$ 16,512	\$ 30,260
Income taxes refunded	\$ 2,054	\$ 1,964
Interest paid on debt	\$ 5,828	\$ 8,776

See accompanying notes to unaudited condensed consolidated financial statements.

**NETWORK APPLIANCE, INC.**

**NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS**  
**(In thousands, except per share data, Unaudited)**

**1. The Company**

Based in Sunnyvale, California, Network Appliance (NetApp, we, the company or our) was incorporated in California in April 1992 and reincorporated in Delaware in November 2001. Network Appliance, Inc. is a supplier of enterprise storage and data management software and hardware products and services. Our solutions help global enterprises meet major information technology challenges such as managing storage growth, assuring secure and timely information access, protecting data, and controlling costs by providing innovative solutions that simplify the complexity associated with managing corporate data. Network Appliance™ solutions are the data management and storage foundation for many of the world's leading corporations and government agencies.

**2. Condensed Consolidated Financial Statements**

The accompanying interim unaudited condensed consolidated financial statements have been prepared by Network Appliance, Inc. without audit and reflect all adjustments, consisting only of normal recurring adjustments which are, in the opinion of management, necessary for a fair presentation of our financial position, results of operations, and cash flows for the interim periods presented. The statements have been prepared in accordance with accounting principles generally accepted in the United States of America ("generally accepted accounting principles") for interim financial information and in accordance with the instructions to Form 10-Q and Article 10-01 of Regulation S-X. Accordingly, they do not include all information and footnotes required by generally accepted accounting principles for annual consolidated financial statements. These financial statements should be read in conjunction with the audited consolidated financial statements and accompanying notes included in our Annual Report on Form 10-K for the year ended April 27, 2007. The results of operations for the three- and nine-month periods ended January 25, 2008 are not necessarily indicative of the operating results to be expected for the full fiscal year or future operating periods.

In the first quarter of fiscal 2008, we began to classify sales-related tax receivable balances from our customers within prepaid expenses and other current assets. These balances were included in accounts receivable, net, in previous periods (\$43,075 at April 27, 2007), and such amounts have been reclassified in the accompanying financial statements to conform to the current period classification. This reclassification had no effect on the reported amounts of net income or cash flow from operations for any period presented. In addition, we have chosen to use the term "software entitlements and maintenance" in our statements of income to describe the arrangements under which we provide our customers the right to receive unspecified software product upgrades and enhancements on a when-and-if-available basis, bug fixes, and patch releases; these were previously described as "software upgrade and maintenance arrangements."

We operate on a 52-week or 53-week year ending on the last Friday in April. The first nine months of fiscal 2008 and 2007 were both 39-week fiscal periods.

**3. Use of Estimates**

The preparation of the condensed consolidated financial statements is in conformity with generally accepted accounting principles and requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the condensed consolidated financial statements and the reported amounts of revenues and expenses during the reporting period. Such estimates include, but are not limited to, revenue recognition and allowances; allowance for doubtful accounts; valuation of goodwill and intangibles; fair value of derivative instruments and related hedged items; accounting for income taxes; inventory valuation and contractual commitments; restructuring accruals; impairment losses on investments; fair value of options granted under our stock-based compensation plans; and loss contingencies. Actual results could differ from those estimates.

**NETWORK APPLIANCE, INC.**  
**NOTES TO UNAUDITED CONDENSED**  
**CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

**4. Stock-Based Compensation, Equity Incentive Programs and Stockholders' Equity**

*Stock-Based Compensation Expense*

The stock-based compensation expenses included in the Condensed Consolidated Statements of Income for the three- and nine-month periods ended January 25, 2008 and January 26, 2007 are as follows:

	Three Months Ended		Nine Months Ended	
	January 25, 2008	January 26, 2007	January 25, 2008	January 26, 2007
Cost of product revenue	\$ 802	\$ 922	\$ 2,515	\$ 2,660
Cost of service revenue	2,511	2,533	7,788	7,657
Sales and marketing	14,802	17,315	49,428	54,747
Research and development	10,815	12,276	36,322	39,166
General and administrative	5,366	6,188	17,024	20,449
Total stock-based compensation expense before income taxes	34,296	39,234	113,077	124,679
Income taxes	(7,123)	(5,371)	(19,252)	(20,652)
Total stock-based compensation expense after income taxes	<u>\$ 27,173</u>	<u>\$ 33,863</u>	<u>\$ 93,825</u>	<u>\$ 104,027</u>

The following table summarizes stock-based compensation expense associated with each type of award:

	Three Months Ended		Nine Months Ended	
	January 25, 2008	January 26, 2007	January 25, 2008	January 26, 2007
Employee stock options and awards	\$ 30,901	\$ 36,276	\$ 101,147	\$ 115,574
Employee stock purchase plan ("ESPP")	3,327	2,954	11,969	9,609
Amounts capitalized in inventory	68	4	(39)	(504)
Total stock-based compensation expense before income taxes	34,296	39,234	113,077	124,679
Income taxes	(7,123)	(5,371)	(19,252)	(20,652)
Total stock-based compensation expense after income taxes	<u>\$ 27,173</u>	<u>\$ 33,863</u>	<u>\$ 93,825</u>	<u>\$ 104,027</u>

*Valuation Assumptions*

We estimated the fair value of stock options using the Black-Scholes model on the date of the grant. Assumptions used in the Black-Scholes valuation model were as follows:

	Stock Options Three Months Ended		ESPP Three Months Ended	
	January 25, 2008	January 26, 2007	January 25, 2008	January 26, 2007
Expected life in years(1)	4.0	4.0	0.5	0.5
Risk-free interest rate(2)	2.83% - 3.34%	4.49% - 4.70%	3.21%	5.06%
Volatility(3)	47% - 51%	34% - 37%	49%	35%
Expected dividend(4)	0%	0%	0%	0%

**NETWORK APPLIANCE, INC.**  
**NOTES TO UNAUDITED CONDENSED**  
**CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

	Stock Options		ESPP	
	Nine Months Ended		Nine Months Ended	
	January 25, 2008	January 26, 2007	January 25, 2008	January 26, 2007
Expected life in years(1)	4.0	4.0	0.5	0.5
Risk-free interest rate(2)	2.83% - 5.02%	4.49% - 5.05%	4.15%	5.06%
Volatility(3)	33% - 55%	34% - 38%	44%	35%
Expected dividend(4)	0%	0%	0%	0%

- (1) The expected life of 4.0 years represented the period that our stock-option awards are expected to be outstanding and was determined based on historical experience on similar awards. The expected life of 0.5 years for the employee stock purchase plan was based on the term of the purchase period.
- (2) The risk-free interest rate for the stock option awards was based upon U.S. Treasury bills with equivalent expected terms of our employee stock-option award. The risk-free interest rate for the employee stock purchase plan was based on the U.S. Treasury bills yield curve in effect at the time of grant for the expected term of the purchase period.
- (3) We used the implied volatility of traded options to estimate our stock price volatility.
- (4) The expected dividend was determined based on our history and expected dividend payouts.

We estimate our forfeiture rates based on historical voluntary termination behavior and recognized compensation expense only for those equity awards expected to vest.



**NETWORK APPLIANCE, INC.**  
**NOTES TO UNAUDITED CONDENSED**  
**CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

**Stock Options**

A summary of the combined activity under our stock option plans and agreements is as follows:

	Shares Available for Grant	Numbers of Shares	Outstanding Options Weighted Average Exercise Price	Weighted Average Remaining Contractual Term (Years)	Aggregate Intrinsic Value
Outstanding at April 27, 2007	22,862	65,043	\$ 29.28		
Additional shares reserved for plan	7,200	—	—		
Options granted	(9,824)	9,824	27.13		
Restricted stock units granted	(1,234)	1,234	—		
Options exercised	—	(3,986)	13.07		
Restricted stock units exercised	—	(295)	—		
Options forfeitures and cancellation	3,461	(3,461)	37.00		
Restricted stock units forfeitures and cancellation	96	(96)	—		
Options expired	(558)	—	—		
Outstanding at January 25, 2008	<u>22,003</u>	<u>68,263</u>	\$ 30.79		
Options vested and expected to vest as of January 25, 2008		63,349	\$ 30.14	5.16	\$ 130,147
Exercisable at January 25, 2008		42,086	\$ 29.65	4.41	\$ 128,465
RSUs vested and expected to vest as of January 25, 2008		1,990	\$ —	1.99	\$ 44,248
Exercisable at January 25, 2008		—	\$ —	—	\$ —

The intrinsic value represents the difference between the exercise price of stock options and the market price of our stock on that day for all in-the-money options. The weighted-average fair value of options granted during the three- and nine-month periods ended January 25, 2008 were \$9.53 and \$10.27, respectively. The weighted-average fair value of options granted during the three- and nine-month periods ended January 26, 2007 were \$14.10 and \$12.93, respectively. The total intrinsic value of options exercised was \$11,701 and \$67,488 for the three- and nine-month periods ended January 25, 2008, respectively, and \$96,699 and \$214,030 for the three- and nine-month periods ended January 26, 2007, respectively. We received \$9,634 and \$52,104 from the exercise of stock options for the three- and nine-month periods ended January 25, 2008, respectively, and \$65,270 and \$140,217 from the exercise of stock options for the three- and nine-month periods ended January 26, 2007, respectively.

The following table summarizes our nonvested shares (restricted stock awards) as of January 25, 2008:

	Number of Shares	Weighted-Average Grant-Date Fair Value
Nonvested at April 27, 2007	265	\$ 34.45
Awards granted	—	—
Awards vested	(63)	32.99
Awards canceled/expired/forfeited	(45)	34.82
Nonvested at January 25, 2008	<u>157</u>	\$ 34.94

**NETWORK APPLIANCE, INC.**  
**NOTES TO UNAUDITED CONDENSED**  
**CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

Although nonvested shares are legally issued, they are considered contingently returnable shares subject to repurchase by the Company when employees terminate their employment. The total fair value of shares vested during the three- and nine-month periods ended January 25, 2008 was \$861 and \$1,408, respectively. There was \$6,051 of total unrecognized compensation as of January 25, 2008 related to restricted stock awards. The unrecognized compensation will be amortized on a straight-line basis over a weighted-average remaining period of 2.3 years.

**Employee Stock Purchase Plan**

	<u>Number of Shares</u>	<u>Weighted Average Exercise Price</u>	<u>Weighted Average Remaining Contractual Term</u>	<u>Aggregate Intrinsic Value</u>
Outstanding at January 25, 2008	1,264	\$ 20.97	0.4	\$ 1,594
Vested and expected to vest at January 25, 2008	1,228	\$ 20.97	0.4	\$ 1,547

The total intrinsic value of employee stock purchases was \$4,322 and \$9,365 for the three- and nine-month periods ended January 25, 2008. The intrinsic value of employee stock purchases was \$9,520 and \$20,462 for the three- and nine-month periods ended January 26, 2007, respectively. The compensation cost for shares purchased under the ESPP plan was \$3,327 and \$11,969 for the three- and nine-month periods ended January 25, 2008, respectively, and \$2,954 and \$9,609 for the three- and nine-month periods ended January 26, 2007, respectively. This compensation cost will be amortized on a straight-line basis over a weighted-average remaining period of approximately 0.35 years.

The following table shows the shares issued and their purchase price per share for the employee stock purchase plan for the six-month ESPP purchase period ended November 30, 2007:

Purchase date	November 30, 2007
Shares issued	1,166
Average purchase price per share	\$ 21.00

**Stock Repurchase Program**

Common stock repurchase activities for the three- and nine-month periods ended January 25, 2008, and January 26, 2007, were as follows:

	<u>Three Months Ended</u>		<u>Nine Months Ended</u>	
	<u>January 25, 2008</u>	<u>January 26, 2007</u>	<u>January 25, 2008</u>	<u>January 26, 2007</u>
Common stock repurchased	5,798	6,165	29,922	16,984
Cost of common stock repurchased	\$ 144,278	\$ 241,800	\$ 844,251	\$ 605,708
Average price per share	\$ 24.88	\$ 39.22	\$ 28.21	\$ 35.66

Since the inception of the stock repurchase program through January 25, 2008, we have purchased a total of 84,515 shares of our common stock at an average price of \$29.20 per share for an aggregate purchase price of \$2,467,942. At January 25, 2008, \$555,697 remained available for repurchases under the plan. The stock repurchase program may be suspended or discontinued at any time.

**Other Repurchases of Common Stock**

We also repurchase shares in settlement of employee tax withholding obligations due upon the vesting of restricted stock or stock units.

**NETWORK APPLIANCE, INC.**  
**NOTES TO UNAUDITED CONDENSED**  
**CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

**5. Credit Facility and Debt**

On November 2, 2007, the Company ("Borrower") entered into a senior unsecured credit agreement (the "Unsecured Credit Agreement") with certain lenders and BNP Paribas ("BNP"), as syndication agent, and JPMorgan Chase Bank National Association ("JPMorgan"), as administrative agent. The Unsecured Credit Agreement provides for a revolving unsecured credit facility that is comprised of commitments from various lenders who agree to make revolving loans and swingline loans and issue letters of credit of up to an aggregate amount of \$250,000 with a term of five years. Revolving loans may be, at Borrower's option, Alternative Base Rate borrowings or Eurodollar borrowings. Interest on Eurodollar borrowings accrues at a floating rate based on London Interbank Offered Rate ("LIBOR") for the interest period specified by the Borrower plus a spread based on the Borrower's leverage ratio. Interest on Alternative Base Rate borrowings, swingline loans and letter of credit disbursements accrues at a rate based on the Prime Rate in effect on such day. The proceeds of the loans may be used for our general corporate purposes, including stock repurchases and working capital needs. As of January 25, 2008, no amount was outstanding under this facility.

On October 5, 2007, the Company entered into a secured credit agreement (the "Secured Credit Agreement") with JPMorgan Chase Bank, National Association, as administrative agent. The Secured Credit Agreement provides for a revolving secured credit facility of up to \$250,000 with a term of five years. The proceeds of the Secured Credit Agreement will be used for general corporate purposes, including stock repurchases and working capital needs. On October 10, 2007, \$250,000 was advanced to the Company and was recorded in the Long-Term Debt on the accompanying Condensed Consolidated Balance Sheets. During the three- and nine-month periods ended January 25, 2008, we made repayments of \$13,000 and drew \$13,000 on the revolving credit facility. The full amount is due on the maturity date of October 5, 2012. As of January 25, 2008, we have pledged \$307,389 of long-term restricted investments in connection with the Secured Credit Agreement.

Interest for the Secured Credit Agreement accrues at a floating rate based on the base rate in effect from time to time, plus a margin, which totaled 4.48% at January 25, 2008.

On March 31, 2006, Network Appliance Global LTD. ("Global"), a subsidiary of the Company, entered into a loan agreement (the "Loan Agreement") with JPMorgan, as administrative agent. The Loan Agreement provides for a term loan available in two tranches, a tranche of \$220,000 ("Tranche A") and a tranche of \$80,000 ("Tranche B"), for an aggregate borrowing of \$300,000. The proceeds of the term loan have been used to finance a dividend from Global to the Company under the American Jobs Creation Act. The Tranche A term loan, together with accrued and unpaid interest, is due in full on the maturity date of March 31, 2008. During the three- and nine-month periods ended January 25, 2008, we made repayments of \$18,980 and \$56,320 on the term loan, respectively. As of January 25, 2008, Global has pledged \$63,159 of short-term restricted investments for the Tranche A term loan in connection with the Loan Agreement. The Tranche B term loan was fully repaid as of January 26, 2007. The remaining outstanding balance of \$28,790 on the Tranche A term loan will be paid in full on the maturity date of March 31, 2008.

Interest for the Tranche A term loan accrues at a floating rate based on the base rate in effect from time to time, plus a margin, which totaled 4.98% at January 25, 2008.

As of January 25, 2008, the Company and Global were in compliance with all debt covenants as required by the Unsecured Credit Agreement, Secured Credit Agreement and Loan Agreement, respectively.

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**6. Short-Term Investments**

The following is a summary of investments at January 25, 2008:

	Amortized Cost	Gross Unrealized		Estimated Fair Value
		Gains	Losses	
Corporate bonds	\$462,637	\$4,962	\$ 135	\$467,464
Auction rate securities	82,996	—	—	82,996
U.S. government agencies	74,538	623	32	75,129
U.S. Treasuries	20,646	177	—	20,823
Municipal bonds	1,572	17	—	1,589
Certificate of deposits	2	—	—	2
Money market funds	73,777	—	—	73,777
Total debt and equity securities	716,168	5,779	167	721,780
Less short-term restricted investments	63,203	—	44	63,159(1)
Less long-term restricted investments	305,875	1,593	79	307,389(1)
Short-term investments	<u>\$347,090</u>	<u>\$4,186</u>	<u>\$ 44</u>	<u>\$351,232</u>

The following is a summary of investments at April 27, 2007:

	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Estimated Fair Value
Auction rate securities	114,415	—	—	114,415
Corporate securities	113,084	24	7	113,101
U.S. government agencies	218,492	12	753	217,751
U.S. Treasuries	10,097	—	112	9,985
Municipal bonds	3,769	—	11	3,758
Marketable equity securities	4,637	8,276	—	12,913
Money market funds	84,961	—	—	84,961
Total debt and equity securities	1,093,789	8,710	2,367	1,100,132
Less cash equivalents	164,347	23	—	164,370
Less short-term restricted investments	116,950	—	890	116,060(2)
Short-term investments	<u>\$ 812,492</u>	<u>\$ 8,687</u>	<u>\$ 1,477</u>	<u>\$ 819,702</u>

- (1) As of January 25, 2008, we have pledged \$63,159 of short-term restricted investments for the Tranche A term loan as defined in the Loan Agreement, and \$307,389 of long-term restricted investments for the revolving credit facility (see Note 5). In addition, we have short-term and long-term restricted cash of \$2,597 and \$5,228 respectively, relating to our foreign rent, custom, and service performance guarantees. These combined amounts are presented as short-term and long-term restricted cash and investments in the accompanying Condensed Consolidated Balance Sheets as of January 25, 2008.
- (2) As of April 27, 2007, we have pledged \$116,060 of short-term restricted investments for the Tranche A term loan as defined in the Loan Agreement (see Note 5). In addition, we have short-term and long-term restricted cash of \$2,252 and \$3,639, respectively, relating to our foreign rent, custom, and service performance

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guarantees. These combined amounts are presented as short-term and long-term restricted cash and investments in the accompanying Condensed Consolidated Balance Sheets as of April 27, 2007.

On August 13, 2007, we sold 360 shares of common stock of Blue Coat and received net proceeds of \$18,256 and recorded \$13,619 realized gain. These shares of common stock in Blue Coat Systems, Inc. ("Blue Coat") were received in connection with the sale of certain assets of NetCache® to Blue Coat on September 11, 2006.

We record net unrealized gains or losses on available-for-sale securities in stockholders' equity. Realized gains or losses are reflected in income which have not been material for all years presented. The following table shows the gross unrealized losses and fair values of our investments, aggregated by investment category and length of time that individual securities have been in a continuous unrealized loss position, at January 25, 2008:

	Less Than 12 Months		12 Months or Greater		Total	
	Fair Value	Unrealized Loss	Fair Value	Unrealized Loss	Fair Value	Unrealized Loss
Corporate bonds	\$ 49,729	\$ 100	\$ 13,286	\$ 35	\$ 63,015	\$ 135
Corporate securities	—	—	—	—	—	—
U.S. government agencies	3,017	32	—	—	3,017	32
U.S. treasury	—	—	—	—	—	—
Municipal bonds	—	—	—	—	—	—
Total	<u>\$ 52,746</u>	<u>\$ 132</u>	<u>\$ 13,286</u>	<u>\$ 35</u>	<u>\$ 66,032</u>	<u>\$ 167</u>

The unrealized losses on our investments in corporate bonds and U.S. government agencies were caused by interest rate increases. We believe that we will be able to collect all principal and interest amounts due to us at maturity given the high credit quality of these investments. Because the decline in market value is attributable to changes in interest rates and not credit quality, and because we have the ability and intent to hold those investments until a recovery of fair value, which may be maturity, we do not consider these investments to be other-than temporarily impaired at January 25, 2008.

Since the third quarter of calendar 2007, the credit markets have been volatile and have experienced a shortage in overall liquidity due to the instability in the sub-prime lending industry. We believe we have sufficient liquidity under cash provided by operations and our financing agreements. If the global credit market continues to deteriorate, our investment portfolio may be impacted and we could determine some of our investments are impaired which could adversely impact our financial results. See further discussion under Item 1A — Risk Factors, "We are exposed to fluctuations in the market values of our portfolio investments and in interest rates."

Our short term investments of \$351,232 include auction rate securities (ARS) in the amount of \$82,996. The ARS held by the Company are securities with long term nominal maturities which, in accordance with investment policy guidelines, had credit ratings of AAA and Aaa at time of purchase. Interest rates for ARS are reset through a "Dutch auction" each month, which historically has provided a liquid market for these securities.

Substantially all of our ARS are backed by pools of student loans guaranteed by the U.S. Department of Education, and we believe the credit quality of these securities is high based on this guarantee. Subsequent to January 25, 2008, we successfully reset and liquidated certain of our ARS investments; however, liquidity issues in the global credit markets resulted in the failure of auctions for certain other ARS investments, with a fair value of \$67,800 at January 25, 2008. For each failed auction, the interest rate moves to a maximum rate defined for each security, and the ARS continue to pay interest in accordance with their terms. However, the principal associated with the ARS will not be accessible until there is a successful auction or such time as other markets for ARS investments develop.

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We believe that the underlying credit quality of the assets backing our ARS investments have not been impacted by the reduced liquidity of these investments. We are continuing to evaluate the credit quality, liquidity, classification and valuation of our ARS investments; however, we are not yet able to quantify the amount of impairment, if any, or change in classification in these investments at this time. We do not believe that the lack of liquidity relating to our ARS investments will impact our ability to fund working capital needs, capital expenditures or other operating requirements.

**7. Inventories**

Inventories are stated at the lower of cost (first-in, first-out basis) or market. Inventories consist of the following:

	<u>January 25, 2008</u>	<u>April 27, 2007</u>
Purchased components	\$ 7,814	\$ 19,429
Work-in-process	464	5
Finished goods	51,824	35,446
	<u>\$ 60,102</u>	<u>\$ 54,880</u>

**8. Goodwill and Intangible Assets**

Under Statement of Financial Accounting Standards (“SFAS”) No. 142, “*Goodwill and Other Intangible Assets*,” goodwill attributable to each of our reporting units is required to be tested for impairment by comparing the fair value of each reporting unit with its carrying value. Our reporting units are the same as our operating units. Goodwill is reviewed annually for impairment (or more frequently if indicators of impairment arise). As of January 25, 2008, and April 27, 2007, respectively, there had been no impairment of goodwill and intangible assets.

Identified intangible assets are summarized as follows:

	Amortization Period (Years)	<u>January 25, 2008</u>			<u>April 27, 2007</u>		
		Gross Assets	Accumulated Amortization	Net Assets	Gross Assets	Accumulated Amortization	Net Assets
<b>Identified Intangible Assets:</b>							
Patents	5	\$ 10,040	\$ (8,916)	\$ 1,124	\$ 10,040	\$ (7,429)	\$ 2,611
Existing technology	4 -5	113,625	(65,712)	47,913	113,625	(49,878)	63,747
Trademarks/tradenames	2 -6	5,280	(2,326)	2,954	5,280	(1,651)	3,629
Customer Contracts/relationships	1.5 -6	17,220	(6,634)	10,586	17,220	(4,398)	12,822
Covenants Not to Compete	1.5 -2	9,510	(9,510)	—	9,510	(9,310)	200
Total Identified Intangible Assets, Net		<u>\$ 155,675</u>	<u>\$ (93,098)</u>	<u>\$62,577</u>	<u>\$ 155,675</u>	<u>\$ (72,666)</u>	<u>\$83,009</u>

Amortization expense for identified intangible assets is summarized below:

	<u>Three Months Ended</u>		<u>Nine Months Ended</u>	
	<u>January 25, 2008</u>	<u>January 26, 2007</u>	<u>January 25, 2008</u>	<u>January 26, 2007</u>
Patents	\$ 495	\$ 495	\$ 1,486	\$ 1,486
Existing technology	5,278	4,572	15,833	12,303
Other identified intangibles	971	1,026	3,113	2,668
	<u>\$ 6,744</u>	<u>\$ 6,093</u>	<u>\$ 20,432</u>	<u>\$ 16,457</u>

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Based on the identified intangible assets recorded at January 25, 2008, the future amortization expense of identified intangibles for the remainder of fiscal 2008 and the next four fiscal years and thereafter is as follows:

<u>Year Ending April,</u>	<u>Amount</u> <u>(In thousands)</u>
2008	\$ 6,744
2009	24,665
2010	19,694
2011	8,987
2012	1,633
Thereafter	854
Total	<u>\$ 62,577</u>

**9. Fair Value of Financial Instruments**

The carrying values of cash and cash equivalents and restricted cash and investments reported in the Condensed Consolidated Balance Sheets approximate their fair value. Our short-term investments and foreign exchange contracts are carried at fair value based on quoted market prices. Other investments in nonmarketable securities are included in other assets at January 25, 2008, and April 27, 2007, with total carrying value of \$11,185 and \$8,932, which approximate their fair values. The fair value of our debt also approximates its carrying value as of January 25, 2008, and April 27, 2007.

We do not use derivative financial instruments for speculative or trading purposes. We enter into forward foreign exchange and currency option contracts to hedge trade and intercompany receivables and payables as well as future sales and operating expenses against future movement in foreign exchange rates.

Foreign currency forward contracts obligate us to buy or sell foreign currencies at a specified future date. Option contracts give us the right to buy or sell foreign currencies and are exercised only when economically beneficial. As of January 25, 2008, we had \$448,954 of outstanding foreign exchange contracts (including \$18,617 of option contracts) that all had remaining maturities of five months or less. As of April 27, 2007, we had \$367,479 of outstanding foreign exchange contracts (including \$21,703 of option contracts). For the balance sheet hedges, these contracts are adjusted to fair value at the end of each month and are included in earnings. The premiums paid on the foreign currency option contracts are recognized as a reduction to other income when the contract is entered into. For cash flow hedges, the related unrealized gains or losses are included in other comprehensive income. Gains and losses on these foreign exchange contracts are offset by losses and gains on the underlying assets and liabilities. At January 25, 2008, and April 27, 2007 the estimated notional fair values of forward foreign exchange contracts were \$449,381 and \$368,807, respectively. The fair value of foreign exchange contracts is based on prevailing financial market information.

For the three-month period ended January 25, 2008, net gains generated by hedged assets and liabilities totaled \$1,529 and were offset by losses on the related derivative instruments of \$2,075. For the nine-month period ended January 25, 2008, net gains generated by hedged assets and liabilities totaled \$6,789 and were offset by losses on the related derivative instruments of \$6,588. For the three-month period ended January 26, 2007, net losses generated by hedged assets and liabilities totaled \$22 and were offset by gains on the related derivative instruments of \$495. For the nine-month period ended January 26, 2007, net gains generated by hedged assets and liabilities and related derivative instruments totaled \$522 and \$770, respectively.

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**10. Net Income per Share**

During all periods presented, we had certain options outstanding, which could potentially dilute basic earnings per share in the future, but were excluded in the computation of diluted earnings per share in such periods, as their effect would have been antidilutive. These certain options were antidilutive in the three- and nine-month periods ended January 25, 2008, and January 26, 2007, as these options' exercise prices were above the average market prices in such periods. For the three-month periods ended January 25, 2008, and January 26, 2007, 40,085 and 18,571 shares of common stock options with a weighted average exercise price of \$38.58 and \$47.89, respectively, were excluded from the diluted net income per share computation. For the nine-month periods ended January 25, 2008, and January 26, 2007, 37,552 and 22,271 shares of common stock options with a weighted average exercise price of \$39.81 and \$44.75, respectively, were excluded from the diluted net income per share computation.

As of January 25, 2008, our Board of Directors had authorized the repurchase of up to \$3,023,639 of common stock under the stock repurchase program. The repurchased shares were held as treasury stock and our outstanding shares used to calculate earnings per share have been reduced by the weighted number of repurchased shares.

The following is a reconciliation of the numerators and denominators of the basic and diluted net income per share computations for the periods presented:

	Three Months Ended		Nine Months Ended	
	January 25, 2008	January 26, 2007	January 25, 2008	January 26, 2007
<b>Net Income (Numerator):</b>				
Net income, basic and diluted	\$ 101,823	\$ 66,514	\$ 219,918	\$ 208,114
<b>Shares (Denominator):</b>				
Weighted average common shares outstanding	344,455	371,735	355,015	372,372
Weighted average common shares outstanding subject to repurchase	(180)	(448)	(216)	(434)
Shares used in basic computation	344,275	371,287	354,799	371,938
Weighted average common shares outstanding subject to repurchase	180	448	216	434
Common shares issuable upon exercise of stock options	8,325	17,385	10,275	17,183
Shares used in diluted computation	352,780	389,120	365,290	389,555
<b>Net Income per Share:</b>				
Basic	0.30	\$ 0.18	\$ 0.62	\$ 0.56
Diluted	0.29	\$ 0.17	\$ 0.60	\$ 0.53



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Basic net income per share is computed by dividing income available to common stockholders by the weighted average number of common shares outstanding, excluding unvested restricted stock for that period. Diluted net income per share is computed giving effect to all dilutive potential shares that were outstanding during the period. Dilutive potential common shares consist of incremental common shares subject to repurchase, common shares issuable upon exercise of stock options, and restricted stock awards.

**11. Comprehensive Income**

The components of comprehensive income were as follows:

	Three Months Ended		Nine Months Ended	
	January 25, 2008	January 26, 2007	January 25, 2008	January 26, 2007
Net income	\$ 101,823	\$ 66,514	\$ 219,918	\$ 208,114
Change in currency translation adjustment	(284)	437	915	1,323
Change in unrealized gain (loss) on available-for-sale investments, net of related tax effect	3,740	1,990	(920)	8,566
Change in unrealized gain (loss) on derivatives	1,283	(458)	3,043	377
<b>Comprehensive income</b>	<b>\$ 106,562</b>	<b>\$ 68,483</b>	<b>\$ 222,956</b>	<b>\$ 218,380</b>

The components of accumulated other comprehensive income were as follows:

	January 25, 2008	April 27, 2007
Accumulated translation adjustments	\$ 4,236	\$ 3,321
Accumulated unrealized gain (loss) on available-for-sale investments	4,549	5,469
Accumulated unrealized gain (loss) on derivatives	(245)	(3,288)
<b>Total accumulated other comprehensive loss</b>	<b>\$ 8,540</b>	<b>\$ 5,502</b>

**12. Restructuring Charges**

In fiscal 2002, as a result of unfavorable economic conditions and a reduction in information technology ("IT") spending rates, we implemented two restructuring plans, which included reductions in our workforce and consolidations of our facilities. As of January 25, 2008, we have no outstanding balance in our restructuring liability for the first restructuring. The second restructuring related to the closure of an engineering facility and consolidation of resources to the Sunnyvale headquarters. In fiscal 2006, we implemented a third restructuring plan related to the move of our global services center operations from Sunnyvale to our new flagship support center at our Research Triangle Park facility in North Carolina. Of the reserve balance at January 25, 2008, \$549 was included in other accrued liabilities, and the remaining \$1,077 was classified as long-term obligations.

Our restructuring estimates are reviewed and revised periodically and may result in a substantial charge or reduction to restructuring expense should different conditions prevail than were anticipated in previous management estimates. Such estimates included various assumptions such as the time period over which the facilities will be vacant, expected sublease terms, and expected sublease rates. During the three and nine-month periods ended January 25, 2008, we did not record any substantial charge or reduction to the restructuring reserve.

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	<b>Total</b>
Reserve balance at April 27, 2007	\$2,084
Cash payments	(153)
Reserve balance at July 27, 2007	\$1,931
Cash payments	(153)
Reserve balance at October 26, 2007	\$1,778
Cash payments	(152)
Reserve balance at January 25, 2008	\$1,626

**13. Commitments and Contingencies**

The following summarizes our commitments and contingencies at January 25, 2008, and the effect such obligations may have on our future periods:

	2008	2009	2010	2011	2012	Thereafter	Total
<b>Contractual Obligations:</b>							
Office operating lease payments(1)	\$ 6,463	\$25,594	\$22,064	\$18,196	\$12,972	\$ 34,139	\$119,428
Real estate lease payments(2)	1,862	9,542	13,726	13,726	13,726	250,653	303,235
Equipment operating lease payments(3)	3,956	14,574	9,912	3,625	1,489	1,240	34,796
Venture capital funding commitments(4)	62	235	223	210	17	—	747
Capital expenditures(5)	16,425	23,927	—	—	—	—	40,352
Communications and maintenance(6)	5,997	18,371	9,875	2,675	248	—	37,166
<b>Total Contractual Cash Obligations</b>	<b>\$ 34,765</b>	<b>\$92,243</b>	<b>\$55,800</b>	<b>\$38,432</b>	<b>\$28,452</b>	<b>\$286,032</b>	<b>\$535,724</b>

For purposes of the above table, contractual obligations for the purchase of goods and services are defined as agreements that are enforceable, are legally binding on us, and subject us to penalties if we cancel the agreement. Some of the amounts we include in this table are based on management's estimates and assumptions about these obligations, including their duration, the possibility of renewal or termination, anticipated actions by management and third parties, and other factors. Because these estimates and assumptions are necessarily subjective, our actual future obligations may vary from those reflected in the table.

	2008	2009	2010	2011	2012	Thereafter	Total
<b>Other Commercial Commitments:</b>							
Letters of credit(7)	\$1,636	\$516	\$116	\$ —	\$356	\$ 433	\$3,057

(1) We lease sales offices and research and development facilities throughout the United States and internationally. These sales offices are leased under operating leases that expire on various dates through fiscal 2018. We are responsible for certain maintenance costs, taxes, and insurance under these leases. Substantially all lease agreements have fixed payment terms based on the passage of time. Some lease agreements provide us with the option to renew or terminate the lease. Our future operating lease obligations would change if we were to exercise these options and if we were to enter into additional operating lease agreements. Rent operating lease payments in the table exclude lease payments that were accrued as part of our fiscal 2002 restructurings and include only rent lease commitments that are over one year.

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- (2) Included in the above contractual cash obligations pursuant to six financing arrangements with BNP are (a) lease commitments of \$1,862 in the remainder of fiscal 2008; \$9,542 in fiscal 2009; \$13,726 in each of the fiscal years 2010, 2011, and 2012; and \$250,653 thereafter, which are based on the LIBOR rate at January 25, 2008 plus a spread, for a term of five years, and (b) at the expiration or termination of the lease, a supplemental payment obligation equal to our minimum guarantee of \$234,218 in the event that we elect not to purchase or arrange for sale of the buildings.
- (3) Equipment operating leases include servers and IT equipment used in our engineering labs and data centers.
- (4) Venture capital funding commitments include a quarterly committed management fee based on a percentage of our committed funding to be payable through June 2011.
- (5) Capital expenditures include worldwide contractual commitments to purchase equipment and to construct buildings and leasehold improvements, which will be recorded as property and equipment.
- (6) We are required to pay based on a minimum volume under certain communication contracts with major telecommunication companies as well as maintenance contracts with multiple vendors. Such obligations will expire in November 2011.
- (7) The amounts outstanding under these letters of credit relate to workers' compensation, a customs guarantee, a corporate credit card program, and foreign rent guarantees.

As of January 25, 2008, we have commitments relating to two financing, construction, and leasing arrangements with BNP for office space to be located on land in Sunnyvale, California that we currently own. These arrangements require us to lease our land to BNP for a period of 99 years to construct approximately 380,000 square feet of office space costing up to \$113,500. After completion of construction, we will pay minimum lease payments, which vary based on the LIBOR plus a spread (4.98% at January 25, 2008) on the cost of the facilities. We expect to begin making lease payments on the completed buildings in January 2008 and January 2009, respectively, for terms of five years. We have the option to renew the leases for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease terms, we must elect one of the following options: (i) purchase the buildings from BNP for \$48,500 and \$65,000, respectively; (ii) if certain conditions are met, arrange for the sale of the buildings by BNP to a third party for an amount equal to at least \$41,225 and \$55,250, respectively, and be liable for any deficiency between the net proceeds received from the third party and such amounts; or (iii) pay BNP supplemental payments of \$41,225 and \$55,250, respectively, in which event we may recoup some or all of such payments by arranging for a sale of either or both buildings by BNP during the ensuing two-year period.

As of January 25, 2008, we have a commitment relating to a third financing, construction, and leasing arrangement with BNP for facility space to be located on land currently owned by us in Research Triangle Park, North Carolina. This arrangement requires us to lease our land to BNP for a period of 99 years to construct approximately 120,000 square feet for a data center costing up to \$61,000. After completion of construction, we will pay minimum lease payments, which vary based on LIBOR plus a spread (4.98% at January 25, 2008) on the cost of the facility. We expect to begin making lease payments on the completed building in January 2009 for a term of five and half years. We have the option to renew the lease for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease term, we must elect one of the following options: (i) purchase the building from BNP for \$61,000; (ii) if certain conditions are met, arrange for the sale of the building by BNP to a third party for an amount equal to at least \$51,850, and be liable for any deficiency between the net proceeds received from the third party and \$51,850; or (iii) pay BNP a supplemental payment of \$51,850, in which event we may recoup some or all of such payment by arranging for the sale of the building by BNP during the ensuing two-year period.

During the third quarter of fiscal 2008, we entered into three additional financing and operating leasing arrangements with BNP for approximately 374,274 square feet of buildings located in Sunnyvale, California costing up to \$101,050. These lease arrangements require us to pay minimum lease payments, which may vary

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based on the LIBOR plus a spread (4.98% at January 25, 2008). We began to make lease payments on two buildings in December 2007 and the third building in January 2008 for terms of five years. We have the option to renew the leases for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease terms, we must elect one of the following options: (i) purchase the buildings from BNP for \$101,050; (ii) if certain conditions are met, arrange for the sale of the buildings by BNP to a third party for an amount equal to at least \$85,893, and be liable for any deficiency between the net proceeds received from the third party and \$85,893; or (iii) pay BNP a supplemental payment of \$85,893, in which event we may recoup some or all of such payment by arranging for the sale of the buildings by BNP during the ensuing two-year period.

All leases require us to maintain specified financial covenants with which we were in compliance as of January 25, 2008. Such specified financial covenants include a maximum ratio of Total Debt to Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA") and Minimum Unencumbered Cash and Short Term Investments.

As of January 25, 2008, the notional fair value of our foreign exchange forward and foreign currency option contracts totaled \$449,381. We do not believe that these derivatives present significant credit risks, because the counterparties to the derivatives consist of major financial institutions, and we manage the notional amount of contracts entered into with any one counterparty. We do not enter into derivative financial instruments for speculative or trading purposes. Other than the risk associated with the financial condition of the counterparties, our maximum exposure related to foreign currency forward and option contracts is limited to the premiums paid on purchased options.

We have both recourse and nonrecourse lease financing arrangements with third-party leasing companies through preexisting relationships with customers. Under the terms of recourse leases, which are generally three years or less, we remain liable for the aggregate unpaid remaining lease payments to the third-party leasing company in the event that any customers default. For these recourse arrangements, revenues on the sale of our product to the leasing company are deferred and recognized into income as payments to the leasing company come due. As of January 25, 2008, and April 27, 2007, the maximum recourse exposure under such leases totaled approximately \$18,579 and \$10,262, respectively. Under the terms of the nonrecourse leases, we do not have any continuing obligations or liabilities. To date, we have not experienced material losses under this lease financing program.

From time to time, we have committed to purchase various key components used in the manufacture of our products. We establish accruals for estimated losses on purchased components for which we believe it is probable that they will not be utilized in future operations. To the extent that such forecasts are not achieved, our commitments and associated accruals may change.

We are subject to various legal proceedings and claims which may arise in the normal course of business. While the outcome of these legal matters is currently not determinable, we do not believe that any current litigation or claims will have a material adverse effect on our business, cash flow, operating results, or financial condition.

We are currently undergoing federal income tax audits in the United States and several foreign tax jurisdictions. The rights to some of our intellectual property ("IP") are owned by certain of our foreign subsidiaries, and payments are made between foreign and U.S. tax jurisdictions relating to the use of this IP in a qualified cost sharing arrangement. Recently, several other U.S. companies have had their foreign IP arrangements challenged as part of IRS examinations, which have resulted in material proposed assessments and/or pending litigation. Effective September 27, 2007, the Internal Revenue Service's Large and Mid-Sized Business Division ("LMSB") released a Coordinated Issues Paper ("CIP") with respect to qualified cost sharing arrangements ("CSAs"). Specifically, this CIP provides guidance to IRS personnel concerning methods that may be applied to evaluate the arm's length charge (buy-in payment) for internally developed (pre-existing) as well as acquisition-related intangible property that is made available to a qualified CSA. We have evaluated the IRS's positions in this CIP and have concluded that

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it will not have a material adverse impact upon our consolidated financial position and the results of operations and cash flows. Furthermore, our management does not believe, based upon information currently known to us, that the final resolution of any of our audits will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows. However, if upon the conclusion of these audits the ultimate determination of our taxes owed in any of these tax jurisdictions is for an amount in excess of the tax provision we have recorded or reserved for, our overall effective tax rate may be adversely impacted in the period of adjustment.

The General Services Administration ("GSA") is currently auditing our records under the schedule contracts it had with us to verify our compliance with various contract provisions. If the audit determines that we did not comply with such provisions, we may be required to pay the GSA a potential settlement. The exact date for completion of the audit and the subsequent negotiation process is unknown and may not be concluded for some time. Our management does not believe, based upon information currently known to us, that the final resolution of our audit will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows.

On September 5, 2007, we filed a patent infringement lawsuit in the Eastern District of Texas seeking compensatory damages and a permanent injunction against Sun Microsystems. On October 25, 2007, Sun Microsystems filed a counter claim against us in the Eastern District of Texas seeking compensatory damages and a permanent injunction. On October 29, 2007, Sun filed a second lawsuit against us in the Northern District of California asserting additional patents against us. The Texas court granted a joint motion to transfer the Texas lawsuit to the Northern District of California on November 26, 2007. We are unable at this time to determine the likely outcome of these various patent litigations. In addition, as we are unable to reasonably estimate the amount or range of any potential settlement, no accrual has been recorded as of January 25, 2008.

#### 14. Income Taxes

In June 2006, the Financial Accounting Standards Board ("FASB") issued FASB Interpretation ("FIN") No. 48, *Accounting for Uncertainty in Income Taxes — an Interpretation of FASB Statement No. 109*, ("FIN No. 48"), which clarifies the accounting for uncertainty in income taxes recognized in an enterprise's financial statements in accordance with SFAS No. 109, *Accounting for Income Taxes*. This interpretation prescribes a recognition threshold and measurement attribute for the financial statement recognition and measurement of a tax position taken or expected to be taken in a tax return. FIN No. 48 also provides guidance on derecognition of tax benefits, classification on the balance sheet, interest and penalties, accounting in interim periods, disclosure, and transition.

The total amount of unrecognized tax benefits upon the adoption of FIN No. 48, on April 28, 2007, was \$58,326. There was no cumulative effect from the adoption of FIN No. 48; however, certain amounts were reclassified among our consolidated balance sheet accounts as follows:

Retained earnings cumulative effect	\$ —
Additional deferred tax assets	4,889
Reclass from current liability to long-term liability	<u>53,437</u>
Total increase in liability	<u>\$58,326</u>

The entire portion of the \$58,326 balance of unrecognized tax benefits at April 28, 2007, if recognized, would affect our effective tax rate.

We recognize accrued interest and penalties related to unrecognized tax benefits in the income tax provision. During the fiscal years ended 2005 through 2007, we recognized total accrued interest and penalties of approximately \$170 and have included this accrual in our FIN No. 48 disclosure balances.

**NETWORK APPLIANCE, INC.**  
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We are subject to taxation in the United States, various states, and several foreign jurisdictions. Our federal income tax returns are currently being examined for the fiscal years 2003-2004. We are effectively subject to federal tax examination adjustments for tax years ending on or after fiscal year 2000, in that we have net operating loss carryforwards from these years that could be subject to adjustment, if and when utilized.

As we are in the early stages of the federal income tax return and foreign jurisdiction income tax audit process, at this time we can not make a determination as to whether or not recognition of any unrecognized tax benefits will occur within the next 12 months.

The tax years that remain subject to examination for our major tax jurisdictions are shown below:

**Tax Years Subject to Examination for Major Tax Jurisdictions at January 25, 2008**

2003 — 2007	United States — federal income tax
2002 — 2007	United States — state and local income tax
2003 — 2007	Australia
2004 — 2007	Germany
2005 — 2007	India
2006 — 2007	Japan
2000 — 2007	The Netherlands
2004 — 2007	United Kingdom

The above table excludes the net operating loss carryover risk identified above with respect to federal and state tax returns.

**15. New Accounting Pronouncements**

In December 2007, the FASB issued SFAS No. 141(R), "*Business Combinations*" (SFAS No. 141(R)). SFAS No. 141(R) establishes principles and requirements for how the acquirer in a business combination recognizes and measures in its financial statements the identifiable assets acquired, the liabilities assumed and any noncontrolling interest in the acquiree at the acquisition date fair value. SFAS No. 141(R) determines what information to disclose to enable users of the financial statements to evaluate the nature and financial effects of the business combination. We are required to adopt SFAS No. 141(R) at the beginning of the first quarter of fiscal 2010, which begins on April 25, 2009. We are currently evaluating the effect that the adoption of SFAS No. 141(R) will have on our consolidated financial statements.

In December 2007, the FASB issued SFAS No. 160, "*Noncontrolling Interests in Consolidated Financial Statements, an amendment of ARB No. 51.*" (SFAS No. 160). SFAS No. 160 will change the accounting and reporting for minority interests, which will be recharacterized as noncontrolling interests and classified as a component of equity. This new consolidation method will significantly change the accounting for transactions with minority interest holders. We are required to adopt SFAS No. 160 at the beginning of the first quarter of fiscal 2010, which begins on April 25, 2009. We are currently evaluating the effect, if any, that the adoption of SFAS No. 160 will have on our consolidated financial statements.

Effective April 28, 2007, we adopted FIN No. 48. FIN No. 48 prescribes a comprehensive model for how a company should recognize, measure, present, and disclose in its financial statements uncertain tax positions that we have taken or expect to take on a tax return (including a decision whether to file or not to file a return in a particular jurisdiction). FIN No. 48 is applicable to all uncertain tax positions for taxes accounted for under SFAS No. 109, "*Accounting for Income Taxes.*" and substantially changes the applicable accounting model. There was no cumulative effect from the adoption of FIN No. 48. As a result of the implementation of FIN No. 48, we recognize the tax liability for uncertain income tax positions on the income tax return based on the two-step process prescribed

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in the interpretation. The first step is to determine whether it is more likely than not that each income tax position would be sustained upon audit. The second step is to estimate and measure the tax benefit as the amount that has a greater than 50% likelihood of being realized upon ultimate settlement with the tax authority. Estimating these amounts requires us to determine the probability of various possible outcomes. We evaluate these uncertain tax positions on a quarterly basis. See "Note 14, Income Taxes," for further discussion.

In February 2007, the FASB issued SFAS No. 159, *"The Fair Value Option for Financial Assets and Financial Liabilities — Including an Amendment of FASB Statement No. 115 'Accounting for Certain Investments in Debt and Equity Securities.'"* SFAS No. 159 allows measurement at fair value of eligible financial assets and liabilities that are not otherwise measured at fair value. If the fair value option for an eligible item is elected, unrealized gains and losses for that item shall be reported in current earnings at each subsequent reporting date. SFAS No. 159 also establishes presentation and disclosure requirements designed to draw comparison between the different measurement attributes the company elects for similar types of assets and liabilities. We are required to adopt SFAS No. 159 at the beginning of the first quarter of fiscal 2009, which begins on April 26, 2008. We are currently evaluating the effect, if any, that the adoption of SFAS No. 159 will have on our consolidated financial statements.

In September 2006, the FASB issued SFAS No. 157 *"Fair Value Measurements."* SFAS No. 157 provides a framework for measuring fair value, clarifies the definition of fair value, and expands disclosures regarding fair value measurements. SFAS No. 157 does not require any new fair value measurements and eliminates inconsistencies in guidance found in various prior accounting pronouncements. We are required to adopt SFAS No. 157 at the beginning of the first quarter of fiscal 2009, which begins on April 26, 2008. We are currently evaluating the effect that the adoption of SFAS No. 157 will have on our consolidated results of operations and financial condition, but do not expect it to have a material impact.

**16. Subsequent Events**

On February 1, 2008, we entered into a \$48,950 financing and operating leasing arrangement with BNP for approximately 189,697 square feet of buildings located in Sunnyvale, California. The lease can be renewed for up to two consecutive periods of 5 years each upon approval by BNP. We expect to complete construction of the office building by approximately January 2010 and to lease the completed building from BNP for a term expiring in February 2015. After completion of construction, we will pay minimum lease payments which vary based on a floating effective rate.

On January 29, 2008, we acquired Onaro, Inc. ("Onaro"), a privately held company based in Boston, Massachusetts, that develops and sells storage service management software that makes data center consolidation and migration projects easier to plan and manage, at a fraction of normal operational costs. The acquisition will continue to expand our heterogeneous storage infrastructure and strengthen our storage and data management software portfolio across multiple vendor storage environments.

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

This Quarterly Report on Form 10-Q contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and is subject to the safe harbor provisions set forth in the Exchange Act. Forward-looking statements usually contain the words "estimate," "intend," "plan," "predict," "seek," "may," "will," "should," "would," "could," "anticipate," "expect," "believe," or similar expressions and variations or negatives of these words. In addition, any statements that refer to expectations, projections, or other characterizations of future events or circumstances, including any underlying assumptions, are forward-looking statements. All forward-looking statements, including, but not limited to, statements regarding (1) our plan to continue strengthening our strategic partnerships with server virtualization partners and leveraging our Storage Grid architecture to enable customers to scale their server and storage infrastructure, reduce costs, maximize asset utilization and keep data highly available; (2) our belief that the Onaro acquisition will expand our heterogeneous storage infrastructure and strengthen our storage and data management software portfolio; (3) our belief that we will be able to continue to gain market share in a more constrained spending environment; (4) our belief that we are well positioned in the fastest growth segments of the storage market to capitalize on an IT spending recovery; (5) our plan to continue managing our discretionary expenses and the rate of hiring to support our targeted business model; (6) our intention to continue investing in the people, processes, and systems necessary to best optimize our revenue growth and long-term profitability; (7) our belief that the IRS federal tax audits we are currently undergoing will not have a material adverse effect upon our consolidated financial position and the results of operations and cash flows; (8) our plan to closely monitor our ARS investments and take appropriate action, as necessary, to ensure that our ARS investments do not negatively affect our financial condition; (9) our belief that any lack of liquidity relating to our ARS investments will not have an impact on our ability to fund our operations; (10) our expectation that service margins will vary over time as we continue to build out our service capability and capacity to support our growing customer base and new products; (11) our intention to continue selectively adding sales capacity in an effort to expand domestic and international markets, introduce new products, and establish and expand new distribution channels; (12) our estimates regarding future capitalized patent amortization expenses for the remainder of fiscal 2008 and beyond; (13) our belief that our future performance will depend in large part on our ability to maintain and enhance our current product line, develop new products that achieve market acceptance, maintain technological competitiveness, and meet an expanding range of customer requirements; (14) our expectation that we will continuously support current and future product development and enhancement efforts and incur corresponding charges; (15) our intention to continuously broaden our existing product offerings and introduce new products that expand our solutions portfolio; (16) our belief that our review of restructuring estimates may result in a substantial charge or reduction to restructuring expense if different conditions prevail than were anticipated in previous management estimates; (17) our expectation that the balance of the restructuring reserve relating to closure of facilities and consolidation of resources will be paid by fiscal 2011; (18) our expectation that interest expense will be subject to market interest volatility; (19) our intentions with respect to certain properties located in Sunnyvale, California and Research Triangle Park, North Carolina; (20) our belief that no current litigation or claims will have a material adverse effect on our business, cash flow, operating results, or financial condition; (21) our expectation that capital expenditures will increase in the future to support the growth of our business; (22) our intention to continue investing in people, land, buildings, capital equipment, and enhancements to our worldwide infrastructure; (23) our belief that our existing facilities and those being developed in Sunnyvale, California, Research Triangle Park, North Carolina and worldwide will be adequate for our requirements over at least the next two years and that additional space will be available as needed; (24) our intention to finance construction projects, including commitments under facilities and equipment operating leases and any required capital expenditures over the next few years, through cash from operations and existing cash, cash equivalents, and investments; (25) our belief that we have sufficient liquidity through cash provided by operations and our financing agreements; (26) our belief that our diversified customer base should mitigate our exposure to a particular end market and therefore the variability of our financial performance; (27) our expectation that we will incur higher capital expenditures in the near future to expand our operations; (28) our intention to acquire products and businesses that are complementary to our business; (29) the possibility that we will continue to repurchase our common stock, thereby reducing cash, cash equivalents, and/or short-term investments available to fund future operations and meet other liquidity requirements; (30) our belief that our cash and cash equivalents, short-term investments, cash generated from operations, and credit facilities will



satisfy our working capital needs, capital expenditures, stock repurchases, contractual obligations, and other liquidity requirements associated with our operations for at least the next twelve months; (31) our expectations regarding interest payments on our outstanding term loan and the revolving secured credit facility; (32) our belief that the investment, at current market rates, of additional cash flow generated from operations will offer a natural hedge against interest rate risk from our debt in the event of a significant change in market interest rates; (33) our belief that our expected revenue growth could be materially affected if any storage market trends and emerging standards on which we are basing our assumptions do not materialize and/or if there is reduced or no demand for our products; (34) our belief that a decrease in the percentage of our total earnings from our international business or a change in the mix of international business among particular tax jurisdictions could increase our overall effective tax rate; (35) our expectation that product gross margin will continue to be impacted by selective price reductions and discounts, increased indirect channel sales, increases in software revenue and new higher margin products; (36) our expectation that our sales and marketing expenses will increase to support future revenue growth; (37) our belief that our sales and marketing expenses will increase in absolute dollars for the remainder of fiscal 2008 due to increased headcount, sales- and marketing-related programs to support future revenue growth, and real estate lease payments; (38) our belief that our research and development expenses will increase in absolute dollars for the remainder of fiscal 2008; (39) our expectation that period-to-period changes in interest income will continue to be impacted by the volatility of market interest rates, cash and investment balances, timing of stock repurchases, capital expenditures and payments of our future contractual obligations; (40) our estimated future amortization of existing technology to cost of product revenues; (41) our estimated future amortization, such as trademarks and customer relationships, included in sales and marketing expenses; (42) our intention to continuously broaden our existing product offerings and to introduce new products that expand our solutions portfolio; (43) our belief that there will be no future amortization of covenants not to compete relating to our acquisitions; (44) our belief that period-to-period changes in foreign exchange gains or losses will continue to be impacted by hedging costs associated with our forward and option activities and forecast variance; (45) our belief that we may receive less cash from stock option exercises and may not receive the same level of tax benefits in the future if stock option exercise patterns change; (46) our belief that foreign exchange forward and foreign currency option contracts do not present significant credit risks; (47) our belief that, other than the risk associated with the financial condition of the counterparties, our maximum exposure related to foreign currency forward and option contracts is limited to premiums paid, are inherently uncertain as they are based on management's current expectations and assumptions concerning future events, and they are subject to numerous known and unknown risks and uncertainties. Readers are cautioned not to place undue reliance on these forward-looking statements, which speak only as of the date hereof and are based upon information available to us at this time. These statements are not guarantees of future performance. We disclaim any obligation to update information in any forward-looking statement.

### **Third Quarter Fiscal 2008 Overview**

Revenues for the third quarter of fiscal 2008 were \$884.0 million, reflecting an increase of 21.2% year over year and an increase of 11.6% sequentially over the previous quarter. Revenues for the first nine months of fiscal 2008 totaled \$2,365.4 million compared to revenues of \$2,003.1 million for the same period a year ago, an increase of 18.1% year over year. Revenue growth was driven by strength in international sales and U.S. channel demand, and increased revenue from our U.S. commercial enterprise business partially offset by continued softness in our top enterprise accounts. Revenue growth was attributable to increased software entitlements and maintenance, increased service revenue, and increased product revenue with an expanded portfolio of new products and solutions for enterprise customers, and was partially offset by lower-cost-per-megabyte disks and lower average selling prices of our older generation products. Despite unfavorable macroeconomic conditions in certain markets, we achieved our revenue growth this quarter through our continuous efforts to increase field coverage, expand our product portfolio and diversify our revenue streams. We continued to accelerate our revenue growth by investing in go-to-market partnerships, specifically through our channel programs and initiatives. Our indirect channel grew 13.2% sequentially quarter over quarter to 63.3% of total revenue.

We continued to make progress in penetrating and expanding our business in enterprise data centers with mission-critical partners. We will continue to strengthen our strategic partnerships with server virtualization partners and leverage our storage grid architecture to enable customers to scale their server and storage

infrastructures, reduce costs, maximize asset utilization and keep data highly available. The Onaro acquisition, completed on January 29, 2008, will expand our heterogeneous storage infrastructure and strengthen our storage and data management software portfolio by enabling customers with new storage service management and change management capabilities.

While we reported solid results for the third quarter and first nine months of fiscal 2008, we were not immune to macroeconomic conditions. We believe that our storage solutions provide customers with value propositions that will enable us to continue to gain market share in a more constrained spending environment. We also believe that we are well positioned in the fastest growth segments of the storage market to capitalize on an IT spending recovery. However, if any storage market trends and emerging standards on which we are basing our assumptions do not materialize as anticipated, and if there is reduced or no demand for our products, our expected rate of revenue growth could be materially impacted. We will continue to manage our discretionary expenses and the rate of hiring to support our targeted business model. However, continued revenue growth depends on the introduction and market acceptance of new products and solutions and continued market demand for our products. We will continue to invest in the people, processes, and systems necessary to best optimize our revenue growth and long-term profitability. However, we cannot assure you that such investments will achieve our financial objectives.

Our revenues for the three-month period ended January 25, 2008 were \$884.0 million, a 21.2% increase over the same period a year ago. Our revenues for the nine-month period ended January 25, 2008, were \$2,365.4 million, an 18.1% increase over the same period a year ago. Our year-over-year revenue growth was driven by increases in service, software entitlements and maintenance, and product.

Our overall gross margin increased to 61.0% in the three-month period ended January 25, 2008, from 60.9% in the same period a year ago, and increased to 60.9% in the nine-month period ended January 25, 2008 from 60.8% in the same period a year ago. The moderate increase in overall gross margin was primarily due to increased revenue from higher margin software entitlements and maintenance and add-on software as well as improved service margins, partially offset by higher channel sales.

In the first nine months of fiscal 2008, we generated \$715.6 million of cash from operating activities as compared to \$653.7 million in the first nine months of fiscal 2007. As of January 25, 2008, our cash, cash equivalents, and short-term investments decreased to \$1,127.6 million, compared to \$1,308.8 million as of April 27, 2007. Our deferred revenue increased by 21.6% to \$1,341.5 million as of January 25, 2008, from \$1,103.0 million reported as of April 27, 2007, reflecting higher software entitlements and maintenance revenue and service maintenance contracts. Capital purchases of plant, property, and equipment for the first nine months of fiscal 2008 and 2007 were \$124.8 million and \$112.4 million, respectively, reflecting continued worldwide capital investment to meet our business growth.

#### **Critical Accounting Estimates and Policies**

Our discussion and analysis of financial condition and results of operations are based upon our Condensed Consolidated Financial Statements, which have been prepared in accordance with accounting principles generally accepted in the United States of America. The preparation of such statements requires us to make estimates and assumptions that affect the reported amounts of revenues and expenses during the reporting period and the reported amounts of assets and liabilities as of the date of the financial statements. Our estimates are based on historical experience and other assumptions that we consider to be appropriate in the circumstances. However, actual future results may vary from our estimates.

With the exception of the changes required by Financial Accounting Standards Board ("FASB") Interpretation No. 48 ("FIN No. 48") on Accounting for Income Taxes, there have been no significant changes during the three-and nine-month periods ended January 25, 2008, to the items we disclosed as our critical accounting policies and estimates in the Management's Discussion and Analysis of Financial Condition and Results of Operations section of our Annual Report on Form 10-K for the year ended April 27, 2007.

### ***Accounting for Income Taxes***

The determination of our tax provision is subject to judgments and estimates due to the complexity of the tax law that we are subject to in several tax jurisdictions. Earnings derived from our international business are generally taxed at rates that are lower than U.S. rates, resulting in a lower effective tax rate than the U.S. statutory tax rate of 35.0%. The ability to maintain our current effective tax rate is contingent on existing tax laws in both the United States and the respective countries in which our international subsidiaries are located. Future changes in domestic or international tax laws could affect the continued realization of the tax benefits we are currently receiving. In addition, a decrease in the percentage of our total earnings from international business or a change in the mix of international business among particular tax jurisdictions could increase our overall effective tax rate.

We account for income taxes in accordance with Statement of Financial Accounting Standards ("SFAS") No. 109, "Accounting for Income Taxes." SFAS No. 109 requires that deferred tax assets and liabilities be recognized for the effect of temporary differences between the carrying amounts of assets and liabilities for financial reporting purposes and the amounts used for income tax purposes. SFAS No. 109 also requires that deferred tax assets be reduced by a valuation allowance if it is more likely than not that some or all of the deferred tax asset will not be realized. We have provided a valuation allowance of \$21.0 million as of January 25, 2008 and April 27, 2007 on certain of our deferred tax assets.

We are currently undergoing federal income tax audits in the United States and several foreign tax jurisdictions. The rights to some of our intellectual property ("IP") are owned by certain of our foreign subsidiaries, and payments are made between foreign and U.S. tax jurisdictions relating to the use of this IP in a qualified cost sharing arrangement. Recently, several other U.S. companies have had their foreign IP arrangements challenged as part of IRS examinations, which have resulted in material proposed assessments and/or pending litigation. Effective September 27, 2007, the IRS's Large and Mid-Sized Business Division ("LMSB") released a Coordinated Issues Paper ("CIP") with respect to qualified cost sharing arrangements ("CSAs"). Specifically, this CIP provides guidance to IRS personnel concerning methods that may be applied to evaluate the arm's length charge (buy-in payment) for internally developed (pre-existing) as well as acquisition-related intangible property that is made available to a qualified CSA. We have evaluated the IRS's positions in this CIP and have concluded that it will not have a material adverse impact upon our consolidated financial position and the results of operations and cash flows. Furthermore, our management does not believe, based upon information currently known to us that the final resolution of any of our audits will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows. However, if upon the conclusion of these audits the ultimate determination of our taxes owed in any of these tax jurisdictions is for an amount in excess of the tax provision we have recorded or reserved for, our overall effective tax rate may be adversely impacted in the period of adjustment.

On April 28, 2007, we adopted FIN No. 48. FIN No. 48 clarifies the accounting for uncertainty in income taxes recognized in an enterprise's financial statements in accordance with SFAS No. 109. This interpretation prescribes a recognition threshold and measurement attribute for the financial statement recognition and measurement of a tax position taken or expected to be taken in a tax return. As a result of the implementation of FIN No. 48, we recognize the tax liability for uncertain income tax positions on the income tax return based on the two-step process prescribed in the interpretation. The first step is to determine whether it is more likely than not that each income tax position would be sustained upon audit. The second step is to estimate and measure the tax benefit as the amount that has a greater than 50% likelihood of being realized upon ultimate settlement with the tax authority. Estimating these amounts requires us to determine the probability of various possible outcomes. We evaluate these uncertain tax positions on a quarterly basis. This evaluation is based on the consideration of several factors, including changes in facts or circumstances, changes in applicable tax law, settlement of issues under audit, and new exposures. If we later determine that our exposure is lower or that the liability is not sufficient to cover our revised expectations, we adjust the liability and effect a related change in our tax provision during the period in which we make such determination.

### ***Impairment Losses on Investments***

All of our available-for-sale investments and nonmarketable securities are subject to a periodic impairment review. Investments are considered to be impaired when a decline in fair value is judged to be other-than-temporary.

This determination requires significant judgment. For publicly traded investments, impairment is determined based upon the specific facts and circumstances present at the time, including factors such as current economic and market conditions, the credit rating of the security's issuer, the length of time an investment's fair value has been below our carrying value, and our ability and intent to hold investments to maturity. If an investment's decline in fair value, caused by factors other than changes in interest rates, is deemed to be other-than-temporary, we would reduce its carrying value to its estimated fair value, as determined based on quoted market prices, liquidation values or other metrics. For investments in publicly held companies, we recognize an impairment charge when the declines in the fair values of our investments in these companies are below their cost basis and are judged to be other-than-temporary. The ultimate value realized on these investments in publicly held companies is subject to market price volatility until they are sold.

We actively review, along with our investment advisors, current investment ratings, company specific events, and general economic conditions in managing our investments and determining whether there is a significant decline in fair value that is other-than-temporary. We have not experienced any material losses on our available-for-sale investments. To the extent we determine that a decline in fair value is other-than-temporary, the associated investment is valued at current fair value and an impairment charge is reflected in earnings.

As of January 25, 2008 and April 27, 2007, our short-term investments have been classified as "available for sale" and are carried at fair value. Our short term investments include approximately \$83.0 million of investments in certain auction rate securities (ARS). The ARS held by the Company are securities with long term nominal maturities which, in accordance with investment policy guidelines, had credit ratings of AAA and Aaa at time of purchase. Substantially all of our ARS are backed by pools of student loans guaranteed by the U.S. Department of Education, and we believe the credit quality of these securities is high based on this guarantee. Subsequent to January 25, 2008, we successfully reset and liquidated certain of our ARS investments; however liquidity issues in the global credit markets resulted in the failure of auctions for certain other ARS investments, with a fair value of \$67.8 million at January 25, 2008. For each failed auction, the interest rate moves to a maximum rate defined for each security, and the ARS continue to pay interest in accordance with their terms. However, the principal associated with the ARS will not be accessible until there is a successful auction or such time as other markets for ARS investments develop.

We believe that the underlying credit quality of the assets backing our ARS investments have not been impacted by the reduced liquidity of these investments. We are continuing to evaluate the credit quality, classification and valuation of our ARS investments; however, we are not yet able to quantify the amount of impairment, if any, or change in classification in these investments at this time. We do not believe that the lack of liquidity relating to our ARS investments will impact our ability to fund working capital needs, capital expenditures or other operating requirements.

For nonmarketable securities, the impairment analysis requires the identification of events or circumstances that would likely have a significant adverse effect on the fair value of the investment, including revenue and earnings trends, overall business prospects, limited capital resources, limited prospects of receiving additional financing, limited prospects for liquidity of the related securities, and general market conditions in the investees' industries. Our investments in privately-held companies were \$11.2 million and \$8.9 million as of January 25, 2008 and April 27, 2007, respectively. During the third quarter and first nine months of fiscal 2008, we recorded an impairment of \$1.6 million for investments in privately-held companies.

#### **New Accounting Standards**

See Note 15 of the Condensed Consolidated Financial Statements for a full description of new accounting pronouncements, including the respective expected dates of adoption and effects on results of operations and financial condition.

**Results of Operations**

The following table sets forth certain consolidated statements of income data as a percentage of total revenues for the periods indicated:

	Three Months Ended		Nine Months Ended	
	January 25, 2008	January 26, 2007	January 25, 2008	January 26, 2007
<b>Revenues:</b>				
Product	68.8%	75.5%	68.2%	74.8%
Software entitlements and maintenance	14.2	11.7	14.8	12.1
Service	17.0	12.8	17.0	13.1
	100.0	100.0	100.0	100.0
<b>Cost of Revenues:</b>				
Cost of product	28.3	28.9	27.7	29.2
Cost of software entitlements and maintenance	0.3	0.4	0.3	0.4
Cost of service	10.4	9.8	11.1	9.6
Gross Profit	61.0	60.9	60.9	60.8
<b>Operating Expenses:</b>				
Sales and marketing	31.6	32.4	32.9	31.7
Research and development	12.6	13.4	13.8	13.8
General and administrative	4.8	5.2	5.2	5.3
Restructuring recoveries	—	—	—	—
Gain on sale of assets	—	—	—	(1.3)
Total Operating Expenses	49.0	51.0	51.9	49.5
Income from Operations	12.0	9.9	9.0	11.3
<b>Other Income (Expenses), Net:</b>				
Interest income	1.9	2.3	2.1	2.6
Interest expense	(0.4)	(0.3)	(0.3)	(0.6)
Net gain (loss) on investments	(0.1)	0.1	0.5	(0.1)
Other income (expenses), net	(0.1)	0.1	—	0.2
Total Other Income, Net	1.3	2.2	2.3	2.1
Income Before Income Taxes	13.3	12.1	11.3	13.4
Provision for Income Taxes	1.8	3.0	2.0	3.0
Net Income	11.5%	9.1%	9.3%	10.4%

**Discussion and Analysis of Results of Operations**

**Total Revenues** — Total revenues increased by 21.2% to \$884.0 million for the three-month period ended January 25, 2008, from \$729.3 million for the three-month period ended January 26, 2007. Total revenues increased by 18.1% to \$2,365.4 million for the nine-month period ended January 25, 2008, from \$2,003.1 million for the nine-month period ended January 26, 2007.

**Product Revenues** — Product revenues increased by 10.4% to \$608.1 million for the three-month period ended January 25, 2008, from \$550.9 million for the three-month period ended January 26, 2007. Product revenues increased by 7.7% to \$1,612.9 million for the nine-month period ended January 25, 2008, from \$1,497.8 million for the nine-month period ended January 26, 2007.

Product revenues were favorably impacted by the following factors:

- Increased revenues from our product portfolio. Product revenue increased \$57.3 million in the three-month period ended January 25, 2008, as compared to the same period a year ago, due to a \$54.0 million increase in unit volume and \$3.3 million related to increased price and configuration of our products. The \$54.0 million volume increase reflected \$154.4 million in revenues generated from products we began shipping in the last twelve months. New product revenues were partially offset by \$100.4 million associated with lower net shipment volumes on existing products. Product revenue grew \$115.1 million for the nine-month period ended January 25, 2008, as compared to the same period in the prior year, due to \$94.6 million of increased unit volume and a \$20.5 million increased price and configuration of our products. The \$94.6 million volume increase reflected \$295.5 million new product revenue, which was partially offset by \$200.9 million associated with lower net shipment volumes on existing products.
- Increased revenues from our Fabric-Attached Storage ("FAS") products including our new FAS 2000 entry-level systems. Revenues of the FAS 3000 and FAS 6000 enterprise storage systems increased 8.6% and 40.5%, respectively, for the three-month period ended January 25, 2008, compared to the same period in the prior year, and increased 17.2% and 76.0%, respectively, for the nine-month period ended January 25, 2008, compared to the same period in the prior year.
- Increased petabytes shipped year over year. Our petabytes shipped increased 66.7% and 68.2% year over year for the three- and nine-month periods ended January 25, 2008, respectively, to 173.5 and 422.1 petabytes, respectively, due to increased penetration in primary and secondary storage, i.e., enterprise data centers, data protection, disaster recovery, archival, and compliance requirements. Advanced Technology Attachment ("ATA") drives accounted for 61.9% and 59.9% of our total petabytes shipped in the three- and nine-month periods ended January 25, 2008, respectively, compared to 55.2% and 54.0% in the three- and nine-month periods ended January 26, 2007, respectively. Fibre Channel petabyte shipments increased 30.6% and 39.4% for the three- and nine-month periods ended January 25, 2008, respectively, to 35.1% and 38.1% of our total shipped, respectively. Serial Attached SCSI ("SAS") petabytes accounted for 3.0% and 2.0% of our total petabytes shipped in the three- and nine-month periods ended January 25, 2008, respectively.
- Increased sales through indirect channels. Sales through our indirect channels including, resellers, distributors, and OEM partners, represented 63.3% and 62.5% of total revenues for the three- and nine-month periods ended January 25, 2008, respectively, and 59.6% and 58.2% of total revenues for the three- and nine-month periods ended January 26, 2007, respectively.

Product revenues were negatively impacted by the following factors:

- Decreased revenues from older generation products (i.e. older or end-of-life products with a decreased unit volume year over year as well as products we no longer ship.) Revenues from our older generation products declined by \$224.0 million and \$578.4 million in the three- and nine-month periods ended January 25, 2008, respectively, compared to same periods a year ago. Revenue generated by FAS 900 series systems and NearStore® R200 systems decreased by 99.4% and 100.0%, respectively, for the three-month period ended January 25, 2008, compared to the same period a year ago. Revenue generated by FAS 900 and R200 series systems decreased by 96.8% and 99.5%, respectively, for the nine-month period ended January 25, 2008, compared to the same period a year ago. In addition, revenue also declined by \$16.3 million and \$16.8 million in the three- and nine-month periods ended January 25, 2008, respectively, compared to the same periods in the prior year due to products that we no longer ship, including our NetCache Products.

Our systems are highly configurable to respond to customer requirements in the open systems storage markets that we serve, and this wide variation in customized configuration can significantly impact revenue, cost of revenue, and gross margin performance. Price changes, volumes, configuration and product model mix also impact revenue, cost of revenue and gross margin performance. In addition, we continue to experience price declines per petabyte for our hardware products as disks are a significant component of our storage systems. As performance has improved on our devices, the related price we can charge per petabyte of storage has decreased.

*Software Entitlements and Maintenance Revenues* — Software entitlements and maintenance revenues increased by 47.8% to \$125.6 million for the three-month period ended January 25, 2008, from \$85.0 million for the three-month period ended January 26, 2007. Software entitlements and maintenance revenues increased by 44.9% to \$350.6 million for the nine-month period ended January 25, 2008, from \$242.1 million for the nine-month period ended January 26, 2007. The year over year increases were due to a larger installed base of customers who have purchased or renewed software entitlements and maintenance. Software entitlements and maintenance revenues represented 14.2% and 14.8% of total revenues for the three- and nine-month periods ended January 25, 2008, respectively, and 11.7% and 12.1% of total revenues for the three- and nine-month periods ended January 26, 2007, respectively.

*Service Revenues* — Service revenues, which include hardware support, professional services, and educational services, increased by 60.9% to \$150.3 million for the three-month period ended January 25, 2008, from \$93.4 million in the three-month period ended January 26, 2007. Service revenues increased by 52.7% to \$401.9 million in the nine-month period ended January 25, 2008, compared to \$263.3 million in the same period a year ago.

Professional service revenue increased by 56.5% in the three-month period ended January 25, 2008, compared to the same period a year ago, and increased by 50.9% in the nine-month period ended January 25, 2008, compared to the same period a year ago. The increase was due to higher customers' demand for our professional services in connection with the integration of our solutions into their IT environment.

Service maintenance revenue increased by 72.3% and 60.6% in the three- and nine-month periods ended January 25, 2008, respectively, compared to the same periods a year ago due to a growing installed base which resulted in new customer support contracts and renewals in addition to increased service contracts.

While it is an element of our strategy to expand and offer more comprehensive global enterprise support and service solutions, we cannot assure you that service revenue will grow at the current rate in the remainder of fiscal 2008 or beyond.

A large portion of our service revenues is deferred and, in most cases, recognized ratably over the service obligation period, which is typically one to three years. Service revenues represented 17.0% of total revenues for both the three- and nine-month periods ended January 25, 2008, respectively, and 12.8% and 13.1% of total revenues for the three- and nine-month periods ended January 26, 2007, respectively.

*International Total Revenues* — International total revenues (including U.S. exports) increased by 24.3% and 21.6% for the three- and nine-month periods ended January 25, 2008, respectively, as compared to the same periods in fiscal 2007. Total revenues from Europe, Middle East and Africa were \$307.6 million and \$763.8 million, or 34.8% and 32.3% of total revenues, respectively, for the three- and nine-month periods ended January 25, 2008, compared to \$256.1 million and \$642.4, or 35.1% and 32.1% of total revenues, for the three- and nine-month periods ended January 26, 2007, respectively. Total revenues from Asia Pacific, Australia were \$114.9 million and \$296.7 million, or 13.0% and 12.5% of total revenues, respectively, for the three- and nine-month periods ended January 25, 2008, compared to \$83.9 million and \$230.0 million, or 11.5% and 11.5% of total revenues, respectively, for the three- and nine-month periods ended January 26, 2007. The increase in international sales was primarily driven by the same factors outlined under the Total Revenues discussion, as compared to the same periods in the prior fiscal year. We cannot assure you that we will be able to maintain or increase international revenues in the remainder of fiscal 2008 or beyond.

*Product Gross Margin* — Product gross margin decreased to 58.8% for the three-month period ended January 25, 2008, from 61.7% for the same period a year ago. Product gross margin decreased to 59.4% for the nine-month period ended January 25, 2008, from 60.9% for the same period a year ago.

Product gross margin was negatively impacted by selective pricing actions, rebates and initiatives taken throughout the year, most notably in third quarter of fiscal 2008 and directed primarily to various indirect channels. We expect future product gross margin may continue to be impacted by a variety of factors including selective price reductions and discounts, increased indirect channel sales, increases in software revenue and new higher margin products.

Stock-based compensation expense included in cost of product revenues was \$0.8 million and \$2.5 million for the three- and nine-month periods ended January 25, 2008, respectively, compared to \$0.9 million and \$2.7 million for the three- and nine-month periods ended January 26, 2007, respectively. Amortization of existing technology included in cost of product revenues was \$5.3 million and \$15.8 million for the three- and nine-month periods ended January 25, 2008, respectively, and \$4.6 million and \$12.3 million for the three- and nine-month periods ended January 26, 2007, respectively. Estimated future amortization of existing technology to cost of product revenues will be \$5.3 million for the remainder of fiscal 2008, \$20.4 million for fiscal year 2009, \$15.9 million for fiscal year 2010, \$6.3 million for fiscal year 2011, and none thereafter.

*Software Entitlements and Maintenance Gross Margin* — Software entitlements and maintenance gross margins increased to 98.0% for the three-month period ended January 25, 2008, from 96.8% for the same period a year ago. Software entitlements and maintenance gross margins increased to 98.1% for the nine-month period ended January 25, 2008, from 96.9% for the same period a year ago. The improved software entitlements and maintenance gross margins year over year were due to increased software entitlements and maintenance revenue, larger installed base renewals and upgrades.

*Service Gross Margin* — Service gross margin increased to 39.0% for the three-month period ended January 25, 2008, as compared to 23.7% for the same period a year ago. Service gross margin increased to 34.4% for the nine-month period ended January 25, 2008, as compared to 27.2% in the same period in fiscal 2007. Cost of service revenue increased by 28.7% to \$91.7 million for the three-month period ended January 25, 2008, from \$71.2 million for the same period a year ago. Cost of service revenue increased by 37.6% to \$263.8 million for the nine-month period ended January 25, 2008, from \$191.7 million for the same period a year ago. Stock-based compensation expense of \$2.5 million and \$7.8 million was included in the cost of service revenue for the three- and nine-month periods ended January 25, 2008, respectively, and \$2.5 million and \$7.7 million was included in the cost of service revenue for the three- and nine-month periods ended January 26, 2007, respectively.

The improvement in service gross margins year over year was primarily due to an increase in services revenues and improved productivity, partially offset by increased service infrastructure spending to support our customers. This spending included additional professional support engineers, increased support center activities and global service partnership programs. Service gross margins will typically be impacted by factors such as timing of technical support service initiations and renewals and additional investments in our customer support infrastructure. For the remainder of fiscal 2008, we expect service margins to experience some variability over time as we continue to build out our service capability and capacity to support our growing customer base and new products.

*Sales and Marketing* — Sales and marketing expenses consist primarily of salaries, commissions, advertising and promotional expenses, stock-based compensation expense, and certain customer service and support costs. Sales and marketing expenses increased 18.1% to \$279.1 million for the three-month period ended January 25, 2008, from \$236.4 million for the same period a year ago. These expenses as a percentage of revenue decreased to 31.6% for the three-month period ended January 25, 2008, from 32.4% for the same period a year ago. Sales and marketing expenses increased 22.5% to \$779.1 million for the nine-month period ended January 25, 2008, from \$636.2 million for the same period a year ago. These expenses were 32.9% and 31.7% of total revenues for the nine-month periods ended January 25, 2008 and January 26, 2007, respectively. The increase in sales and marketing expenses was due to increased commission expenses resulting from higher revenues, higher headcount, higher partner program expenses, and the continued worldwide investment in our sales and global service organizations associated with selling complete enterprise solutions.

Stock compensation expense included in sales and marketing expenses for the three- and nine-month periods ended January 25, 2008 was \$14.8 million and \$49.4 million, respectively, compared to stock compensation expense of \$17.3 million and \$54.7 million for the three- and nine-month periods ended January 26, 2007, respectively. Amortization of trademarks/trade names and customer contracts/relationships included in sales and marketing expenses was \$1.0 million and \$0.8 million for the three-month periods ended January 25, 2008 and January 26, 2007, respectively and was \$2.9 million and \$2.0 million for the nine-month periods ended January 25, 2008 and January 26, 2007, respectively. Based on identified intangibles related to our acquisitions recorded at January 25, 2008, estimated future amortization such as trademarks and customer relationships included in sales



and marketing expenses will be \$1.0 million for the remainder of fiscal 2008, \$3.8 million for fiscal 2009, \$3.6 million for fiscal 2010, \$2.7 million for fiscal 2011, \$1.6 million for fiscal 2012 and \$0.9 million thereafter.

We expect to continue to selectively add sales capacity in an effort to expand domestic and international markets, introduce new products, and establish and expand new distribution channels. We expect to increase our sales and marketing expenses to support our future revenue growth. We believe that our sales and marketing expenses will increase in absolute dollars for the remainder of fiscal 2008 due to increased headcount, sales- and marketing-related programs to support future revenue growth, and real estate lease payments, partially offset by reduced discretionary spending.

*Research and Development* — Research and development expenses consist primarily of salaries and benefits, stock-based compensation, prototype expenses, engineering charges, consulting fees, and amortization of capitalized patents.

Research and development expenses increased 14.6% to \$111.7 million for the three-month periods ended January 25, 2008, from \$97.5 million for the same period a year ago. These expenses as a percentage of revenue were 12.6% and 13.4% for the three-month periods ended January 25, 2008, and January 26, 2007, respectively. Research and development expenses increased 18.3% to \$327.2 million for the nine-month period ended January 25, 2008, from \$276.6 million for the same period a year ago. These expenses represented 13.8% of total revenues for both the first nine months of fiscal 2008 and 2007, respectively. The increase in research and development expenses was primarily a result of increased headcount-related salaries and incentive compensation, future product development and enhancement efforts. For the third quarter and the first nine-months of fiscal 2008 and 2007, no software development costs were capitalized.

Stock compensation expense included in research and development expenses for the three- and nine-month periods ended January 25, 2008, was \$10.8 million and \$36.3 million, respectively, compared to stock compensation expense of \$12.3 million and \$39.2 million, respectively, for the three- and nine-month periods ended January 26, 2007. Included in research and development expenses is capitalized patents amortization of \$0.5 million and \$1.5 million for the three- and nine-month periods ended January 25, 2008 and January 26, 2007. Based on capitalized patents recorded at January 25, 2008, estimated future capitalized patent amortization expenses for the remainder of fiscal 2008 will be \$0.5 million, \$0.5 million for fiscal year 2009, \$0.2 million in fiscal 2010, and none thereafter.

We believe that our future performance will depend in large part on our ability to maintain and enhance our current product line, develop new products that achieve market acceptance, maintain technological competitiveness, and meet an expanding range of customer requirements. We expect to continuously support current and future product development and enhancement efforts, broaden our existing product offerings and introduce new products that expand our solutions portfolio.

We believe that our research and development expenses will increase in absolute dollars for the remainder of fiscal 2008, primarily due to costs associated with the development of new products and technologies, headcount growth, real estate lease payments and the operating impact from the Onaro acquisition.

*General and Administrative* — General and administrative expenses increased 13.4% to \$42.8 million for the three-month period ended January 25, 2008, from \$37.7 million for the same period a year ago. These expenses as a percentage of revenue decreased to 4.8% for the third quarter of fiscal 2008 from 5.2% for the same period in the prior year. General and administrative expenses increased 17.5% to \$123.7 million for the nine-month period ended January 25, 2008, from \$105.3 million for the same period a year ago. These expenses represented 5.2% and 5.3% of total revenues for the nine-month periods ended January 25, 2008 and January 26, 2007, respectively. The increase in absolute dollars was primarily due to increased headcount and associated payroll expenses, higher expenses related to prior acquisition, and increased professional and legal fees for general corporate matters.

We believe that our general and administrative expenses will increase in absolute dollars for the remainder of fiscal 2008 due to spending required to support and enhance our existing infrastructure as well as real estate lease payments, partially offset by reduced discretionary spending. Stock compensation expense included in general and administrative expenses for the three- and nine-month periods ended January 25, 2008, was \$5.4 million and

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\$17.0 million, respectively, compared to stock compensation expense of \$6.2 million and \$20.5 million, respectively, for the three- and nine-month periods ended January 26, 2007, respectively.

*Restructuring Charges* — In fiscal 2002, as a result of unfavorable economic conditions and a reduction in information technology (“IT”) spending rates, we implemented two restructuring plans, which included reductions in our workforce and consolidations of our facilities. As of January 25, 2008, we have no outstanding balance in our restructuring liability for the first restructuring. The second restructuring related to the closure of an engineering facility and consolidation of resources to the Sunnyvale headquarters. In fiscal 2006, we implemented a third restructuring plan related to the move of our global service center operations from Sunnyvale to our new flagship support center at our Research Triangle Park facility in North Carolina.

Our restructuring estimates are reviewed and revised periodically and may result in a substantial charge or reduction to restructuring expense should different conditions prevail than were anticipated in previous management estimates. Such estimates included various assumptions such as the time period over which the facilities would be vacant, expected sublease terms, and expected sublease rates. During the three- and nine-month periods ended January 25, 2008, we did not record any reduction in restructuring reserve resulting from a change in the estimates of our third restructuring plan.

Of the reserve balance at January 25, 2008, \$0.5 million was included in other accrued liabilities, and the remaining \$1.1 million was classified as long-term obligations. The balance of the reserve relates to facilities and is expected to be paid by fiscal 2011.

The following analysis sets forth the significant components of the restructuring reserve at January 25, 2008 (in thousands):

	<u>Total</u>
Reserve balance at April 27, 2007	\$2,084
Cash payments	(153)
Reserve balance at July 27, 2007	\$1,931
Cash payments	(153)
Reserve balance at October 26, 2007	\$1,778
Cash payments	(152)
Reserve balance at January 25, 2008	<u>\$1,626</u>

*Gain on Sale of Assets* — We recorded a gain of \$25.3 million for the nine-month periods ended January 26, 2007 as a result of the sale of certain of our assets to Blue Coat.

*Operating Income* — Operating income as a percentage of revenue increased to 12.0% for the three-month period ended January 25, 2008, from 9.9% for the same period a year ago. Operating income as a percentage of revenue decreased to 9.0% for the nine-month period ended January 25, 2008, from 11.3% for the same period a year ago. Operating income for the nine-month period ended January 26, 2007 included a gain on sale of assets of \$25.3 million. Our operating expense levels are based in part on our expectations as to future revenue growth, and a significant percentage of our operating expenses are fixed and difficult to reduce within a short period of time. As a result, if revenue levels are below expectations, our fixed expenses could adversely affect our operating income and cash flow until revenues increase or until such fixed expenses are reduced to a level commensurate with revenues. We cannot assure you that we will be able to maintain or increase revenues for the remainder of fiscal 2008 or beyond.

*Interest Income* — Interest income was \$17.0 million and \$50.3 million for the three- and nine-month periods ended January 25, 2008, respectively, as compared to \$17.1 million and \$51.2 million for the three- and nine-month periods ended January 26, 2007. The slight decrease in interest income was primarily driven by lower average interest rates on our investment portfolio and lower cash and investment balances. We expect that period-to-period changes in interest income will continue to be impacted by the volatility of market interest rates, cash and investment balances, timing of our stock repurchases, capital expenditures and payments of our future contractual obligations.

*Interest Expense* — Interest expense was \$3.6 million and \$6.1 million for the three- and nine-month periods ended January 25, 2008, respectively, as compared to \$2.3 million and \$11.4 million for the three- and nine-month periods ended January 26, 2007. The increase in interest expense for the third quarter of fiscal 2008 was due to the outstanding \$250.0 million outstanding revolving Secured Credit Agreement as compared to a lower outstanding debt balance of the Loan Agreement in the same period a year ago. The decrease in interest expense for the first nine months of fiscal 2008 was primarily due to lower outstanding debt balance of the Loan Agreement compared to the same period a year ago, partially offset by interest expense associated with a \$250.0 million borrowing on the revolving Secured Credit Agreement advanced to us in October 2007. We expect interest expense to be subject to market interest rate volatility which could negatively impact interest expense.

*Other Income* — Other income/(loss) was \$(0.6) million and \$0.4 million for the three- and nine-month periods ended January 25, 2008, respectively. Other income for the three-month period ended January 25, 2008 included net exchange losses from foreign currency of \$0.5 million and other expenses of \$0.1 million. Other income for the nine-month period ended January 25, 2008 included net exchange gains from foreign currency of \$0.2 million and other income of \$0.2 million. Other income was \$0.5 million and \$3.2 million for the three- and nine-month periods ended January 26, 2007. Other income for the three- and nine-month periods ended January 26, 2007 was primarily related to net exchange gains from foreign exchange transactions. We believe that period-to-period changes in foreign exchange gains or losses will continue to be impacted by hedging costs associated with our forward and option activities and forecast variance.

*Net Gain (Loss) on Investments* — Net gain (loss) on sale of investments was \$(1.0) million and \$12.6 million for the three- and nine-month periods ended January 25, 2008, respectively. Net gain for the nine months ended January 25, 2008 consisted primarily of a gain of \$13.6 million related to the sale of shares of Blue Coat common stock offset by a net other-than-temporary writedown of \$1.0 million. For the three- and nine-month periods ended January 26, 2007, net gain (loss) on sale of investments was \$0.9 million and \$(1.1) million, respectively. Net loss for the nine months ended January 26, 2007 was due to an other-than-temporary impairment in a privately held investment.

*Provision for Income Taxes* — For the three- and nine-month periods ended January 25, 2008, we applied to pretax income an annual effective tax rate before discrete reporting items of 13.2% and 16.0%, respectively. The decrease to the annual effective tax rate year over year is primarily attributable to a relative decrease in the tax impact of nondeductible stock compensation under SFAS No. 123R, brought about in part by our decision to cease granting incentive stock options. Since we have replaced the granting of incentive stock options with the granting of nonqualified stock options, this gives rise to the recognition of more deferred tax assets as SFAS No. 123R expense occurs. After taking into account the tax effect of discrete items reported, the effective tax rates applied to the pretax income for the three- and nine-month periods ended January 25, 2008 were 13.3% and 17.8%, respectively. For the three- and nine-month periods ended January 26, 2007, we applied an effective tax rate of 24.9% and 22.3%, respectively.

Our estimate of the effective tax rate is based on the application of existing tax laws to current projections of our annual consolidated income, including projections of the mix of income (loss) earned among our entities and tax jurisdictions in which they operate.

#### **Liquidity and Capital Resources**

The following sections discuss the effects of changes in our balance sheet and cash flow, contractual obligations and other commercial commitments, stock repurchase program, capital commitments, and other sources and uses of cash flow on our liquidity and capital resources.

##### ***Balance Sheet and Operating Cash Flows***

As of January 25, 2008, as compared to April 27, 2007, our cash, cash equivalents, and short-term investments decreased by \$181.2 million to \$1,127.6 million. We derive our liquidity and capital resources primarily from our cash flow from operations and from working capital. Working capital (Current Assets minus Current Liabilities) decreased by \$361.1 million to \$692.2 million as of January 25, 2008, compared to \$1,053.3 million as of April 27, 2007 due to higher stock repurchase activities in the nine-month period ended January 25, 2008.

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During the nine-month period ended January 25, 2008, we generated cash flows from operating activities of \$715.6 million, as compared with \$653.7 million in the same period a year ago. We recorded net income of \$219.9 million for the nine-month period ended January 25, 2008, as compared to \$208.1 million for the same period a year ago. A summary of the significant changes in noncash adjustments affecting net income and changes in assets and liabilities impacting operating cash flows is as follows:

- Stock-based compensation expense was \$113.1 million in the nine-month period ended January 25, 2008, compared to \$124.7 million in the same period a year ago. The decrease in stock-based compensation was largely due to our declining stock prices year over year.
- Depreciation expense was \$83.9 million and \$62.3 million in the nine-month periods ended January 25, 2008 and January 26, 2007, respectively. The increase in depreciation expense was due to continued capital expansion to meet our business growth.
- Amortization of intangibles and patents was \$20.4 million and \$16.5 million in the nine-month periods ended January 25, 2008 and January 26, 2007, respectively. The increase was attributable to intangibles related to the Topio acquisition.
- Net gain on sale of investments was \$12.6 million for the nine-month period ended January 25, 2008, compared to net loss of \$1.1 million for the nine-month period ended January 26, 2007. The increased gain was related to sale of Blue Coat common shares which amounted to \$13.6 million in the nine-month period ended January 25, 2008.
- Gain on sale of certain assets to Blue Coat was \$25.3 million in the nine-month period ended January 26, 2007.
- A decrease in accounts receivable of \$86.5 million in the first nine-months of fiscal 2008 as compared to an increase of \$16.0 million in accounts receivable in the first nine months of fiscal 2007 were due to shipment linearity and timing of collections.
- An increase in deferred revenues of \$237.0 million and \$263.4 million in the first nine months of fiscal 2008 and 2007, respectively, was due to higher software entitlements and maintenance and service revenue and long-term service contracts, as well as renewals of existing maintenance agreements in the first nine months of fiscal 2008 and fiscal 2007.
- An increase in income taxes payable of \$11.0 million in the first nine months of fiscal 2008 as compared to a decrease in income taxes payable of \$12.4 million in the first nine months of fiscal 2007 were attributed to lower tax provision year over year due to a relative decrease in the tax impact of nondeductible stock compensation expense under SFAS No. 123R partially offset by tax payments. During the first nine months of fiscal 2007, we paid \$30.3 million of taxes, which included an \$18.7 million federal income tax payment made for the fiscal year 2006 tax year relating to the income tax on foreign dividend repatriation.

The above factors were partially offset by the effects of:

- An increase in deferred income taxes of \$74.8 million in the nine-month period ended January 25, 2008, compared to \$88.5 million in nine-month period ended January 26, 2007, primarily due to an increase in deferred tax balances associated primarily with increases in deferred revenue and tax benefits associated with stock compensation.
- Accrued compensation and related benefits decreased by \$5.0 million and increased by \$16.9 million in the first nine months of fiscal 2008 and 2007, respectively, reflecting the timing of payroll and payroll-related accruals and payments.
- Accounts payable decreased by \$33.9 million in the first nine months of fiscal 2008 and increased by \$4.4 million in the first nine months of fiscal 2007 due to timing of payment activities.

We expect that cash provided by operating activities may fluctuate in future periods as a result of a number of factors, including fluctuations in our operating results, shipment linearity, accounts receivable collections, inventory management, and the timing of tax and other payments.

***Cash Flows from Investing Activities***

Capital expenditures for the nine-month period ended January 25, 2008, were \$124.8 million as compared to \$112.4 million for the same period a year ago. We received net proceeds of \$155.0 million and \$69.5 million in the nine-month periods ended January 25, 2008 and January 26, 2007, respectively, for the net of purchases and redemptions of short-term investments. We redeemed \$53.7 million and \$63.2 million of restricted investments to repay the term loan with JP Morgan in the nine-month periods ended January 25, 2008 and January 26, 2007, respectively (see Note 5 of the Condensed Consolidated Financial Statements). Investing activities in the nine-month periods ended January 25, 2008 and January 26, 2007 also included new investments in privately held companies of \$4.2 million and \$1.3 million, respectively. In the first nine months of fiscal 2007, we acquired Topio, Inc. for a purchase price of approximately \$146.4 million, which consisted of the value of the assumed options, cash payments of \$131.2 million, and related transaction costs. In the first nine months of fiscal 2008 and fiscal 2007, we received \$0.9 million and \$1.8 million, respectively, from the sale of investments in privately held companies. In the first nine months of fiscal 2008, we received \$18.3 million from the sale of shares of Blue Coat common stock. In the first nine months of fiscal 2007, we received \$23.9 million in cash in connection with the sale of certain assets to Blue Coat.

The credit markets have been volatile and have experienced a shortage in overall liquidity. We believe we have sufficient liquidity under cash provided by operations and our financing agreements. If the global credit market continues to deteriorate, our investment portfolio may be impacted and we could determine some of our investments are impaired which could adversely impact our financial results.

***Cash Flows from Financing Activities***

We used \$509.4 million and \$538.4 million in the nine-month periods ended January 25, 2008 and January 26, 2007, respectively, for net financing activities. We made repayments of \$69.3 million and \$148.9 million for our debt and revolving credit facility during the nine-month periods ended January 25, 2008 and January 26, 2007, respectively. We repurchased 29.9 million and 17.0 million shares of common stock for a total of \$844.3 million and \$605.7 million during the nine-month periods ended January 25, 2008 and January 26, 2007, respectively. Sales of common stock related to employee stock option exercises and employee stock purchases provided \$100.2 million and \$177.4 million in the nine-month periods ended January 25, 2008 and January 26, 2007, respectively. Tax benefits, related to tax deductions in excess of the stock-based compensation expense recognized, of \$47.1 million and \$43.5 million were presented as financing cash flows for the nine-month periods ended January 25, 2008 and January 26, 2007, respectively, in accordance with SFAS No. 123R. During the nine-month periods ended January 25, 2008 and January 26, 2007, we withheld shares with an aggregate value of \$5.9 million and \$4.7 million, respectively, in connection with the exercise of certain employees' restricted stock for purposes of satisfying those employees' federal, state, and local withholding tax obligations. The increase in the amounts withheld year over year was due to the release of restricted stock units assumed in connection with acquisitions. During the nine-month period ended January 25, 2008, we borrowed \$262.8 million through a revolving credit facility for our general corporate purposes, including stock repurchases and working capital needs.

Net proceeds from the issuance of common stock related to employee participation in employee stock programs have historically been a significant component of our liquidity. The extent to which our employees participate in these programs generally increases or decreases based upon changes in the market price of our common stock. As a result, our cash flow resulting from the issuance of common stock related to employee participation in employee stock programs will vary. Income tax benefit associated with dispositions of employee stock transactions has historically been another significant source of our liquidity. If stock option exercise patterns change, we may receive less cash from stock option exercises and may not receive the same level of tax benefits in the future, which could cause our cash payments for income taxes to increase. In addition, if our stock price declines, we may receive less tax benefits, which could also cause our income tax payments to increase.

***Stock Repurchase Program***

At January 25, 2008, \$555.7 million remained available for future repurchases under plans approved as of that date. The stock repurchase program may be suspended or discontinued at any time.

**Credit Facilities and Debt**

In October 2007, we received proceeds from a secured credit agreement totaling \$250.0 million, due October 5, 2012, to finance general corporate purposes, including stock repurchases and working capital needs ("Secured Credit Agreement"). See Note 5 of the Condensed Consolidated Financial Statements. In the third quarter of fiscal 2008, we repaid \$13.0 million and drew \$13.0 million against this Secured Credit Agreement. The obligations under the Secured Credit Agreement are collateralized by certain investments with a value totaling \$307.4 million as of January 25, 2008. Interest on the loans under the Secured Credit Agreement accrues at a floating rate based on a base rate in effect from time to time, plus a margin. The interest rate at January 25, 2008 was 4.48%. In accordance with the payment terms of the Secured Credit Agreement, interest payments will be approximately \$2.8 million in the remainder of fiscal 2008. As of January 25, 2008, we were in compliance with the liquidity and leverage requirements of the Secured Credit Agreement.

In March 2006, we received proceeds from a term loan agreement totaling \$300.0 million to finance a dividend under the American Jobs Creation Act ("Loan Agreement"). (See Note 5 of the Condensed Consolidated Financial Statements.) Loan repayments under the Loan Agreement of \$28.8 million are due by March 31, 2008. The obligations under the Loan Agreement are collateralized by certain investments with a value totaling \$63.2 million as of January 25, 2008. Interest on the loans under the Loan Agreement accrues at a floating rate based on the base rate in effect from time to time, plus margin. The interest rate at January 25, 2008 was 4.98%. In accordance with the payment terms of the Loan Agreement, interest payments will be approximately \$0.2 million for the remainder of fiscal 2008. As of January 25, 2008, we were in compliance with the liquidity and leverage ratio as required by the Loan Agreement with the lenders.

In November 2007, we entered into a \$250.0 million Unsecured Credit Agreement with JP Morgan (See Note 5 of the Condensed Consolidated Financial Statements.) and as of January 25, 2008, no amount was outstanding under this facility.

**Contractual Obligations**

The following summarizes our contractual obligations at January 25, 2008 and the effect such obligations are expected to have on our liquidity and cash flow in future periods (in thousands):

	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>Thereafter</u>	<u>Total</u>
	(In thousands)						
<b>Contractual Obligations:</b>							
Office operating lease payments(1)	\$ 6,463	\$ 25,594	\$22,064	\$18,196	\$12,972	\$ 34,139	\$119,428
Real estate lease payments(2)	1,862	9,542	13,726	13,726	13,726	250,653	303,235
Equipment operating lease payments(3)	3,956	14,574	9,912	3,625	1,489	1,240	34,796
Venture capital funding commitments(4)	62	235	223	210	17	—	747
Capital expenditures(5)	16,425	23,927	—	—	—	—	40,352
Communications and maintenance(6)	5,997	18,371	9,875	2,675	248	—	37,166
Restructuring charges(7)	153	577	579	318	—	—	1,627
Debt and revolving credit facility(8)	<u>31,759</u>	<u>11,200</u>	<u>11,200</u>	<u>11,200</u>	<u>11,200</u>	<u>253,733</u>	<u>330,292</u>
<b>Total Contractual Cash Obligations</b>	<u>\$ 66,677</u>	<u>\$104,020</u>	<u>\$67,579</u>	<u>\$49,950</u>	<u>\$39,652</u>	<u>\$539,765</u>	<u>\$867,643</u>

For purposes of the above table, contractual obligations for the purchase of goods and services are defined as agreements that are enforceable, are legally binding on us, and subject us to penalties if we cancel the agreement. Some of the figures we include in this table are based on management's estimates and assumptions about these obligations, including their duration, the possibility of renewal or termination, anticipated actions by management

and third parties, and other factors. Because these estimates and assumptions are necessarily subjective, our actual future obligations may vary from those reflected in the table.

	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>Thereafter</u>	<u>Total</u>
	(In thousands)						
<b>Other Commercial Commitments:</b>							
Letters of credit(9)	<u>\$1,636</u>	<u>\$516</u>	<u>\$116</u>	<u>\$—</u>	<u>\$356</u>	<u>\$ 433</u>	<u>\$3,057</u>

- (1) We enter into operating leases in the normal course of business. We lease sales offices, research and development facilities, and other property and equipment under operating leases throughout the United States and internationally, which expire on various dates through fiscal year 2018. Substantially all lease agreements have fixed payment terms based on the passage of time and contain payment escalation clauses. Some lease agreements provide us with the option to renew or terminate the lease. Our future operating lease obligations would change if we were to exercise these options and if we were to enter into additional operating lease agreements. Facilities operating lease payments exclude the leases impacted by the restructurings described in Note 12 of the Condensed Consolidated Financial Statements. The amounts for the leases impacted by the restructurings are included in subparagraph (7) below. The net increase in the office operating lease payments was primarily due to several domestic lease extensions during the third quarter of fiscal 2008.
- (2) Included in the above contractual cash obligations pursuant to six financing arrangements with BNP Paribas LLC (“BNP”) are (a) lease commitments of \$1.9 million in the remainder of fiscal 2008; \$9.5 million in fiscal 2009; \$13.7 million in each of the fiscal years 2010, 2011, and 2012; and \$250.7 million thereafter; which are based on the LIBOR rate at January 25, 2008 plus a spread, for a term of five years, and (b) at the expiration or termination of the lease, a supplemental payment obligation equal to our minimum guarantee of \$234.2 million in the event that we elect not to purchase or arrange for sale of the buildings. See Note 13 of the Condensed Consolidated Financial Statements.
- (3) Equipment operating leases include servers and IT equipment used in our engineering labs and data centers.
- (4) Venture capital funding commitments include a quarterly committed management fee based on a percentage of our committed funding to be payable through June 2011.
- (5) Capital expenditures include worldwide contractual commitments to purchase equipment and to construct building and leasehold improvements, which will be recorded as property and equipment.
- (6) We are required to pay based on a minimum volume under certain communication contracts with major telecommunication companies as well as maintenance contracts with multiple vendors. Such obligations will expire in November 2011.
- (7) These amounts are included on our Consolidated Balance Sheets under Long-Term Obligations and Other Accrued Liabilities, which is comprised of committed lease payments and operating expenses net of committed and estimated sublease income.
- (8) Included in these amounts is the JP Morgan Chase loan (see Note 5 of the Condensed Consolidated Financial Statements) on our Consolidated Balance Sheets under Current Portion of Long-Term Debt. This amount also includes estimated interest payments of \$0.2 million for the remainder of fiscal 2008. The net decrease from April 27, 2007 represented a loan repayment of \$56.3 million in connection with the Loan Agreement, plus interest of \$5.8 million for both the Loan Agreement and the Secured Credit Agreement for the first nine months of fiscal 2008. In addition, included in these amounts is the \$250.0 million secured credit agreement entered into with JP Morgan Chase. Estimated interest payments for the secured credit agreement is \$51.5 million for the remainder of fiscal 2008 through fiscal 2013.
- (9) The amounts outstanding under these letters of credit relate to workers' compensation, a customs guarantee, a corporate credit card program, and a foreign rent guarantee.

As discussed in Note 14 of the Notes to the Condensed Consolidated Financial Statements, we adopted the provisions of FIN No. 48. At January 25, 2008, we have a liability of \$68.6 million, for which we are unable to make a reasonably reliable estimate when cash settlement with a taxing authority will occur. Accordingly, this amount has been excluded from the table above.

As of January 25, 2008, we have commitments relating to two financing, construction, and leasing arrangements with BNP Paribas LLC ("BNP") for office space to be located on land in Sunnyvale, California that we currently own. These arrangements require us to lease our land to BNP for a period of 99 years to construct approximately 380,000 square feet of office space costing up to \$113.5 million. After completion of construction, we will pay minimum lease payments, which vary based on the LIBOR plus a spread (4.98% at January 25, 2008) on the cost of the facilities. We expect to begin making lease payments on the completed buildings in January 2008 and January 2009 for terms of five years. We have the option to renew the leases for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease terms, we must elect one of the following options: (i) purchase the buildings from BNP for \$48.5 million and \$65.0 million, respectively; (ii) if certain conditions are met, arrange for the sale of the buildings by BNP to a third party for an amount equal to at least \$41.2 million and \$55.3 million, respectively, and be liable for any deficiency between the net proceeds received from the third party and such amounts; or (iii) pay BNP supplemental payments of \$41.2 million and \$55.3 million, respectively, in which event we may recoup some or all of such payment by arranging for a sale of either or both buildings by BNP during the ensuing two-year period.

As of January 25, 2008, we have a commitment relating to a third financing, construction, and leasing arrangements with BNP for facility space to be located on land currently owned by us in Research Triangle Park, North Carolina. These arrangements require us to lease our land to BNP for a period of 99 years to construct approximately 120,000 square feet for a data center costing up to \$61.0 million. After completion of construction, we will pay minimum lease payments, which vary based on LIBOR plus a spread (4.98% at January 25, 2008) on the cost of the facility. We expect to begin making lease payments on the completed buildings in January 2009 for a term of five and half years. We have the option to renew the lease for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease term, we must elect one of the following options: (i) purchase the building from BNP for \$61.0 million; (ii) if certain conditions are met, arrange for the sale of the building by BNP to a third party for an amount equal to at least \$51.9 million, and be liable for any deficiency between the net proceeds received from the third party and \$51.9 million; or (iii) pay BNP a supplemental payment of \$51.9 million, in which event we may recoup some or all of such payment by arranging for the sale of the building by BNP during the ensuing two-year period.

In the third quarter of fiscal 2008, we entered into three financing and operating leasing arrangements totaling \$101.1 million with BNP for approximately 374,274 square feet of buildings located in Sunnyvale, California. These lease arrangements require us to pay minimum lease payments, which may vary based on the LIBOR plus a spread (4.98% at January 25, 2008). We began to make lease payments on two buildings in December 2007 and the third building in January 2008 for terms of five years. We have the option to renew the leases for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease terms, we must elect one of the following options: (i) purchase the buildings from BNP for \$101.1 million; (ii) if certain conditions are met, arrange for the sale of the building by BNP to a third party for an amount equal to at least \$85.9 million, and be liable for any deficiency between the net proceeds received from the third party and \$85.9 million; or (iii) pay BNP a supplemental payment of \$85.9 million, in which event we may recoup some or all of such payment by arranging for the sale of the building by BNP during the ensuing two-year period.

All leases also require us to maintain specified financial covenants with which we were in compliance as of January 25, 2008. Such specified financial covenants include a maximum ratio of Total Debt to EBITA and a Minimum Unencumbered Cash and Short Term Investments.

As of January 25, 2008, the notional fair value of our foreign exchange forward and foreign currency option contracts totaled \$449.4 million. We do not believe that these derivatives present significant credit risks, because the counterparties to the derivatives consist of major financial institutions, and we manage the notional amount of contracts entered into with any one counterparty. We do not enter into derivative financial instruments for speculative or trading purposes. Other than the risk associated with the financial condition of the counterparties, our maximum exposure related to foreign currency forward and option contracts is limited to the premiums paid on purchased options.

On September 5, 2007, we filed a patent infringement lawsuit in the Eastern District of Texas seeking compensatory damages and a permanent injunction against Sun Microsystems. On October 25, 2007, Sun



Microsystems filed a counter claim against us in the Eastern District of Texas seeking compensatory damages and a permanent injunction. On October 29, 2007, Sun filed a second lawsuit against us in the Northern District of California asserting additional patents against us. The Texas court granted a joint motion to transfer the Texas lawsuit to the Northern District of California on November 26, 2007. We are unable at this time to determine the likely outcome of these various patent litigations. In addition, as we are unable to reasonably estimate the amount or range of the potential settlement, no accrual has been recorded as of January 25, 2008.

In addition, we are subject to various legal proceedings and claims which have arisen or may arise in the normal course of business. While the outcome of these legal matters is currently not determinable, we do not believe that any current litigation or claims will have a material adverse effect on our business, cash flow, operating results, or financial condition.

#### ***Capital Expenditure Requirements***

We expect capital expenditures to increase in the future consistent with the growth in our business, as we continue to invest in people, land, buildings, capital equipment, and enhancements to our worldwide infrastructure. We expect that our existing facilities and those being developed in Sunnyvale, California; Research Triangle Park ("RTP"), North Carolina; and worldwide are adequate for our requirements over at least the next two years and that additional space will be available as needed. We expect to finance these construction projects, including our commitments under facilities and equipment operating leases, and any required capital expenditures over the next few years through cash from operations and existing cash, cash equivalents, and investments.

#### ***Credit Environment***

The credit markets have been volatile and have experienced a shortage in overall liquidity. We believe we have sufficient liquidity through cash provided by operations and our financing agreements. If the global credit market continues to deteriorate, our investment portfolio may be impacted and we could determine some of our investments have experienced other-than-temporary declines in fair value which could adversely impact our financial results. In addition, some of our sales are derived from customers in the financial services industry, which is experiencing a downturn. We believe that our diversified customer base should mitigate our exposure to any one industry; however, we remain exposed to overall reductions in spending by our customer base.

See further discussion under Item 1A — Risk Factors, "We are exposed to fluctuations in the market values of our portfolio investments and in interest rates," and "Significant changes to the financial market conditions may affect our revenues."

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

As of January 25, 2008, our financial guarantees of \$3.1 million that were not recorded on our balance sheet consisted of standby letters of credit related to workers' compensation, a customs guarantee, a corporate credit card program, and guarantees for foreign rental obligations.

As of January 25, 2008, the notional fair value of our foreign exchange forward and foreign currency option contracts totaled \$449.4 million. We do not believe that these derivatives present significant credit risks, because the counterparties to the derivatives consist of major financial institutions, and we manage the notional amount of contracts entered into with any one counterparty. We do not enter into derivative financial instruments for speculative or trading purposes. Other than the risk associated with the financial condition of the counterparties, our maximum exposure related to foreign currency forward and option contracts is limited to the premiums paid.

We have entered into indemnification agreements with third parties in the ordinary course of business. Generally, these indemnification agreements require us to reimburse losses suffered by the third party due to various events, such as lawsuits arising from patent or copyright infringement. These indemnification obligations are considered off-balance sheet arrangements in accordance with FASB Interpretation 45, of FIN No. 45, "Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others."

We have commitments related to two lease arrangements with BNP for approximately 380,000 square feet of office space to be located on land we currently own in Sunnyvale, California. We also have a third commitment related to a lease arrangement with BNP for approximately 120,000 square feet of data center to be located on land that we currently own in Research Triangle Park, North Carolina (as further described above under “Contractual Obligations”).

We have evaluated our accounting for these leases under the provisions of FIN No. 46R and have determined the following:

- BNP is a leasing company for BNP Paribas in the United States. BNP is not a “special purpose entity” organized for the sole purpose of facilitating the lease to us. The obligation to absorb expected losses and receive expected residual returns rests with the parent, BNP Paribas. Therefore, we are not the primary beneficiary of BNP as we do not absorb the majority of BNP’s expected losses or expected residual returns; and
- BNP has represented in the Closing Agreement (filed as Exhibit 10.40) that the fair value of the property leased to us by BNP is less than half of the total of the fair values of all assets of BNP, excluding any assets of BNP held within a silo. Further, the property leased to Network Appliance is not held within a silo. The definition of “held within a silo” means that BNP has obtained funds equal to or in excess of 95% of the fair value of the leased asset to acquire or maintain its investment in such asset through nonrecourse financing or other contractual arrangements, the effect of which is to leave such asset (or proceeds thereof) as the only significant asset of BNP at risk for the repayment of such funds.

Accordingly, under the current FIN No. 46R standard, we are not required to consolidate either the leasing entity or the specific assets that we lease under the BNP lease. Our future minimum lease payments and residual guarantees under these real estates leases will amount to a total of \$303.2 million reported under our Note 13, “Commitments and Contingencies.”

#### ***Liquidity and Capital Resource Requirements***

Key factors affecting our cash flows include our ability to effectively manage our working capital, in particular, accounts receivable and inventories and future demand for our products and related pricing. We expect to incur higher capital expenditures in the near future to expand our operations. We will from time to time acquire products and businesses complementary to our business. In the future, we may continue to repurchase our common stock, which would reduce cash, cash equivalents, and/or short-term investments available to fund future operations and meet other liquidity requirements. Based on past performance and current expectations, we believe that our cash and cash equivalents, short-term investments, cash generated from operations, and credit facilities will satisfy our working capital needs, capital expenditures, stock repurchases, contractual obligations, and other liquidity requirements associated with our operations for at least the next twelve months. However, should we need to investigate other financing alternatives, we cannot be certain that additional financing will be available on satisfactory terms.

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

We are exposed to market risk related to fluctuations in interest rates, market prices, and foreign currency exchange rates. We use certain derivative financial instruments to manage these risks. We do not use derivative financial instruments for speculative or trading purposes. All financial instruments are used in accordance with management-approved policies.

#### **Market Risk and Market Interest Risk**

*Interest and Investment Income* — As of January 25, 2008, we had available-for-sale investments of \$721.8 million, which included restricted investments in connection with our debt and credit facility. Our investment portfolio primarily consists of investments with original maturities at the date of purchase of greater than three months, which are classified as available-for-sale. These investments, consisting primarily of corporate bonds, corporate securities, government, municipal debt securities, and auction-rate securities are subject to interest rate and interest income risk and will decrease

in value if market interest rates increase. A hypothetical 10 percent increase in market interest rates from levels at January 25, 2008 would cause the fair value of these available-for-sale investments to decline by approximately \$3.6 million. Because we have the ability to hold these investments until maturity, we would not expect any significant decline in value of our investments caused by market interest rate changes. Declines in interest rates over time will, however, reduce our interest income. We do not use derivative financial instruments in our investment portfolio.

Our investment policy is to limit credit exposure through diversification and investment in highly rated securities. We further mitigate concentrations of credit risk in our investments by limiting our investments in the debt securities of a single issuer and by diversifying risk across geographies and type of issuer. We actively review, along with our investment advisors, current investment ratings, company specific events, and general economic conditions in managing our investments and in determining whether there is a significant decline in fair value that is other-than-temporary. We have not experienced any material losses on our available-for-sale investments. To the extent we determine that a decline in fair value is other-than-temporary, the associated investment is valued at current fair value and an impairment charge is reflected in earnings.

*Lease Commitments* — As of January 25, 2008, we have two arrangements with BNP to lease our land for a period of 99 years to construct approximately 380,000 square feet of office space and a parking structure costing up to \$113.5 million. We also have a third arrangement with BNP to lease our land for a period of 99 years to construct approximately 120,000 square feet of data center costing up to \$61.0 million. After completion of construction, we will pay minimum lease payments which vary based on LIBOR plus a spread. We expect to pay lease payments on the first and second leases in January 2008 for a term of five years, and the third lease in January 2009 for a term of five and a half years. In the third quarter of fiscal 2008, we entered into three additional financing and operating leasing arrangements with BNP to lease approximately 374,274 square feet of buildings located in Sunnyvale, California for \$101.1 million. We began to make lease payments on two buildings in December 2007 and the third building in January 2008 for terms of five years. We have the option to renew all three leases for two consecutive five-year periods upon approval by BNP. A hypothetical 10 percent increase in market interest rates from levels at January 25, 2008 would increase our total lease payments under the initial five-year term by approximately \$6.4 million. We do not currently hedge against market interest rate increases. As additional cash flow generated from operations is invested at current market rates, it will offer a natural hedge against interest rate risk from our lease commitments in the event of a significant change in market interest rate.

*Debt Obligation* — We have an outstanding variable rate term loan totaling \$28.8 million as of January 25, 2008. Under the terms of this arrangement, we expect to make interest payments at LIBOR plus a spread. A hypothetical 10 percent increase in market interest rates from levels at January 25, 2008 would increase our total interest payments by \$0.1 million. We also have an outstanding secured credit facility totaling \$250.0 million as of January 25, 2008. Under the terms of this arrangement, we expect to make interest payments at LIBOR plus a spread. A hypothetical 10 percent increase in market interest rates from levels at January 25, 2008 would increase our total interest payments by approximately \$5.6 million. We do not currently use derivatives to manage interest rate risk. As additional cash flow generated from operations is invested at current market rates, it will offer a natural hedge against interest rate risk from our debt in the event of a significant change in market interest rate.

*Nonmarketable Securities* — We have from time to time made cash investments in companies with distinctive technologies that are potentially strategically important to us. Our investments in nonmarketable securities would be negatively affected by an adverse change in equity market prices, although the impact cannot be directly quantified. Such a change, or any negative change in the financial performance or prospects of the companies whose nonmarketable securities we own, would harm the ability of these companies to raise additional capital and the likelihood of our being able to realize any gains or return of our investments through liquidity events such as initial public offerings, acquisitions, and private sales. These types of investments involve a high degree of risk, and there can be no assurance that any company we invest in will grow or be successful. We do not currently engage in any hedging activities to reduce or eliminate equity price risk with respect to such nonmarketable investment. Accordingly, we could lose all or part of this investment if there is an adverse change in the market price of a company we invest in. Our investments in nonmarketable securities had a carrying amount of \$11.2 million as of January 25, 2008 and \$8.9 million as of April 27, 2007. If we determine that an other-than-temporary decline in fair value exists for a nonmarketable equity security, we write down the investment to its fair value and record the related write-down as an investment loss in our Consolidated Statements of Income.

**Foreign Currency Exchange Rate Risk and Foreign Exchange Forward Contracts**

We hedge risks associated with foreign currency transactions to minimize the impact of changes in foreign currency exchange rates on earnings. We utilize forward and option contracts to hedge against the short-term impact of foreign currency fluctuations on certain assets and liabilities denominated in foreign currencies. All balance sheet hedges are marked to market through earnings every period. We also use foreign exchange forward contracts to hedge foreign currency forecasted transactions related to certain sales and operating expenses. These derivatives are designated as cash flow hedges under SFAS No. 133. For cash flow hedges outstanding at January 25, 2008, the gains or losses were included in other comprehensive income.

We do not enter into foreign exchange contracts for speculative or trading purposes. In entering into forward and option foreign exchange contracts, we have assumed the risk that might arise from the possible inability of counterparties to meet the terms of their contracts. We attempt to limit our exposure to credit risk by executing foreign exchange contracts with creditworthy multinational commercial banks. All contracts have a maturity of less than one year.

The following table provides information about our foreign exchange forward and currency option contracts outstanding on January 25, 2008 (in thousands):

Currency	Buy/Sell	Foreign Currency Amount	Notional Contract Value in USD	Notional Fair Value in USD
<b>Forward Contracts:</b>				
EUR	Sell	186,331	\$ 273,324	\$273,268
GBP	Sell	42,671	\$ 84,116	\$ 84,405
CAD	Sell	14,740	\$ 14,616	\$ 14,617
Other	Sell	N/A	\$ 17,748	\$ 17,747
AUD	Buy	32,678	\$ 28,625	\$ 28,624
Other	Buy	N/A	\$ 11,909	\$ 11,908
<b>Option Contracts:</b>				
EUR	Sell	10,000	\$ 14,660	\$ 14,815
GBP	Sell	2,000	\$ 3,957	\$ 3,997

**Item 4. Controls and Procedures**

Disclosure controls are controls and procedures designed to ensure that information required to be disclosed in our reports filed under the Exchange Act, such as this Quarterly Report on Form 10-Q, is recorded, processed, summarized, and reported within the time periods specified in the U.S. Securities and Exchange Commission's rules and forms. Disclosure controls and procedures are also designed to ensure that such information is accumulated and communicated to our management, including the CEO and CFO, as appropriate to allow timely decisions regarding required disclosure.

Under the supervision and with the participation of our management, including our principal executive officer and principal financial officer, we conducted an evaluation of the effectiveness of the design and operation of our disclosure controls and procedures, as defined in Rules 13a-15(e) and 15d-15(e) under the Securities Exchange Act of 1934, as amended, as of January 25, 2008, the end of the fiscal period covered by this Quarterly Report on Form 10-Q (the "Evaluation Date"). Based on this evaluation, our principal executive officer and principal financial officer concluded as of the Evaluation Date that our disclosure controls and procedures were effective such that the information relating to Network Appliance, including our consolidated subsidiaries, required to be disclosed in our Securities and Exchange Commission ("SEC") reports (i) is recorded, processed, summarized, and reported within the time periods specified in SEC rules and forms, and (ii) is accumulated and communicated to Network Appliance management, including our principal executive officer and principal financial officer, as appropriate to allow timely decisions regarding required disclosure.

There was no change in our internal control over financial reporting that occurred during the period covered by this Quarterly Report on Form 10-Q that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

## PART II. OTHER INFORMATION

### Item 1. *Legal Proceedings*

On September 5, 2007, we filed a patent infringement lawsuit in the Eastern District of Texas seeking compensatory damages and a permanent injunction against Sun Microsystems. On October 25, 2007, Sun Microsystems filed a counter claim against us in the Eastern District of Texas seeking compensatory damages and a permanent injunction. On October 29, 2007, Sun filed a second lawsuit against us in the Northern District of California asserting additional patents against us. The Texas court granted a joint motion to transfer the Texas lawsuit to the Northern District of California on November 26, 2007. We are unable at this time to determine the likely outcome of these various patent litigations. In addition, as we are unable to reasonably estimate the amount or range of the potential settlement, no accrual has been recorded as of January 25, 2008.

### Item 1A. *Risk Factors*

*The following risk factors and other information included in this Quarterly Report on Form 10-Q should be carefully considered. The risks and uncertainties described below are not the only ones we face. Additional risks and uncertainties not presently known to us or that we presently deem less significant may also impair our business operations. If any of the events or circumstances described in the following risk factors actually occurs, our business, operating results, and financial condition could be materially adversely affected.*

***Factors beyond our control could cause our quarterly results to fluctuate, which could adversely impact our common stock price.***

We believe that period-to-period comparisons of our results of operations are not necessarily meaningful and should not be relied upon as indicators of future performance. Many of the factors that could cause our quarterly operating results to fluctuate significantly in the future are beyond our control and include, but are not limited to, the following:

- Changes in general economic conditions and specific economic conditions in the computer, storage, and networking industries
- General decrease in global corporate spending on information technology leading to a decline in demand for our products
- A shift in federal government spending patterns
- The possible effects of terrorist activity and international conflicts, which could lead to business interruptions and difficulty in forecasting
- The level of competition in our target product markets
- Our reliance on a limited number of suppliers due to industry consolidation, which could subject us to periodic supply-and-demand, price rigidity, and quality issues with our components
- The size, timing, and cancellation of significant orders
- Product configuration and mix
- The extent to which our customers renew their service and maintenance contracts with us
- Market acceptance of new products and product enhancements
- Announcements, introductions, and transitions of new products by us or our competitors

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- Deferrals of customer orders in anticipation of new products or product enhancements introduced by us or our competitors
- Changes in our pricing in response to competitive pricing actions
- Our ability to develop, introduce, and market new products and enhancements in a timely manner
- Supply constraints
- Technological changes in our target product markets
- The levels of expenditure on research and development and sales and marketing programs
- Our ability to achieve targeted cost reductions
- Excess or inadequate facilities
- Disruptions resulting from new systems and processes as we continue to enhance and adapt our system infrastructure to accommodate future growth
- Future accounting pronouncements and changes in accounting policies
- Seasonality

In addition, sales for any future quarter may vary and accordingly be different from what we forecast. We manufacture products based on a combination of specific order requirements and forecasts of our customer demands. Products are typically shipped within one to four weeks following receipt of an order. In certain circumstances, customers may cancel or reschedule orders without penalty. Product sales are also difficult to forecast because the storage and data management market is rapidly evolving, and our sales cycle varies substantially from customer to customer.

We derive a majority of our revenue in any given quarter from orders booked in the same quarter. Bookings typically follow intraquarter seasonality patterns weighted toward the back end of the quarter. If we do not achieve bookings in the latter part of a quarter consistent with our quarterly financial targets, our financial results will be adversely impacted. If revenues do not meet our expectations, our operating profit may be negatively impacted because portions of our expenses are fixed and difficult to reduce in a short period of time. If our revenues are lower than expected, our fixed expenses could adversely affect our net income and cash flow until revenues increase or until such fixed expenses are reduced to a level commensurate with revenues.

Due to all of the foregoing factors, it is possible that in one or more future quarters our results may fall below our forecasts and the expectations of public market analysts and investors. In such event, the trading price of our common stock would likely decrease.

***We cannot assure you that our OEM relationship with IBM will generate significant revenue.***

In April 2005, we announced a strategic partner relationship with IBM. As part of the relationship, we entered into an original equipment manufacturing (“OEM”) agreement that enables IBM to sell IBM branded solutions based on Network Appliance unified solutions, including NearStore and the NetApp® V-Series systems, as well as associated software offerings. While this agreement is an element of our strategy to expand our reach into more customers and countries, we do not have an exclusive relationship with IBM, and there is no minimum commitment for any given period of time; therefore we cannot assure you that this relationship will contribute any revenue in future years. In addition, we have no control over the products that IBM selects to sell, or its release schedule and timing of those products; nor do we control its pricing. In the event that sales through IBM increase, we may experience distribution channel conflicts between our direct sales force and IBM or among our channel partners. If we fail to minimize channel conflicts, our operating results and financial condition could be harmed.

Currently we do not and cannot assure you that this OEM relationship will generate significant revenue or that this strategic partnership will continue to be in effect for any specific period of time.

***If we are unable to maintain our existing relationships and develop new relationships with major strategic partners, our revenue may be impacted negatively.***

An element of our strategy to increase revenue is to strategically partner with major third-party software and hardware vendors that integrate our products into their products and also comarket our products with these vendors. We have significant partner relationships with database, business application, and backup management companies, including Microsoft, Oracle, SAP, and Symantec. A number of these strategic partners are industry leaders that offer us expanded access to segments of the storage market. There is intense competition for attractive strategic partners, and even if we can establish strategic relationships with these partners, we cannot assure you that these partnerships will generate significant revenue or that the partnerships will continue to be in effect for any specific period of time.

We intend to continue to establish and maintain business relationships with technology companies to accelerate the development and marketing of our storage solutions. To the extent that we are unsuccessful in developing new relationships and maintaining our existing relationships, our future revenue and operating results could be impacted negatively. In addition, the loss of a strategic partner could have a material adverse effect on our revenue and earnings.

***We cannot assure you that we are able to maintain existing resellers and attract new resellers and that channel conflicts will not materially adversely affect our channel relationships. In addition, we do not have exclusive relationships with our resellers and accordingly there is a risk that those resellers may give higher priority to products of other suppliers, which could materially adversely affect our operating results.***

We market and sell our storage solutions directly through our worldwide sales force and indirectly through channels such as value-added resellers ("VAR"), systems integrators, distributors, OEMs, and strategic business partners, and we derive a significant portion of our revenue from these indirect channel partners. In the nine-month period ended January 25, 2008, our indirect channels accounted for 62.5% of our consolidated revenues.

However, in order for us to maintain our current revenue sources and grow our revenue as we have forecasted, we must effectively manage our relationships with these indirect channel partners. To do so, we must attract and retain a sufficient number of qualified channel partners to successfully market our products. However, because we also sell our products directly to customers through our sales force, on occasion we compete with our indirect channels for sales of our products to our end customers, competition that could result in conflicts with these indirect channel partners and make it harder for us to attract and retain these indirect channel partners. At the same time, our indirect channel partners may offer products that are competitive to ours. In addition, because our reseller partners generally offer products from several different companies, including products of our competitors, these resellers may give higher priority to the marketing, sales, and support of our competitors' products than ours. If we fail to effectively manage our relationships with these indirect channel partners to minimize channel conflict and continue to evaluate and meet our indirect sales partners' needs with respect to our products, we will not be able to maintain or increase our revenue as we have forecasted, which would have a materially adverse effect on our business, financial condition, and results of operations. Additionally, if we do not manage distribution of our products and services and support effectively, or if our resellers' financial conditions or operations weaken, our revenues and gross margins could be adversely affected.

***The U.S. government has contributed to our revenue growth and has become an important customer for us.***

The U.S. government has become an important customer for the storage market and for us; however, government demand is unpredictable, and there is no guarantee of future revenue growth from the U.S. government. Government agencies are subject to budgetary processes and expenditure constraints that could lead to delays or decreased capital expenditures in IT spending on infrastructures. If the government or individual agencies within the government reduce or shift their capital spending pattern, our financial results may be harmed. We cannot assure you that revenue from the U.S. government will continue to grow in the future.

The General Services Administration ("GSA") is currently auditing our records under the schedule contracts it had with us to verify our compliance with various contract provisions. If the audit determines that we did not comply

with such provisions, we may be required to pay the GSA a potential settlement. The exact date for completion of the audit and the subsequent negotiation process is unknown and may not be concluded for some time. Our management does not believe, based upon information currently known to us, that the final resolution of our audit will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows.

***The marketplace for our common stock has fluctuated significantly in the past and will likely continue to do so in the future.***

The market price for our common stock has experienced substantial volatility in the past, and several factors could cause the price to fluctuate substantially in the future. These factors include but are not limited to:

- Fluctuations in our operating results
- Variations between our operating results and either the guidance we have furnished to the public or the published expectations of securities analysts
- Fluctuations in the valuation of companies perceived by investors to be comparable to us
- Changes in analysts' recommendations or projections
- Inquiries by the SEC, NASDAQ, law enforcement, or other regulatory bodies
- Economic developments in the storage and data management market as a whole
- International conflicts and acts of terrorism
- Announcements of new products, applications, or product enhancements by us or our competitors
- Changes in our relationships with our suppliers, customers, and channel and strategic partners
- General market conditions

In addition, the stock market has experienced volatility that has particularly affected the market prices of equity securities of many technology companies. Additionally, certain macroeconomic factors such as changes in interest rates, the market climate for the technology sector, and levels of corporate spending on information technology could also have an impact on the trading price of our stock. As a result, the market price of our common stock may fluctuate significantly in the future, and any broad market decline, as well as our own operating results, may materially and adversely affect the market price of our common stock.

Macroeconomic conditions and an IT spending slowdown in the United States as well as variations in our expected operating performance may continue to cause volatility in our stock price. We are unable to predict changes in general economic conditions and when global IT spending rates will be affected. Furthermore, if there are future reductions in either domestic or international IT spending rates, or if IT spending rates do not increase, our revenues, operating results, and stock price may continue to be adversely affected.

***Our forecasts of our revenues and earnings outlook may be inaccurate and could materially and adversely impact our business or our planned results of operations.***

Our revenues are difficult to forecast. We use a "pipeline" system, a common industry practice, to forecast revenues and trends in our business. Sales personnel monitor the status of potential business and estimate when a customer will make a purchase decision, the dollar amount of the sale and the products or services to be sold. These estimates are aggregated periodically to generate a sales pipeline. Our pipeline estimates may prove to be unreliable either in a particular quarter or over a longer period of time, in part because the "conversion rate" of the pipeline into contracts varies from customer to customer, can be difficult to estimate, and requires management judgment. Small deviations from our forecasted conversion rate may result in inaccurate plans and budgets and materially adversely impact our business or our planned results of operations. In particular, a slowdown in IT spending or weak economic conditions or evolving technology generally can reduce the conversion rate in a particular quarter as our customers' purchasing decisions are delayed, reduced in amount, or cancelled. Moreover, even after contracts have been executed, extensive analysis is required before the timing of revenue recognition can be reliably determined; this



delay reflects both the complexity of the revenue recognition rules applicable to software and the effect that the multiple element arrangements and other terms and conditions can have when these rules are applied.

***If we are unable to develop and introduce new products and respond to technological change, if our new products do not achieve market acceptance, or if we fail to manage the transition between our new and old products, or if we cannot provide the level of service and support for our new products, our operating results could be materially and adversely affected.***

Our future growth depends upon the successful development and introduction of new hardware and software products. Due to the complexity of storage subsystems and storage security appliances and the difficulty in gauging the engineering effort required to produce new products, such products are subject to significant technical risks. However, our new products may not achieve market acceptance. Additional product introductions in future periods may also impact our sales of existing products. In addition, our new products must respond to technological changes and evolving industry standards. If we are unable, for technological or other reasons, to develop and introduce new products in a timely manner in response to changing market conditions or customer requirements, or if such products do not achieve market acceptance, our operating results could be materially and adversely affected.

As new or enhanced products are introduced, we must successfully manage the transition from older products in order to minimize disruption in customers' ordering patterns, avoid excessive levels of older product inventories, and ensure that enough supplies of new products can be delivered to meet customers' demands.

As we enter into new or emerging markets, we will likely increase demands on our service and support operations and may be exposed to additional competition. We may not be able to provide products, service, and support to effectively compete for these market opportunities. Further, provision of greater levels of services from us may result in a delay in the timing of revenue recognition.

***Our gross margins may vary based on the configuration of our product and service solutions, and such variation may make it more difficult to forecast our earnings.***

We derive a significant portion of our sales from the resale of disk drives as components of our storage systems, and the resale market for hard disk drives is highly competitive and subject to intense pricing pressures. Our sales of disk drives generate lower gross margin percentages than those of our storage systems. As a result, as we sell more highly configured systems with greater disk drive content, overall gross margin percentages may be negatively affected.

Our gross margins have been and may continue to be affected by a variety of other factors, including:

- Demand for storage and data management products
- Discount levels and price competition
- Direct versus indirect and OEM sales
- Product and add-on software mix
- The mix of services as a percentage of revenue
- The mix and average selling prices of products
- The mix of disk content
- New product introductions and enhancements
- Excess inventory purchase commitments as a result of changes in demand forecasts and possible product and software defects as we transition our products
- The cost of components, manufacturing labor, and quality

Changes in service gross margins may result from various factors such as continued investments in our customer support infrastructure and changes in the mix between technical support services and professional services, as well as the timing of technical support service contract initiations and renewals.

***An increase in competition could materially and adversely affect our operating results.***

The storage markets are intensely competitive and are characterized by rapidly changing technology. In the storage market, our primary and nearline storage system products and our associated storage software portfolio compete primarily with storage system products and data management software from EMC, HDS, HP, IBM, and Sun/StorageTek. We also see Dell, Inc. as a competitor in the storage marketplace, primarily through its business partnership with EMC, allowing Dell to resell EMC storage hardware and software products. We have also historically encountered less-frequent competition from other companies, including LSI Logic. In the secondary storage market, which includes the disk-to-disk backup, compliance, and business continuity segments, our solutions compete primarily against products from EMC and Sun/StorageTek. Our NearStore VTL appliances also compete with traditional tape backup solutions in the broader data backup/recovery space. Additionally, a number of small, new companies are currently attempting to enter the storage systems and data management software markets and the near-line and NearStore VTL storage markets, some of which may become significant competitors in the future.

There has been a trend toward industry consolidation in our markets for several years. We expect this trend to continue as companies attempt to strengthen or hold their market positions in an evolving industry and as companies are acquired or are unable to continue operations. We believe that industry consolidation may result in stronger competitors that are better able to compete as sole-source vendors for customers. In addition, current and potential competitors have established or may establish cooperative relationships among themselves or with third parties. Accordingly, it is possible that new competitors or alliances among competitors may emerge and rapidly acquire significant market share. We cannot assure you that we will be able to compete successfully against current or future competitors. Competitive pressures we face could materially and adversely affect our operating results.

***We rely on a limited number of suppliers, and any disruption or termination of these supply arrangements could delay shipment of our products and could materially and adversely affect our operating results.***

We rely on a limited number of suppliers for components such as disk drives, computer boards, and microprocessors utilized in the assembly of our products. In recent years, rapid industry consolidation has led to fewer component suppliers, which could subject us to periodic supply constraints and price rigidity.

Our reliance on a limited number of suppliers involves several risks, including:

- A potential inability to obtain an adequate supply of required components because we do not have long-term supply commitments
- Supplier capacity constraints
- Price increases
- Timely delivery
- Component quality

Component quality risk is particularly significant with respect to our suppliers of disk drives. In order to meet product performance requirements, we must obtain disk drives of extremely high quality and capacity. In addition, there are periodic supply-and-demand issues for disk drives, microprocessors, and semiconductor memory components, which could result in component shortages, selective supply allocations, and increased prices of such components. We cannot assure you that we will be able to obtain our full requirements of such components in the future or that prices of such components will not increase. In addition, problems with respect to yield and quality of such components and timeliness of deliveries could occur. Disruption or termination of the supply of these components could delay shipments of our products and could materially and adversely affect our operating results. Such delays could also damage relationships with current and prospective customers and suppliers.

In addition, we license certain technology and software from third parties that are incorporated into our products. If we are unable to obtain or license the technology and software on a timely basis, we will not be able to deliver products to our customers in a timely manner.

***The loss of any contract manufacturers or the failure to accurately forecast demand for our products or successfully manage our relationships with our contract manufacturers could negatively impact our ability to manufacture and sell our products.***

We currently rely on several contract manufacturers to manufacture our products. Our reliance on our third-party contract manufacturers reduces our control over the manufacturing process, exposing us to risks, including reduced control over quality assurance, production costs, and product supply. If we should fail to effectively manage our relationships with our contract manufacturers, or if our contract manufacturers experience delays, disruptions, capacity constraints, or quality control problems in their manufacturing operations, our ability to ship products to our customers could be impaired, and our competitive position and reputation could be harmed. Qualifying a new contract manufacturer and commencing volume production are expensive and time-consuming. If we are required to change contract manufacturers or assume internal manufacturing operations, we may lose revenue and damage our customer relationships. If we inaccurately forecast demand for our products, we may have excess or inadequate inventory or incur cancellation charges or penalties, which could adversely impact our operating results. As of January 25, 2008, we have no purchase commitment under these agreements.

We intend to regularly introduce new products and product enhancements, which will require us to rapidly achieve volume production by coordinating with our contract manufacturers and suppliers. We may need to increase our material purchases, contract manufacturing capacity, and quality functions to meet anticipated demand. The inability of our contract manufacturers to provide us with adequate supplies of high-quality products or the inability to obtain raw materials could cause a delay in our ability to fulfill orders.

***Our future financial performance depends on growth in the storage and data management markets. If these markets do not continue to grow at the rates at which we forecast growth, our operating results will be materially and adversely impacted.***

All of our products address the storage and data management markets. Accordingly, our future financial performance will depend in large part on continued growth in the storage and data management markets and on our ability to adapt to emerging standards in these markets. We cannot assure you that the markets for storage and data management will continue to grow or that emerging standards in these markets will not adversely affect the growth of UNIX®, Windows®, and the World Wide Web server markets upon which we depend.

For example, we provide our open access data retention solutions to customers within the financial services, healthcare, pharmaceuticals, and government market segments, industries that are subject to various evolving governmental regulations with respect to data access, reliability, and permanence (such as Rule 17(a)(4) of the Securities Exchange Act of 1934, as amended) in the United States and in the other countries in which we operate. If our products do not meet and continue to comply with these evolving governmental regulations in this regard, customers in these market and geographical segments will not purchase our products, and therefore we will not be able to expand our product offerings in these market and geographical segments at the rates for which we have forecast.

***Significant changes to financial market conditions may affect our revenues***

The success of many of our customers is intrinsically linked to the health of the financial markets. We believe that demand for our products could be disproportionately affected by a downturn, disruption, instability in the financial markets.

***We are exposed to fluctuations in the market values of our portfolio investments and in interest rates.***

At January 25, 2008 and April 27, 2007, we had \$1,506.0 million and \$1,430.7 million in cash, cash equivalents, marketable securities and restricted cash and investments. We invest our cash in a variety of financial instruments, consisting principally of investments in corporate bonds, auction rate securities, money market funds and corporate securities, municipalities and the United States government and its agencies. These investments are subject to general credit, liquidity, market and interest rate risks, which may be exacerbated by unusual events such as the sub-prime mortgage crisis in the United States which has affected various sectors of the financial markets and led to global credit and liquidity issues. If the global credit market continues to deteriorate, our investment portfolio

may be impacted and we could determine some of our investments have experienced an other-than-temporary decline in fair value, requiring an impairment charge which could adversely impact our financial results.

We account for our investment instruments in accordance with Statement of Financial Accounting Standards No. 115, (“SFAS No. 115”), *Accounting for Certain Investments in Debt and Equity Securities*. All of the cash equivalents, marketable securities and restricted investments are treated as “available-for-sale” under SFAS No. 115. Investments in both fixed rate and floating rate interest earning instruments carry a degree of interest rate risk. Fixed rate debt securities may have their market value adversely impacted due to a rise in interest rates, while floating rate securities may produce less income than expected if interest rates fall. Due in part to these factors, our future investment income may fall short of expectations due to changes in interest rates. Currently, we do not use derivative financial instruments in our investment portfolio. Because we have the ability and intent to hold our available-for-sale investments until maturity, no gains or losses are recognized due to changes in interest rates unless such securities are sold prior to maturity. However, we may suffer losses in principal if forced to sell securities that have experienced a decline in market value because of changes in interest rates. Currently, we do not use financial derivatives to hedge our interest rate exposure.

Auction rate securities held by the Company are securities with long term nominal maturities which, in accordance with investment policy guidelines, had credit ratings of AAA and Aaa at time of purchase. Interest rates for ARS are reset through a “Dutch auction” each month, which historically has provided a liquid market for these securities.

Substantially all of our ARS are backed by pools of student loans guaranteed by the U.S. Department of Education, and we believe the credit quality of these securities is high based on this guarantee. Subsequent to January 25, 2008, we successfully reset and liquidated certain of our ARS investments; however liquidity issues in the global credit markets resulted in the failure of auctions for certain other ARS investments, with a fair value of \$67.8 million at January 25, 2008. For each failed auction, the interest rate moves to a maximum rate defined for each security, and the ARS continue to pay interest in accordance with their terms. However, the principal associated with the ARS will not be accessible until there is a successful auction or such time as other markets for ARS investments develop.

We believe that the underlying credit quality of the assets backing our ARS investments have not been impacted by the reduced liquidity of these investments. We are continuing to evaluate the credit quality, liquidity, classification and valuation of our ARS investments; however, we are not yet able to quantify the amount of impairment, if any, or change in classification in these investments at this time. If liquidity issues in the global credit market continue, or worsen, or if we experience reduced credit quality, extended illiquidity or realize reduced valuations of our ARS investments, we may determine that we have experienced an other-than-temporary decline in fair value in these investments, which could adversely impact our financial results.

***Unfavorable economic and market conditions and global disruptions could adversely affect our operating results.***

Our operating results may be adversely affected by unfavorable global economic and market conditions as well as the uncertain geopolitical environment. A reduction in demand for storage and data management caused by weakening economic conditions and decreases in corporate spending will result in decreased revenues and lower revenue growth rates. The network storage market growth declined significantly beginning in the third quarter of fiscal 2001 through fiscal 2003, causing both our revenues and operating results to decline. If the storage and data management markets grow more slowly than anticipated, or if emerging standards other than those adopted by us become increasingly accepted by these markets, our operating results could be materially and adversely affected.

Turmoil in the geopolitical environment in many parts of the world, including terrorist activities and military actions, may continue to put pressure on global economic conditions. We have no assurance that the consequences from these events will not disrupt our operations in either the U.S. or other regions of the world. Continued increases in energy prices, declining economic conditions and global credit and liquidity issues could also affect our future operating results. If the economic and market conditions in the United States and globally do not improve, or if they deteriorate, we may experience material impacts on our business, operating results, and financial condition.

***Our effective tax rate may increase or fluctuate, which could increase our income tax expense and reduce our net income.***

Our effective tax rate could be adversely affected by several factors, many of which are outside of our control, including:

- Earnings being lower than anticipated in countries where we are taxed at lower rates as compared to the U.S. statutory tax rate
- Material differences between forecasted and actual tax rates as a result of a shift in the mix of pretax profits and losses by tax jurisdiction, our ability to use tax credits, or effective tax rates by tax jurisdiction different than our estimates
- Changing tax laws, accounting standards, including SFAS No. 123R and FIN No. 48, regulations, and interpretations in multiple tax jurisdictions in which we operate, as well as the requirements of certain tax rulings
- An increase in expenses not deductible for tax purposes, including certain stock-based compensation expense, write-offs of acquired in-process research and development, and impairment of goodwill
- The tax effects of purchase accounting for acquisitions and restructuring charges that may cause fluctuations between reporting periods
- Changes in the valuation of our deferred tax assets and liabilities
- Changes in tax laws or the interpretation of such tax laws
- Tax assessments or any related tax interest or penalties, could significantly affect our income tax expense for the period in which the settlements take place
- A change in our decision to indefinitely reinvest foreign earnings

The price of our common stock could decline to the extent that our financial results are materially affected by an adverse change in our effective tax rate. We are currently undergoing federal income tax audits in the United States and several foreign tax jurisdictions. The rights to some of our intellectual property ("IP") are owned by certain of our foreign subsidiaries, and payments are made between U.S. and foreign tax jurisdictions relating to the use of this IP in a qualified cost sharing arrangement. Recently, several other U.S. companies have had their foreign IP arrangements challenged as part of IRS examinations, which has resulted in material proposed assessments and/or pending litigation. Our management does not believe, based upon information currently known to us that the final resolution of any of our audits will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows. If the ultimate determination of our taxes owed in any of these tax jurisdictions is for an amount in excess of the tax provision we have recorded or reserved for, our operating results, cash flows, and financial condition could be adversely affected.

***We may face increased risks and uncertainties related to our current or future acquisitions and nonmarketable securities, and these investments may not achieve our objectives.***

As part of our strategy, we are continuously evaluating opportunities to buy other businesses or technologies that would complement our current products, expand the breadth of our markets, or enhance our technical capabilities. We may engage in future acquisitions that dilute our stockholders' investments and cause us to use cash, to incur debt, or to assume contingent liabilities.

Acquisitions of companies entail numerous risks, and we may not be able to successfully integrate acquired operations and products or to realize anticipated synergies, economies of scale, or other value. Integration risks and issues may include, but are not limited to, key personnel retention and assimilation, management distraction, technical development, and unexpected costs and liabilities, including goodwill impairment charges. In addition, we may be unable to recover strategic investments in development stage entities. Any such problems could have a material adverse effect on our business, financial condition, and results of operations.

On occasion, we invest in nonmarketable securities of private companies. As of January 25, 2008, the carrying value of our investments in nonmarketable securities totaled \$11.2 million. Investments in nonmarketable securities are inherently risky, and some of these companies are likely to fail. Their success (or lack thereof) is dependent on these companies' product development, market acceptance, operational efficiency, and other key business success factors. In addition, depending on these companies' future prospects, they may not be able to raise additional funds when needed, or they may receive lower valuations, with less favorable investment terms than in previous financings, and our investments in them would likely become impaired.

***Risks inherent in our international operations could have a material adverse effect on our operating results.***

We conduct business internationally. For the nine-month period ended January 25, 2008, 44.8% of our total revenues were from international customers (including U.S. exports). Accordingly, our future operating results could be materially and adversely affected by a variety of factors, some of which are beyond our control, including regulatory, political, or economic conditions in a specific country or region, trade protection measures and other regulatory requirements, government spending patterns, and acts of terrorism and international conflicts.

Because a significant portion of our business is conducted outside the United States, we face exposure to adverse movements in foreign currency exchange rates. These exposures may change over time as business practices evolve, and they could have a material adverse impact on our financial results and cash flows. Our international sales are denominated in U.S. dollars and in foreign currencies. An increase in the value of the U.S. dollar relative to foreign currencies could make our products more expensive and therefore potentially less competitive in foreign markets. Conversely, lowering our price in local currency may result in lower U.S.-based revenue. A decrease in the value of the U.S. dollar relative to foreign currencies could increase the cost of local operating expenses. Additionally, we have exposures to emerging market currencies, which can have extreme currency volatility. We utilize forward and option contracts to hedge our foreign currency exposure associated with certain assets and liabilities as well as anticipated foreign currency cash flows. All balance sheet hedges are marked to market through earnings every quarter, while gains and losses on cash flow hedges are recorded in other comprehensive income until forecasted transactions occur, at which time such realized gains and losses are recognized in earnings. These hedges attempt to reduce, but do not always entirely eliminate, the impact of currency exchange movements. Factors that could have an impact on the effectiveness of our hedging program include the accuracy of forecasts and the volatility of foreign currency markets. There can be no assurance that such hedging strategies will be successful and that currency exchange rate fluctuations will not have a material adverse effect on our operating results.

Additional risks inherent in our international business activities generally include, among others, longer accounts receivable payment cycles and difficulties in managing international operations. Such factors could materially and adversely affect our future international sales and consequently our operating results.

We receive significant tax benefits from sales to our non-U.S. customers. These benefits are contingent upon existing tax regulations in the United States and in the countries in which our international operations are located. Future changes in domestic or international tax regulations could adversely affect our ability to continue to realize these tax benefits. Our effective tax rate could also be adversely affected by different and evolving interpretations of existing law or regulations. Potentially adverse tax consequences could negatively impact the operating and financial results from international operations. International operations currently benefit from a tax ruling concluded in the Netherlands.

Our operating results have not been significantly affected by seasonality in the past. In the future, as we expand our presence internationally, we may experience more seasonality in the sale of our products. For example, sales to European customers tend to be weaker in the summer months, which is our first fiscal quarter.

We cannot assure you that we will be able to maintain or increase international market demand for our products.

***If we fail to manage our expanding business effectively, our operating results could be materially and adversely affected.***

Our future operating results depend to a large extent on management's ability to successfully manage expansion and growth, including but not limited to expanding international operations, forecasting revenues, addressing new markets, controlling expenses, implementing and enhancing infrastructure, investing in people, facilities and capital equipment, and managing our assets. An unexpected decline in the growth rate of revenues without a corresponding and timely reduction in expense growth or a failure to manage other aspects of growth could materially and adversely affect our operating results.

In addition, continued expansion could strain our current management, financial, manufacturing, and other systems and may require us to implement and improve those systems. If we experience any problems with any improvement or expansion of these systems, procedures, or controls, or if these systems, procedures, or controls are not designed, implemented, or improved in a cost-effective and timely manner, our operations may be materially and adversely affected. In addition, any failure to implement, improve, and expand such systems, procedures, and controls in a timely and efficient manner could harm our growth strategy and materially and adversely affect our financial condition and ability to achieve our business objectives.

***As we continue to grow our business, we are likely to incur costs earlier than some of the anticipated benefits, which could harm our operating results. A significant percentage of our expenses are fixed, which could materially and adversely affect our net income.***

We are increasing our investment in engineering, sales, service support, and other functions to grow our business. We are likely to recognize the costs associated with these increased investments earlier than some of the anticipated benefits, and the return on these investments may be lower, or may develop more slowly, than we expect, which could harm our business.

Our expense levels are based in part on our expectations as to future sales, and a significant percentage of our expenses are fixed. As a result, if sales levels are below expectations or previously higher levels, net income will be disproportionately affected in a material and adverse manner.

***We depend on the ability of our personnel, raw materials, equipment, and products to move reasonably unimpeded around the world. Our business could be materially and adversely affected as a result of a natural disaster, terrorist acts, or other catastrophic events.***

Any political, military, world health, or other issue that hinders this movement or restricts the import or export of materials could lead to significant business disruptions. Furthermore, any strike, economic failure, or other material disruption caused by fire, floods, hurricanes, power loss, power shortages, telecommunications failures, break-ins, and similar events could also adversely affect our ability to conduct business. If such disruptions result in cancellations of customer orders or contribute to a general decrease in economic activity or corporate spending on information technology, or directly impact our marketing, manufacturing, financial, and logistics functions, our results of operations and financial condition could be materially adversely affected. In addition, our headquarters are located in Northern California, an area susceptible to earthquakes. If any significant disaster were to occur, our ability to operate our business could be impaired.

***We depend on attracting and retaining qualified technical and sales personnel. If we are unable to attract and retain such personnel, our operating results could be materially and adversely impacted.***

Our continued success depends, in part, on our ability to identify, attract, motivate, and retain qualified technical and sales personnel. Because our future success is dependent on our ability to continue to enhance and introduce new products, we are particularly dependent on our ability to identify, attract, motivate, and retain qualified engineers with the requisite education, background, and industry experience. Competition for qualified engineers, particularly in Silicon Valley, can be intense. The loss of the services of a significant number of our engineers or salespeople could be disruptive to our development efforts or business relationships and could materially and adversely affect our operating results.

***Undetected software errors, hardware errors, or failures found in new products may result in loss of or delay in market acceptance of our products, which could increase our costs and reduce our revenues. Product quality problems could lead to reduced revenue, gross margins, and net income.***

Our products may contain undetected software errors, hardware errors, or failures when first introduced or as new versions are released. Despite testing by us and by current and potential customers, errors may not be found in new products until after commencement of commercial shipments, resulting in loss of or delay in market acceptance, which could materially and adversely affect our operating results.

If we fail to remedy a product defect, we may experience a failure of a product line, temporary or permanent withdrawal from a product or market, damage to our reputation, inventory costs, or product reengineering expenses, any of which could have a material impact on our revenue, margins, and net income.

In addition, we may be subject to losses that may result or are alleged to result from defects in our products, which could subject us to claims for damages, including consequential damages. Based on our historical experience, we believe that the risk of exposure to product liability claims is currently low. However, should we experience increased exposure to product liability claims, our business could be adversely impacted.

***We are exposed to various risks related to legal proceedings or claims and protection of intellectual property rights, which could adversely affect our operating results.***

We are a party to lawsuits in the normal course of our business. Litigation can be expensive, lengthy, and disruptive to normal business operations. Moreover, the results of complex legal proceedings are difficult to predict. An unfavorable resolution of a particular lawsuit could have a material adverse effect on our business, operating results, or financial condition.

If we are unable to protect our intellectual property, we may be subject to increased competition that could materially and adversely affect our operating results. Our success depends significantly upon our proprietary technology. We rely on a combination of copyright and trademark laws, trade secrets, confidentiality procedures, contractual provisions, and patents to protect our proprietary rights. We seek to protect our software, documentation, and other written materials under trade secret, copyright, and patent laws, which afford only limited protection. Some U.S. trademarks and some U.S.-registered trademarks are registered internationally as well. We will continue to evaluate the registration of additional trademarks as appropriate. We generally enter into confidentiality agreements with our employees and with our resellers, strategic partners, and customers. We currently have multiple U.S. and international patent applications pending and multiple U.S. patents issued. The pending applications may not be approved, and if patents are issued, such patents may be challenged. If such challenges are brought, the patents may be invalidated. We cannot assure you that we will develop proprietary products or technologies that are patentable, that any issued patent will provide us with any competitive advantages or will not be challenged by third parties, or that the patents of others will not materially and adversely affect our ability to do business.

Litigation may be necessary to protect our proprietary technology. Any such litigation may be time consuming and costly. Despite our efforts to protect our proprietary rights, unauthorized parties may attempt to copy aspects of our products or to obtain and use information that we regard as proprietary. In addition, the laws of some foreign countries do not protect proprietary rights to as great an extent as do the laws of the United States. We cannot assure you that our means of protecting our proprietary rights will be adequate or that our competitors will not independently develop similar technology, duplicate our products, or design around patents issued to us or other intellectual property rights of ours.

We are subject to intellectual property infringement claims. We may, from time to time, receive claims that we are infringing third parties' intellectual property rights. Third parties may in the future claim infringement by us with respect to current or future products, patents, trademarks, or other proprietary rights. We expect that companies in the appliance market will increasingly be subject to infringement claims as the number of products and competitors in our industry segment grows and the functionality of products in different industry segments overlaps. Any such claims could be time consuming, result in costly litigation, cause product shipment delays, require us to redesign our products, or require us to enter into royalty or licensing agreements, any of which could materially and



adversely affect our operating results. Such royalty or licensing agreements, if required, may not be available on terms acceptable to us or at all.

***Our business is subject to increasingly complex corporate governance, public disclosure, accounting, and tax requirements that have increased both our costs and the risk of noncompliance.***

Because our common stock is publicly traded, we are subject to certain rules and regulations of federal, state, and financial market exchange entities charged with the protection of investors and the oversight of companies whose securities are publicly traded. These entities, including the Public Company Accounting Oversight Board, the SEC, and NASDAQ, have implemented new requirements and regulations and continue developing additional regulations and requirements in response to recent corporate scandals and laws enacted by Congress, most notably the Sarbanes-Oxley Act of 2002. Our efforts to comply with these new regulations have resulted in, and are likely to continue resulting in, increased general and administrative expenses and diversion of management time and attention from revenue-generating activities to compliance activities.

We have recently completed our evaluation of our internal controls over financial reporting as required by Section 404 of the Sarbanes-Oxley Act of 2002. Although our assessment, testing, and evaluation resulted in our conclusion that as of April 27, 2007, our internal controls over financial reporting were effective, we cannot predict the outcome of our testing in future periods. If our internal controls are ineffective in future periods, our business and reputation could be harmed. We may incur additional expenses and commitment of management's time in connection with further evaluations, either of which could materially increase our operating expenses and accordingly reduce our net income.

Because new and modified laws, regulations, and standards are subject to varying interpretations in many cases due to their lack of specificity, their application in practice may evolve over time as new guidance is provided by regulatory and governing bodies. This evolution may result in continuing uncertainty regarding compliance matters and additional costs necessitated by ongoing revisions to our disclosure and governance practices.

***Our ability to forecast earnings is limited by the impact of new accounting requirements such as SFAS No. 123R.***

The Financial Accounting Standards Board requires companies to recognize the fair value of stock options and other share-based payment compensation to employees as compensation expense in the statement of income. Option pricing models require the input of highly subjective assumptions, including the expected stock price volatility, expected life, and forfeiture rate. We have chosen to base our estimate of future volatility using the implied volatility of traded options to purchase the Company's common stock as permitted by SAB No. 107. As of April 29, 2006, the contractual life of our stock options was shortened to seven years from ten years for options issued on or after this date, and to the extent that the shorter life changes employees' exercise behavior, it may change the expected term of an option going forward. SFAS No. 123R requires us to use estimated forfeitures, and therefore the adoption of SFAS No. 123R could have a material impact on the timing of and, based on the accuracy of estimates of future actual forfeitures, the amount of stock-based compensation expense. Given the unpredictable nature of the "Black Scholes" variables and other management assumptions such as number of options to be granted, underlying strike price, and associated income tax impacts, it is very difficult to estimate stock-based compensation expense for any given quarter or year. Any changes in these highly subjective assumptions may significantly impact our ability to make accurate forecasts of future earnings and volatility of our stock price. If another party asserts that the fair value of our employee stock options is misstated, securities class action litigation could be brought against us, or the market price of our common stock could decline, or both could occur. As a result, we could incur significant losses, and our operating results may be below our expectations and those of investors and stock market analysts.

**Item 2. Unregistered Sales of Equity Securities and Use of Proceeds**

The table below sets forth information with respect to common repurchases by Network Appliance, Inc. for the third quarter of fiscal 2008:

Period	(a) Total Number of Shares Purchased	(b) Average Price Paid per Share	(c) Total Number of Shares Purchased as Part of the Repurchase Program(1)	(d) Approximate Dollar Value of Shares That May Yet be Purchased Under the Repurchase Program(2)
October 27, 2007 — November 23, 2007	3,489,497	\$ 25.61	82,206,773	\$ 610,600,446
November 24, 2007 — December 21, 2007	1,008,513	\$ 24.67	83,215,286	\$ 585,716,019
December 22, 2007 — January 25, 2008	1,300,000	\$ 23.09	84,515,286	\$ 555,696,939
Total	<u>5,798,010</u>	\$ 24.88	84,515,286	\$ 555,696,939

- (1) This amount represented total number of shares purchased under our publicly announced repurchase programs since inception.
- (2) On May 13, 2003, we announced that our Board of Directors had authorized a stock repurchase program. As of January 25, 2008, our Board of Directors had authorized the repurchase of up to \$3,023,638,730 of common stock under this program. During the three-month period ended January 25, 2008, we repurchased 5,798,010 shares of our common stock at a weighted-average price of \$24.88 per share for an aggregate purchase price of \$144,278,374. As of January 25, 2008, we had repurchased 84,515,286 shares of our common stock at a weighted-average price of \$29.20 per share for an aggregate purchase price of \$2,467,941,893 since inception of the stock repurchase program, and the remaining authorized amount for stock repurchases under this program was \$555,696,939 with no termination date.

**Item 3. Defaults upon Senior Securities**

None

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

None.

**Item 5. Other Information**

The information required by this item is incorporated by reference from our Proxy Statement for the 2007 Annual Meeting of Shareholders.

**Item 6. Exhibits**

Exhibit No	Description
2.1(6)	Agreement and Plan of Merger of Network Appliance, Inc. (a Delaware corporation) and Network Appliance, Inc. (a California corporation).
2.2(9)	Agreement and Plan of Merger dated as of November 3, 2003, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
2.3(9)	Amendment to Merger Agreement, dated as of February 9, 2004, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
2.4(15)	Agreement and Plan of Merger and Reorganization, dated as of June 15, 2005, by and among Network Appliance Inc., Dolphin Acquisition Corp. and Decru, Inc.
3.1(6)	Certificate of Incorporation of the Company.
3.2(6)	Bylaws of the Company.

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<u>Exhibit No</u>	<u>Description</u>
3.3(17)	Certificate of Amendment to the Bylaws of the Company.
4.1(6)	Reference is made to Exhibits 3.1 and 3.2.
10.1(28)*	The Company's Amended and Restated Employee Stock Purchase Plan.
10.2(7)*	The Company's Amended and Restated 1995 Stock Incentive Plan.
10.3(2)	The Company's Special Non-Officer Stock Option Plan.
10.4(28)*	The Company's Amended and Restated 1999 Stock Incentive Plan.
10.5†(3)	OEM Distribution and License Agreement, dated October 27, 1998, by and between Dell Products L.P. and the Company.
10.6(4)	OEM Distribution and License Agreement, dated November 6, 1998, by and between Fujitsu Limited and the Company.
10.15†(5)	Patent Cross License Agreement dated December 11, 2000, by and between Intel Corporation and the Company.
10.16(1)*	Form of Indemnification Agreement entered into between the Company and its directors and officers.
10.17(8)	Short Form Termination of Operative Documents, dated April 24, 2002, by and between BNP Leasing Corporation and the Company.
10.18(10)*	Spinnaker Networks, Inc. 2000 Stock Plan.
10.19(13)*	Alacritus, Inc. 2005 Stock Plan.
10.20(12)*	The Company's Fiscal Year 2005 Incentive Compensation Plan.
10.21(14)*	The Company's Deferred Compensation Plan.
10.22(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan.
10.23(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan (Chairman of the Board or any Board Committee Chairperson).
10.24(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan (Restricted Stock Agreement).
10.25(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Restricted Stock Unit Agreement).
10.26(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan.
10.27(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Change of Control).
10.28(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (China).
10.29(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Non-Employee Director Automatic Stock Option — Annual).
10.30(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Non-Employee Director Automatic Stock Option — Initial).
10.31(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (France).
10.32(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (India).
10.33(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (United Kingdom).
10.34(18)	Form of Stock Option Grant Notice and Option Agreement under the Decru, Inc. Amended and Restated 2001 Equity Incentive Plan and the 2001 Equity Incentive Plan filed under Attachment II.
10.35(18)	Form of Stock Option Grant Notice and Option Agreement under the Decru, Inc. 2001 Equity Incentive Plan and the 2001 Equity Incentive Plan filed under Attachment II.
10.36(18)	Form of Early Exercise Stock Purchase Agreement under the Decru, Inc. 2001 Equity Incentive Plan.

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<b>Exhibit No</b>	<b>Description</b>
10.37(18)	Form of Restricted Stock Bonus Grant Notice and Agreement under the Decru, Inc. 2001 Equity Incentive Plan.
10.38(19)	Asset Purchase Agreement dated June 20, 2003, by and between Auspex Systems, Inc. and the Company.
10.39(20)	Purchase and Sale Agreement dated July 27, 2004 by and between Cisco Systems, Inc. and the Company.
10.40(21)	Closing Certificate and Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.41(21)	Construction Management Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.42(21)	Lease Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.43(21)	Purchase Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.44(21)	Ground Lease, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.45(23)	Loan Agreement, dated March 31, 2006, by and between the Lenders party hereto and JP Morgan Chase Bank and Network Appliance Global Ltd.
10.46(26)	Closing Certificate and Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.47(26)	Construction Management Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.48(26)	Lease Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.49(26)	Purchase Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.50(26)	Ground Lease, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.51(25)*	SANPro Systems, Inc. 2001 U.S. Stock Option Plan.
10.52(25)*	Topio, Inc. 2004 Israeli Share Option Plan.
10.53(26)	Master Confirmation, dated December 6, 2006, by and between JP Morgan Securities Inc. and the Company.
10.54(27)	Master Confirmation, dated March 19, 2007, by and between JP Morgan Securities Inc. and the Company.
10.55(29)	Closing Certificate and Agreement, dated July 17, 2007, by and between BNP Paribas Leasing Corporation and the Company.
10.56(29)	Construction Management Agreement, dated July 17, 2007, by and between BNP Paribas Leasing Corporation and the Company.
10.57(29)	Lease Agreement, dated July 17, 2007, by and between BNP Paribas Leasing Corporation and the Company.
10.58(29)	Purchase Agreement, dated July 17, 2007, by and between BNP Paribas Leasing Corporation and the Company.
10.59(29)	Ground Lease, dated July 17, 2007, by and between BNP Leasing Corporation and the Company.
10.60(30)	Master Confirmation, dated August 13, 2007, by and between Bank of America, N.A. and the Company.
10.61(30)	Secured Credit Agreement, dated October 5, 2007, by and between the Lenders party hereto and JP Morgan Chase Bank, N.A. and the Company.

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<b>Exhibit No</b>	<b>Description</b>
10.62	Senior Unsecured Credit Agreement, dated November 2, 2007, by and between the Lenders party hereto and BNP Paribas, as syndication agent, and JP Morgan Chase Bank, National Association as administration agent and the Company.
10.63	Closing Certificate and Agreement (Moffett Business Center), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.64	Lease Agreement and Common Definitions And Provisions Agreement (Moffett Business Center), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.65	Purchase Agreement (Moffett Business Center), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.66	Closing Certificate and Agreement, (1299 Orleans) dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.67	Lease Agreement and Common Definitions And Provisions Agreement (1299 Orleans), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.68	Purchase Agreement (1299 Orleans), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
31.1	Certification of the Chief Executive Officer pursuant to Section 302(a) of the Sarbanes-Oxley Act of 2002.
31.2	Certification of the Chief Financial Officer pursuant to Section 302(a) of the Sarbanes-Oxley Act of 2002.
32.1	Certification of Chief Executive Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley Act of 2002.
32.2	Certification of Chief Financial Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley Act of 2002.

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- (1) Previously filed as an exhibit to the Company's Registration Statement on Form S-1 (No. 33-97864).
  - (2) Previously filed as an exhibit with the Company's Annual Report on Form 10-K dated July 23, 1997.
  - (3) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated December 11, 1998.
  - (4) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated March 11, 1999.
  - (5) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated March 12, 2001.
  - (6) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated December 4, 2001.
  - (7) Previously filed as an exhibit with the Company's Proxy Statement dated August 21, 1998.
  - (8) Previously filed as an exhibit with the Company's Annual Report on Form 10-K dated June 28, 2002.
  - (9) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated February 27, 2004.
  - (10) Previously filed as an exhibit with the Company's Form S-8 registration statement dated March 1, 2004.
  - (11) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 4, 2005.
  - (12) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 18, 2005.
  - (13) Previously filed as an exhibit to the Company's Form S-8 registration statement dated June 2, 2005.
  - (14) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated July 7, 2005.
  - (15) Previously filed as an exhibit to the Company's Proxy Statement dated July 8, 2005.
  - (16) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 2, 2005.
  - (17) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 19, 2006.
  - (18) Previously filed as an exhibit to the Company's Form S-8 registration statement dated September 2, 2005.
  - (19) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 3, 2003.
  - (20) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated August 31, 2004.
  - (21) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated March 7, 2006.
  - (22) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated July 8, 2005.

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- (23) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated July 11, 2006.
  - (24) Previously filed as an exhibit to the Company's Form S-8 registration statement dated October 31, 2006.
  - (25) Previously filed as an exhibit to the Company's Form S-8 registration statement dated January 5, 2007.
  - (26) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated March 7, 2007.
  - (27) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated June 26, 2007.
  - (28) Previously filed as an exhibit to the Company's Proxy Statement dated July 25, 2007.
  - (29) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 5, 2007.
  - (30) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated December 4, 2007.
- † Specified portions of this agreement have been omitted and have been filed separately with the Commission pursuant to a request for confidential treatment.
- \* Identifies management plan or compensatory plan or arrangement.

**SIGNATURE**

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

NETWORK APPLIANCE, INC.  
(Registrant)

/s/ STEVEN J. GOMO

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Steven J. Gomo  
*Executive Vice President of Finance and  
Chief Financial Officer*

Date: March 4, 2008

**EXHIBIT INDEX**

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2.3(9)	Amendment to Merger Agreement, dated as of February 9, 2004, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
2.4(15)	Agreement and Plan of Merger and Reorganization, dated as of June 15, 2005, by and among Network Appliance Inc., Dolphin Acquisition Corp, and Decru, Inc.
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10.32(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (India).
10.33(22)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (United Kingdom).
10.34(18)	Form of Stock Option Grant Notice and Option Agreement under the Decru, Inc. Amended and Restated 2001 Equity Incentive Plan and the 2001 Equity Incentive Plan filed under Attachment II.
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10.57(29)	Lease Agreement, dated July 17, 2007, by and between BNP Paribas Leasing Corporation and the Company.
10.58(29)	Purchase Agreement, dated July 17, 2007, by and between BNP Paribas Leasing Corporation and the Company.
10.59(29)	Ground Lease, dated July 17, 2007, by and between BNP Paribas Leasing Corporation and the Company.
10.60(30)	Master Confirmation, dated August 13, 2007, by and between Bank of America, N.A. and the Company.
10.61(30)	Secured Credit Agreement, dated October 5, 2007, by and between the Lenders party hereto and JP Morgan Chase Bank, N.A. and the Company.
10.62	Senior Unsecured Credit Agreement, dated November 2, 2007, by and between the Lenders party hereto and BNP Paribas, as syndication agent, and JP Morgan Chase Bank, National Association as administration agent and the Company.
10.63	Closing Certificate and Agreement (Moffett Business Center), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.64	Lease Agreement and Common Definitions And Provisions Agreement (Moffett Business Center), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.65	Purchase Agreement (Moffett Business Center), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.66	Closing Certificate and Agreement, (1299 Orleans) dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.67	Lease Agreement and Common Definitions And Provisions Agreement (1299 Orleans), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
10.68	Purchase Agreement (1299 Orleans), dated November 29, 2007, by and between BNP Leasing Corporation and the Company.
31.1	Certification of the Chief Executive Officer pursuant to Section 302(a) of the Sarbanes-Oxley Act of 2002.
31.2	Certification of the Chief Financial Officer pursuant to Section 302(a) of the Sarbanes-Oxley Act of 2002.
32.1	Certification of Chief Executive Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley Act of 2002.
32.2	Certification of Chief Financial Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley Act of 2002.

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- (1) Previously filed as an exhibit to the Company's Registration Statement on Form S-1 (No. 33-97864).
  - (2) Previously filed as an exhibit with the Company's Annual Report on Form 10-K dated July 23, 1997.
  - (3) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated December 11, 1998.
  - (4) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated March 11, 1999.
  - (5) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated March 12, 2001.
  - (6) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated December 4, 2001.
  - (7) Previously filed as an exhibit with the Company's Proxy Statement dated August 21, 1998.
  - (8) Previously filed as an exhibit with the Company's Annual Report on Form 10-K dated June 28, 2002.
  - (9) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated February 27, 2004.
  - (10) Previously filed as an exhibit with the Company's Form S-8 registration statement dated March 1, 2004.
  - (11) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 4, 2005.
  - (12) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 18, 2005.
  - (13) Previously filed as an exhibit to the Company's Form S-8 registration statement dated June 2, 2005.

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- (14) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated July 7, 2005.
  - (15) Previously filed as an exhibit to the Company's Proxy Statement dated July 8, 2005.
  - (16) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 2, 2005.
  - (17) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 19, 2006.
  - (18) Previously filed as an exhibit to the Company's Form S-8 registration statement dated September 2, 2005.
  - (19) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 3, 2003.
  - (20) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated August 31, 2004.
  - (21) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated March 7, 2006.
  - (22) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated July 8, 2005.
  - (23) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated July 11, 2006.
  - (24) Previously filed as an exhibit to the Company's Form S-8 registration statement dated October 31, 2006.
  - (25) Previously filed as an exhibit to the Company's Form S-8 registration statement dated January 5, 2007.
  - (26) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated March 7, 2007.
  - (27) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated June 26, 2007.
  - (28) Previously filed as an exhibit to the Company's Proxy Statement dated July 25, 2007.
  - (29) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 5, 2007.
  - (30) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated December 4, 2007.
- † Specified portions of this agreement have been omitted and have been filed separately with the Commission pursuant to a request for confidential treatment.
- \* Identifies management plan or compensatory plan or arrangement.



CREDIT AGREEMENT

dated as of

November 2, 2007

among

NETWORK APPLIANCE, INC., as the Borrower

The Lenders Party Hereto

BANK OF AMERICA, N.A., CITICORP USA, INC. and STANDARD CHARTERED BANK  
as Co-Documentation Agents

BNP PARIBAS,  
as Syndication Agent

and

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,  
as Administrative Agent

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J.P. MORGAN SECURITIES INC. and BNP PARIBAS SECURITIES CORP.,  
as Joint Bookrunners and Joint Lead Arrangers

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EXHIBITS:

- Exhibit A — Form of Assignment and Assumption
- Exhibit B — Form of Opinion of Loan Parties' Counsel
- Exhibit C — List of Closing Documents
- Exhibit D — Form of Subsidiary Guaranty
- Exhibit E — Form of Compliance Certificate
- Exhibit F — Form of Increasing Lender Supplement
- Exhibit G — Form of Augmenting Lender Supplement



CREDIT AGREEMENT (this "Agreement") dated as of November 2, 2007 among NETWORK APPLIANCE, INC., the LENDERS from time to time party hereto, BANK OF AMERICA, N.A., CITICORP USA, INC. and STANDARD CHARTERED BANK, as Co-Documentation Agents, BNP PARIBAS, as Syndication Agent and JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, as Administrative Agent.

The parties hereto agree as follows:

## ARTICLE I

### Definitions

SECTION 1.01. Defined Terms. As used in this Agreement, the following terms have the meanings specified below:

"ABR", when used in reference to any Loan or Borrowing, refers to a Loan, or the Loans comprising such Borrowing, bearing interest at a rate determined by reference to the Alternate Base Rate.

"Adjusted LIBO Rate" means, with respect to any Eurodollar Borrowing for any Interest Period, an interest rate per annum (rounded upwards, if necessary, to the next 1/16 of 1%) equal to (a) the LIBO Rate for such Interest Period multiplied by (b) the Statutory Reserve Rate.

"Administrative Agent" means JPMorgan Chase Bank, National Association, in its capacity as administrative agent for the Lenders hereunder.

"Administrative Questionnaire" means an Administrative Questionnaire in a form supplied by the Administrative Agent.

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

"Aggregate Commitment" means the aggregate of the Commitments of all of the Lenders, as reduced or increased from time to time pursuant to the terms and conditions hereof. As of the Effective Date, the Aggregate Commitment is \$250,000,000.

"Alternate Base Rate" means, for any day, a rate per annum equal to the greater of (a) the Prime Rate in effect on such day and (b) the Federal Funds Effective Rate in effect on such day plus 1/2 of 1%. Any change in the Alternate Base Rate due to a change in the Prime Rate or the Federal Funds Effective Rate shall be effective from and including the effective date of such change in the Prime Rate or the Federal Funds Effective Rate, respectively.

"Applicable Percentage" means, with respect to any Lender, the percentage of the total Commitments represented by such Lender's Commitment. If the Commitments have terminated or expired, the Applicable Percentages shall be determined based upon the Commitments most recently in effect, giving effect to any assignments.

"Applicable Rate" means, for any day, with respect to any Eurodollar Revolving Loan or with respect to the facility fees payable hereunder, as the case may be, the applicable rate per annum set

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forth below under the caption “Eurodollar Spread” or “Facility Fee Rate”, as the case may be, based upon the Leverage Ratio applicable on such date:

Leverage Ratio:	Eurodollar Spread	Facility Fee Rate
Category 1: ≤ 0.50 to 1.00	0.24%	0.06%
Category 2: > 0.50 to 1.00 but ≤ 1.00 to 1.00	0.33%	0.07%
Category 3: > 1.00 to 1.00 but ≤ 1.50 to 1.00	0.42%	0.08%
Category 4: > 1.50 to 1.00 but ≤ 2.00 to 1.00	0.55%	0.10%
Category 5: > 2.00 to 1.00	0.65%	0.15%

For purposes of the foregoing,

(i) if at any time the Borrower fails to deliver the Financials on or before the date the Financials are due pursuant to Section 5.01, Category 5 shall be deemed applicable for the period commencing five (5) Business Days after the required date of delivery and ending on the date which is five (5) Business Days after the Financials are actually delivered, after which the Category shall be determined in accordance with the table above as applicable;

(ii) adjustments, if any, to the Category then in effect shall be effective five (5) Business Days after the Administrative Agent has received the applicable Financials (it being understood and agreed that each change in Category shall apply during the period commencing on the effective date of such change and ending on the date immediately preceding the effective date of the next such change); and

(iii) notwithstanding the foregoing, Category 1 shall be deemed to be applicable until the Administrative Agent’s receipt of the applicable Financials for the Borrower’s first fiscal quarter ending after the Effective Date and adjustments to the Category then in effect shall thereafter be effected in accordance with the preceding paragraphs.

“Approved Fund” has the meaning assigned to such term in Section 9.04.

“Assignment and Assumption” means an assignment and assumption agreement entered into by a Lender and an assignee (with the consent of any party whose consent is required by Section 9.04), and accepted by the Administrative Agent, in the form of Exhibit A or any other form approved by the Administrative Agent.

“Augmenting Lender” has the meaning assigned to such term in Section 2.20.

“Availability Period” means the period from and including the Effective Date to but excluding the earlier of the Maturity Date and the date of termination of the Commitments in accordance with the terms of this Agreement.

“Banking Services” means each and any of the following bank services provided to the Borrower or any Subsidiary by any Lender or any of its Affiliates: (a) commercial credit cards, (b) stored

value cards and (c) treasury management services (including, without limitation, controlled disbursement, automated clearinghouse transactions, return items, overdrafts and interstate depository network services).

“Banking Services Agreement” means any agreement entered into by the Borrower or any Subsidiary in connection with Banking Services.

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

“Borrower” means Network Appliance, Inc. a Delaware corporation.

“Borrowing” means (a) Revolving Loans of the same Type, made, converted or continued on the same date and, in the case of Eurodollar Loans, as to which a single Interest Period is in effect or (b) a Swingline Loan.

“Borrowing Request” means a request by the Borrower for a Borrowing in accordance with Section 2.03.

“Burdensome Restrictions” means any consensual encumbrance or restriction of the type described in clause (a) or (b) of Section 6.06 (without giving effect to any exceptions described in clauses (i) through (v) of such Section 6.06).

“Business Day” means any day that is not a Saturday, Sunday or other day on which commercial banks in New York City are authorized or required by law to remain closed; provided that, when used in connection with a Eurodollar Loan, the term “Business Day” shall also exclude any day on which banks are not open for dealings in Dollar deposits in the London interbank market.

“Capital Lease Obligations” of any Person means the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP, and the amount of such obligations shall be the capitalized amount thereof determined in accordance with GAAP.

“Change in Control” means (a) the acquisition of ownership, directly or indirectly, beneficially or of record, by any Person or group (within the meaning of the Securities Exchange Act of 1934 and the rules of the Securities and Exchange Commission thereunder as in effect on the date hereof), of Equity Interests representing more than 40% of the aggregate ordinary voting power represented by the issued and outstanding Equity Interests of the Borrower; (b) occupation of a majority of the seats (other than vacant seats) on the board of directors of the Borrower by Persons who were neither (i) nominated by the board of directors of the Borrower nor (ii) appointed by directors so nominated; or (c) the Borrower ceasing to own, directly or indirectly, 100% of the issued and outstanding Equity Interests of each Subsidiary Guarantor except in accordance with Section 6.03.

“Change in Law” means (a) the adoption of any law, rule or regulation after the date of this Agreement, (b) any change in any law, rule or regulation or in the interpretation or application thereof by any Governmental Authority after the date of this Agreement or (c) compliance by any Lender or the Issuing Bank (or, for purposes of Section 2.15(b), by any lending office of such Lender or by such Lender’s or the Issuing Bank’s holding company, if any) with any request, guideline or directive (whether or not having the force of law) of any Governmental Authority made or issued after the date of this Agreement.

“Class”, when used in reference to any Loan or Borrowing, refers to whether such Loan, or the Loans comprising such Borrowing, are Revolving Loans or Swingline Loans.

“Code” means the Internal Revenue Code of 1986, as amended from time to time.

“Co-Documentation Agent” means each of Bank of America, N.A., Citicorp USA, Inc. and Standard Chartered Bank in its capacity as co-documentation agent for the credit facility evidenced by this Agreement.

“Commitment” means, with respect to each Lender, the commitment of such Lender to make Revolving Loans and to acquire participations in Letters of Credit and Swingline Loans hereunder, expressed as an amount representing the maximum aggregate amount of such Lender’s Revolving Credit Exposure hereunder, as such commitment may be (a) reduced or terminated from time to time pursuant to Section 2.09 and (b) reduced or increased from time to time pursuant to assignments by or to such Lender pursuant to Section 9.04. The initial amount of each Lender’s Commitment is set forth on Schedule 2.01, or in the Assignment and Assumption pursuant to which such Lender shall have assumed its Commitment, as applicable.

“Consolidated Debt for Borrowed Money” means at any time (1) the sum, without duplication, of (a) items that, in accordance with GAAP, would be classified as indebtedness on the consolidated balance sheet of Borrower and its Subsidiaries and (b) the capitalized portion of any synthetic leases minus (2) the then aggregate outstanding principal amount of Indebtedness under that certain Secured Credit Agreement dated as of October 5, 2007 by and among the Borrower and JPMorgan Chase Bank, National Association as initial lender and as administrative agent and under that certain Loan Agreement dated as of March 31, 2006 by and among Network Appliance Global Ltd. and JPMorgan Chase Bank, National Association as initial lender and as administrative agent. For purposes of clause (b) above, “capitalized portion” means, with respect to any synthetic lease, the price for which the lessee can purchase the leased property or could purchase it if the synthetic lease expired on the date of the applicable calculation of the Consolidated Debt for Borrowed Money.

“Consolidated EBITDA” means, with reference to any period, the sum of the following: (a) Consolidated Net Income for such period, *plus* (b) without duplication and to the extent deducted from revenues in determining such Consolidated Net Income, the sum of (i) Consolidated Interest Expense for such period, (ii) expense for taxes paid or accrued during such period, (iii) all amounts attributable to depreciation, (iv) amortization during such period, (v) extraordinary non-cash charges incurred other than in the ordinary course of business during such period, (vi) nonrecurring extraordinary non-cash restructuring charges, and (vii) share-based non-cash compensation expense *minus* without duplication and to the extent included in determining such Consolidated Net Income, (c) interest income, (d) extraordinary non-cash gains realized other than in the ordinary course of business and (e) any cash payments made during such period in respect of the item described in clause (vii) above subsequent to the fiscal quarter in which the relevant share-based non-cash compensation expense was incurred, all calculated for the Borrower and its Subsidiaries in accordance with GAAP on a consolidated basis. For the purposes of calculating Consolidated EBITDA for any period of four consecutive fiscal quarters (each, a “Reference Period”), (i) if at any time during such Reference Period the Borrower or any Subsidiary shall have made any Material Disposition, the Consolidated EBITDA for such Reference Period shall be reduced by an amount equal to the Consolidated EBITDA (if positive) attributable to the property that is the subject of such Material Disposition for such Reference Period or increased by an amount equal to the Consolidated EBITDA (if negative) attributable thereto for such Reference Period, and (ii) if during such Reference Period the Borrower or any Subsidiary shall have made a Material Acquisition, Consolidated EBITDA for such Reference Period shall be calculated after giving pro forma effect thereto as if such Material Acquisition occurred on the first day of such Reference Period. As used

in this definition, “Material Acquisition” means any acquisition of property or series of related acquisitions of property that (a) constitutes (i) assets comprising all or substantially all or any significant portion of a business or operating unit of a business, or (ii) all or substantially all of the common stock or other Equity Interests of a Person, and (b) involves the payment of consideration by the Borrower and its Subsidiaries in excess of \$50,000,000; and “Material Disposition” means any sale, transfer or disposition of property or series of related sales, transfers, or dispositions of property that yields gross proceeds to the Borrower or any of its Subsidiaries in excess of \$50,000,000.

“Consolidated Interest Expense” means, with reference to any period, (a) the interest expense (including without limitation interest expense under Capital Lease Obligations that is treated as interest in accordance with GAAP) of the Borrower and its Subsidiaries calculated on a consolidated basis for such period with respect to (i) all outstanding Indebtedness of the Borrower and its Subsidiaries allocable to such period in accordance with GAAP and (ii) Swap Agreements (including, without limitation, all commissions, discounts and other fees and charges owed with respect to letters of credit and bankers acceptance financing and net costs under interest rate Swap Agreements to the extent such net costs are allocable to such period in accordance with GAAP), plus (b) the implied interest component of any rents payable for any period pursuant to any so-called “synthetic lease” for such period.

“Consolidated Net Income” means, with reference to any period, the net income (or loss) of the Borrower and its Subsidiaries calculated in accordance with GAAP on a consolidated basis (without duplication) for such period.

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

“Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. “Controlling” and “Controlled” have meanings correlative thereto.

“Credit Event” means a Borrowing, the issuance of a Letter of Credit, an LC Disbursement or any of the foregoing.

“Default” means any event or condition which constitutes an Event of Default or which upon notice, lapse of time or both would, unless cured or waived, become an Event of Default.

“Disclosed Matters” means the actions, suits and proceedings and the environmental matters disclosed in Schedule 3.06 to the Disclosure Letter.

“Disclosure Letter” means the disclosure letter from the Borrower dated as of the date hereof, as amended or supplemented from time to time by the Borrower with the written consent of the Administrative Agent, delivered to the Administrative Agent for the benefit of the Lenders.

“Dollars” or “\$” refers to lawful money of the United States of America.

“Domestic Subsidiary” means any Subsidiary that is incorporated or organized under the laws of the United States of America, any state thereof or in the District of Columbia.

“Effective Date” means the date on which the conditions specified in Section 4.01 are satisfied (or waived in accordance with Section 9.02).

“Environmental Laws” means all laws, rules, regulations, codes, ordinances, orders, decrees, judgments, injunctions or notices issued or promulgated by any Governmental Authority, relating in any way to the environment, preservation or reclamation of natural resources, the management, release or threatened release of any Hazardous Material or to employee health and safety matters.

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

“Equity Interests” means shares of capital stock, partnership interests, membership interests in a limited liability company, beneficial interests in a trust or other equity ownership interests in a Person, and any warrants, options or other rights entitling the holder thereof to purchase or acquire any such equity interest.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended from time to time.

“ERISA Affiliate” means any trade or business (whether or not incorporated) that, together with the Borrower, is treated as a single employer under Section 414(b) or (c) of the Code or, solely for purposes of Section 302 of ERISA and Section 412 of the Code, is treated as a single employer under Section 414 of the Code.

“ERISA Event” means (a) any “reportable event”, as defined in Section 4043 of ERISA or the regulations issued thereunder with respect to a Plan (other than an event for which the 30-day notice period is waived); (b) the existence with respect to any Plan of an “accumulated funding deficiency” (as defined in Section 412 of the Code or Section 302 of ERISA), whether or not waived; (c) the filing pursuant to Section 412(d) of the Code or Section 303(d) of ERISA of an application for a waiver of the minimum funding standard with respect to any Plan; (d) the incurrence by the Borrower or any of its ERISA Affiliates of any liability under Title IV of ERISA with respect to the termination of any Plan; (e) the receipt by the Borrower or any ERISA Affiliate from the PBGC or a plan administrator of any notice relating to an intention to terminate any Plan or Plans or to appoint a trustee to administer any Plan; (f) the incurrence by the Borrower or any of its ERISA Affiliates of any liability with respect to the withdrawal or partial withdrawal of the Borrower or any of its ERISA Affiliates from any Plan or Multiemployer Plan; or (g) the receipt by the Borrower or any ERISA Affiliate of any notice, or the receipt by any Multiemployer Plan from the Borrower or any ERISA Affiliate of any notice, concerning the imposition upon the Borrower or any of its ERISA Affiliates of Withdrawal Liability or a determination that a Multiemployer Plan is, or is expected to be, insolvent or in reorganization, within the meaning of Title IV of ERISA.

“Eurodollar”, when used in reference to any Loan or Borrowing, refers to such Loan, or the Loans comprising such Borrowing, bearing interest at a rate determined by reference to the Adjusted LIBO Rate.

“Event of Default” has the meaning assigned to such term in Article VII.

“Excluded Taxes” means, with respect to the Administrative Agent, any Lender, the Issuing Bank or any other recipient of any payment to be made by or on account of any obligation of the

Borrower hereunder, (a) income, franchise or similar taxes imposed on (or measured by) its net income by the United States of America, or by the jurisdiction under the laws of which such recipient is organized or in which its principal office is located or, in the case of any Lender, in which its applicable lending office is located, (b) any branch profits taxes imposed by the United States of America or any similar tax imposed by any other jurisdiction and (c) in the case of a Foreign Lender (other than an assignee pursuant to a request by the Borrower under Section 2.19(b)), any withholding tax that is imposed on amounts payable to such Foreign Lender at the time such Foreign Lender becomes a party to this Agreement (or designates a new lending office) or is attributable to such Foreign Lender's failure to comply with Section 2.17(e), except to the extent that such Foreign Lender (or its assignor, if any) was entitled, at the time of designation of a new lending office (or assignment), to receive additional amounts from the Borrower with respect to such withholding tax pursuant to Section 2.17(a).

"Extended Letter of Credit" has the meaning set forth in Section 2.06(c).

"Federal Funds Effective Rate" means, for any day, the weighted average (rounded upwards, if necessary, to the next 1/100 of 1%) of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published on the next succeeding Business Day by the Federal Reserve Bank of New York, or, if such rate is not so published for any day that is a Business Day, the average (rounded upwards, if necessary, to the next 1/100 of 1%) of the quotations for such day for such transactions received by the Administrative Agent from three Federal funds brokers of recognized standing selected by it.

"Financial Officer" means the chief financial officer, principal accounting officer, treasurer or controller of the Borrower.

"Financials" means the annual or quarterly financial statements, and accompanying certificates and other documents, of the Borrower and its Subsidiaries required to be delivered pursuant to Section 5.01(a) or 5.01(b).

"Foreign Lender" means any Lender that is organized under the laws of a jurisdiction other than the United States of America or any political subdivision thereof. For purposes of this definition, the United States of America, each State thereof and the District of Columbia shall be deemed to constitute a single jurisdiction.

"GAAP" means generally accepted accounting principles in the United States of America.

"Governmental Authority" means the government of the United States of America, any other nation or any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

"Guarantee" or of by any Person (the "guarantor") means any obligation, contingent or otherwise, of the guarantor guaranteeing or having the economic effect of guaranteeing any Indebtedness or other obligation of any other Person (the "primary obligor") in any manner, whether directly or indirectly, and including any obligation of the guarantor, direct or indirect, (a) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness or other obligation or to purchase (or to advance or supply funds for the purchase of) any security for the payment thereof, (b) to purchase or lease property, securities or services for the purpose of assuring the owner of such Indebtedness or other obligation of the payment thereof, (c) to maintain working capital, equity capital or any other financial statement condition or liquidity of the primary obligor so as to enable the primary

obligor to pay such Indebtedness or other obligation or (d) as an account party in respect of any letter of credit or letter of guaranty issued to support such Indebtedness or obligation; provided, that the term Guarantee shall not include endorsements for collection or deposit in the ordinary course of business.

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

“Increasing Lender” has the meaning assigned to such term in Section 2.20.

“Incremental Term Loan” has the meaning assigned to such term in Section 2.20.

“Incremental Term Loan Amendment” has the meaning assigned to such term in Section 2.20.

“Indebtedness” of any Person means, without duplication, (a) all obligations of such Person for borrowed money, (b) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such Person upon which interest charges are paid or payable, (d) all obligations of such Person under conditional sale or other title retention agreements relating to property acquired by such Person, (e) all obligations of such Person in respect of the deferred purchase price of property or services (excluding accounts payable incurred in the ordinary course of business), (f) all Indebtedness of others secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) any Lien on property owned or acquired by such Person, whether or not the Indebtedness secured thereby has been assumed, (g) all Guarantees by such Person of Indebtedness of others, (h) all Capital Lease Obligations of such Person, (i) all obligations, contingent or otherwise, of such Person as an account party in respect of letters of credit and letters of guaranty, (j) all obligations, contingent or otherwise, of such Person in respect of bankers’ acceptances, (k) the Net Mark-to Market Exposure of all Swap Obligations of such Person, and (l) any other Off-Balance Sheet Liability. The Indebtedness of any Person shall include the Indebtedness of any other entity (including any partnership in which such Person is a general partner) to the extent such Person is liable therefor as a result of such Person’s ownership interest in or other relationship with such entity, except to the extent the terms of such Indebtedness provide that such Person is not liable therefor.

“Indemnified Taxes” means Taxes other than (i) Excluded Taxes and (ii) Other Taxes.

“Interest Election Request” means a request by the Borrower to convert or continue a Borrowing in accordance with Section 2.08.

“Interest Payment Date” means (a) with respect to any ABR Loan (other than a Swingline Loan), the last day of each March, June, September and December and the Maturity Date, (b) with respect to any Eurodollar Loan, the last day of the Interest Period applicable to the Borrowing of which such Loan is a part and, in the case of a Eurodollar Borrowing with an Interest Period of more than three months’ duration, each day prior to the last day of such Interest Period that occurs at intervals of three months’ duration after the first day of such Interest Period and the Maturity Date and (c) with respect to any Swingline Loan, the day that such Loan is required to be repaid and the Maturity Date.

“Interest Period” means with respect to any Eurodollar Borrowing, the period commencing on the date of such Borrowing and ending on the numerically corresponding day in the calendar month that is one, two, three or six months thereafter, as the Borrower may elect, or such other period as is requested by the Borrower and is acceptable to each Lender; provided, that (i) if any Interest



Period would end on a day other than a Business Day, such Interest Period shall be extended to the next succeeding Business Day unless, in the case of a Eurodollar Borrowing only, such next succeeding Business Day would fall in the next calendar month, in which case such Interest Period shall end on the next preceding Business Day and (ii) any Interest Period pertaining to a Eurodollar Borrowing that commences on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the last calendar month of such Interest Period) shall end on the last Business Day of the last calendar month of such Interest Period. For purposes hereof, the date of a Borrowing initially shall be the date on which such Borrowing is made and thereafter shall be the effective date of the most recent conversion or continuation of such Borrowing.

“Issuing Bank” means JPMorgan Chase Bank, National Association, in its capacity as the issuer of Letters of Credit hereunder, and its successors in such capacity as provided in Section 2.06(i). The Issuing Bank may, in its discretion, arrange for one or more Letters of Credit to be issued by Affiliates of the Issuing Bank, in which case the term “Issuing Bank” shall include any such Affiliate with respect to Letters of Credit issued by such Affiliate.

“LC Disbursement” means a payment made by the Issuing Bank pursuant to a Letter of Credit.

“LC Exposure” means, at any time, the sum of (a) the aggregate undrawn amount of all outstanding Letters of Credit at such time plus (b) the aggregate amount of all LC Disbursements that have not yet been reimbursed by or on behalf of the Borrower at such time. The LC Exposure of any Lender at any time shall be its Applicable Percentage of the total LC Exposure at such time.

“Lenders” means the Persons listed on Schedule 2.01 and any other Person that shall have become a Lender hereunder pursuant to an Assignment and Assumption, other than any such Person that ceases to be a party hereto pursuant to an Assignment and Assumption. Unless the context otherwise requires, the term “Lenders” includes the Swingline Lender.

“Letter of Credit” means any letter of credit issued pursuant to this Agreement.

“Leverage Ratio” means the ratio, determined as of the end of each fiscal quarter of the Borrower, of Consolidated Debt for Borrowed Money as of the end of such fiscal quarter to Consolidated EBITDA for the period of 4 consecutive fiscal quarters ending with the end of such fiscal quarter.

“LIBO Rate” means, with respect to any Eurodollar Borrowing for any Interest Period, the rate appearing on Reuters BBA Libor Rates Page 3750 (or on any successor or substitute page of such Service, or any successor to or substitute for such Service, providing rate quotations comparable to those currently provided on such page of such Service, as determined by the Administrative Agent from time to time for purposes of providing quotations of interest rates applicable to deposits in Dollars in the London interbank market) at approximately 11:00 a.m., London time, two (2) Business Days prior to the commencement of such Interest Period, as the rate for deposits in Dollars with a maturity comparable to such Interest Period. In the event that such rate is not available at such time for any reason, then the “LIBO Rate” with respect to such Eurodollar Borrowing for such Interest Period shall be the rate at which deposits in Dollars of \$5,000,000 and for a maturity comparable to such Interest Period are offered by the principal London office of the Administrative Agent in immediately available funds in the London interbank market at approximately 11:00 a.m., London time, two (2) Business Days prior to the commencement of such Interest Period.

“Lien” means, with respect to any asset, (a) any mortgage, deed of trust, lien, pledge, hypothecation, encumbrance, charge or other security interest in, on or of such asset and (b) the interest of

a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement (or any financing lease having substantially the same economic effect as any of the foregoing) relating to such asset.

“Liquidity” means, with respect to the Borrower and its Subsidiaries as of any date of determination, the sum of all unrestricted cash and unrestricted Permitted Investments which are not subject to any Lien (other than as permitted under Section 6.02(e)) and which would be included on the consolidated balance sheet of the Borrower and such Subsidiaries in accordance with GAAP as of such date of determination.

“Loan Documents” means this Agreement, the Subsidiary Guaranty, any promissory notes executed and delivered pursuant to Section 2.10(e) and any and all other instruments and documents executed and delivered in connection with any of the foregoing.

“Loan Parties” means, collectively, the Borrower and the Subsidiary Guarantors.

“Loans” means the loans made by the Lenders to the Borrower pursuant to this Agreement.

“Material Adverse Effect” means a material adverse effect on (a) the business, assets, operations or condition, financial or otherwise, of the Borrower and its Subsidiaries taken as a whole, or (b) the ability of the Borrower or any other Loan Party to perform any of its obligations under this Agreement or any other Loan Document or (c) the rights of or benefits available to the Lenders under this Agreement or any other Loan Document.

“Material Indebtedness” means Indebtedness (other than the Loans and Letters of Credit), or obligations in respect of one or more Swap Agreements, of any one or more of the Borrower and its Subsidiaries in an aggregate principal amount exceeding \$50,000,000. For purposes of determining Material Indebtedness, the “principal amount” of the obligations of the Borrower or any Subsidiary in respect of any Swap Agreement at any time shall be the maximum aggregate amount (giving effect to any netting agreements) that the Borrower or such Subsidiary would be required to pay if such Swap Agreement were terminated at such time.

“Material Subsidiary” means each Subsidiary (a) which, as of the most recent fiscal quarter of the Borrower, for the period covering the then most recently ended fiscal year and the portion of the then current fiscal year ending at the end of such fiscal quarter, for which financial statements have been delivered pursuant to Section 5.01, contributed greater than five percent (5%) of the Borrower’s Consolidated EBITDA for such period or (b) which contributed greater than five percent (5%) of the Borrower’s Consolidated Total Assets as of such date.

“Maturity Date” means November 2, 2012.

“Moody’s” means Moody’s Investors Service, Inc.

“Multiemployer Plan” means a multiemployer plan as defined in Section 4001(a)(3) of ERISA.

“Net Mark-to-Market Exposure” of a Person means, as of any date of determination, the excess (if any) of all unrealized losses over all unrealized profits of such Person arising from each Swap Agreement transaction. “Unrealized losses” means the fair market value of the cost to such Person of replacing such transaction as of the date of determination (assuming such transaction were to be

terminated as of that date), and “unrealized profits” means the fair market value of the gain to such Person of replacing such transaction as of the date of determination (assuming such transaction was to be terminated as of that date).

“Obligations” means all indebtedness (including interest accruing during the pendency of any bankruptcy, insolvency, receivership or other similar proceeding, regardless of whether allowed or allowable in such proceeding), obligations and liabilities of any of the Borrower and its Subsidiaries to any of the Lenders and the Administrative Agent, individually or collectively, existing on the Effective Date or arising thereafter, direct or indirect, joint or several, absolute or contingent, matured or unmatured, liquidated or unliquidated, secured or unsecured, arising by contract, operation of law or otherwise, arising or incurred under this Agreement or any of the other Loan Documents or to the Lenders or any of their Affiliates under any Swap Agreement or Banking Services Agreement or in respect of any of the Loans made or reimbursement or other obligations incurred or any of the Letters of Credit or other instruments at any time evidencing any thereof.

“Off-Balance Sheet Liability” of a Person means (a) any repurchase obligation or liability of such Person with respect to accounts or notes receivable sold by such Person that is related to retained credit risk, or (b) any indebtedness, liability or obligation under any so-called “synthetic lease” transaction entered into by such Person.

“Other Taxes” means any and all present or future stamp or documentary taxes or any other excise or property taxes, charges or similar levies arising from any payment made hereunder or from the execution, delivery or enforcement of, or otherwise with respect to, this Agreement or any other Loan Document.

“Participant” has the meaning set forth in Section 9.04.

“PBGC” means the Pension Benefit Guaranty Corporation referred to and defined in ERISA and any successor entity performing similar functions.

“Permitted Encumbrances” means:

- (a) Liens imposed by law for Taxes or other governmental charges that are not yet due or are being contested in compliance with Section 5.04;
- (b) carriers’, warehousemen’s, mechanics’, materialmen’s, repairmen’s, landlord’s and other like Liens imposed by law, arising in the ordinary course of business and securing obligations that are not overdue by more than sixty (60) days or are being contested in compliance with Section 5.04;
- (c) pledges and deposits made in the ordinary course of business in compliance with workers’ compensation, unemployment insurance and other social security laws or regulations;
- (d) deposits to secure the performance of bids, trade contracts, leases, statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature, in each case in the ordinary course of business;
- (e) judgment liens in respect of judgments that do not constitute an Event of Default under clause (k) of Article VII;

(f) easements, zoning restrictions, rights-of-way and similar encumbrances on real property imposed by law or arising in the ordinary course of business that do not secure any monetary obligations and do not materially detract from the value of the affected property or interfere in any material respect with the ordinary conduct of business of the Borrower or any Subsidiary;

(g) leases or subleases granted to other Persons and not interfering in any material respect with the business of the lessor or sublessor;

(h) Liens arising from precautionary Uniform Commercial Code filings or similar filings relating to operating leases;

(i) Liens in favor of customs and revenue authorities arising as a matter of law to secure payment of customs duties in connection with the importation of goods;

(j) Liens on insurance proceeds securing the premium of financed insurance proceeds;

(k) Liens on cash collateral to secure letters of credit, bank guarantees and banker's acceptances and Swap Agreements;

(l) licenses of intellectual property in the ordinary course of business; and

(m) any interest or title of a lessor or sublessor under any lease of real property or personal property;

provided that the term "Permitted Encumbrances" shall not include any Lien securing Indebtedness.

"Permitted Investments" means:

(a) direct obligations of, or obligations the principal of and interest on which are unconditionally guaranteed by, the United States of America (or by any agency thereof to the extent such obligations are backed by the full faith and credit of the United States of America), in each case maturing within one year from the date of acquisition thereof;

(b) investments in commercial paper maturing within 365 days from the date of acquisition thereof and having, at such date of acquisition, a rating of "A-2" (or better) from S&P or "P-2" (or better) from Moody's;

(c) investments in certificates of deposit, banker's acceptances and time deposits maturing within 180 days from the date of acquisition thereof issued or guaranteed by or placed with, and money market deposit accounts issued or offered by, any domestic office of any commercial bank organized under the laws of the United States of America or any State thereof or any other country which has a combined capital and surplus and undivided profits of not less than \$500,000,000;

(d) fully collateralized repurchase agreements with a term of not more than thirty (30) days for securities described in clause (a) above and entered into with a financial institution satisfying the criteria described in clause (c) above;

(e) money market funds that (i) comply with the criteria set forth in Securities and Exchange Commission Rule 2a-7 under the Investment Company Act of 1940, as amended, to the

extent such money market fund is governed thereby, (ii) are rated AA by S&P and Aa by Moody's and (iii) have portfolio assets of at least \$5,000,000,000;

(f) investments described in Exhibit G, with a valuation percentage of greater than 0%; and

(g) investments made pursuant to a cash management investment policy approved by the board of directors of the Person making such investment and as in effect on the Effective Date, as such policy may be amended or otherwise modified from time to time with the written consent of the Administrative Agent.

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

“Plan” means any employee pension benefit plan (other than a Multiemployer Plan) subject to the provisions of Title IV of ERISA or Section 412 of the Code or Section 302 of ERISA, and in respect of which the Borrower or any ERISA Affiliate is (or, if such plan were terminated, would under Section 4069 of ERISA be deemed to be) an “employer” as defined in Section 3(5) of ERISA.

“Prime Rate” means the rate of interest per annum publicly announced from time to time by JPMorgan Chase Bank, National Association as its prime rate in effect at its principal office in New York City; each change in the Prime Rate shall be effective from and including the date such change is publicly announced as being effective.

“Register” has the meaning set forth in Section 9.04.

“Related Parties” means, with respect to any specified Person, such Person's Affiliates and the respective directors, officers, employees, agents and advisors of such Person and such Person's Affiliates.

“Required Lenders” means, at any time, Lenders having Revolving Credit Exposures and unused Commitments representing more than 50% of the sum of the total Revolving Credit Exposures and unused Commitments at such time.

“Revolving Credit Exposure” means, with respect to any Lender at any time, the sum of the outstanding principal amount of such Lender's Revolving Loans and its LC Exposure and Swingline Exposure at such time.

“Revolving Loan” means a Loan made pursuant to Section 2.01.

“S&P” means Standard & Poor's.

“Sale and Leaseback Transaction” means any sale or other transfer of assets or property by any Person with the intent to lease any such asset or property as lessee.

“Statutory Reserve Rate” means a fraction (expressed as a decimal), the numerator of which is the number one and the denominator of which is the number one minus the aggregate of the maximum reserve percentages (including any marginal, special, emergency or supplemental reserves) expressed as a decimal established by the Board to which the Administrative Agent is subject, with respect to the Adjusted LIBO Rate, for eurocurrency funding (currently referred to as “Eurocurrency Liabilities” in Regulation D of the Board). Such reserve percentages shall include those imposed

pursuant to such Regulation D. Eurodollar Loans shall be deemed to constitute eurocurrency funding and to be subject to such reserve requirements without benefit of or credit for proration, exemptions or offsets that may be available from time to time to any Lender under such Regulation D or any comparable regulation. The Statutory Reserve Rate shall be adjusted automatically on and as of the effective date of any change in any reserve percentage.

“Subordinated Indebtedness” means any Indebtedness of the Borrower or any Subsidiary the payment of which is subordinated to payment of the obligations under the Loan Documents to the written satisfaction of the Administrative Agent.

“Subordinated Indebtedness Documents” means any document, agreement or instrument evidencing any Subordinated Indebtedness or entered into in connection with any Subordinated Indebtedness.

“subsidiary” means, with respect to any Person (the “parent”) at any date, any corporation, limited liability company, partnership, association or other entity the accounts of which would be consolidated with those of the parent in the parent’s consolidated financial statements if such financial statements were prepared in accordance with GAAP as of such date, as well as any other corporation, limited liability company, partnership, association or other entity (a) of which securities or other ownership interests representing more than 50% of the equity or more than 50% of the ordinary voting power or, in the case of a partnership, more than 50% of the general partnership interests are, as of such date, owned, controlled or held, or (b) that is, as of such date, otherwise Controlled, by the parent or one or more subsidiaries of the parent or by the parent and one or more subsidiaries of the parent.

“Subsidiary” means any subsidiary of the Borrower.

“Subsidiary Guarantor” means each Material Subsidiary that is a Domestic Subsidiary. The Subsidiary Guarantors on the Effective Date are identified as such in Schedule 3.01 to the Disclosure Letter.

“Subsidiary Guaranty” means that certain Guaranty dated as of the Effective Date in the form of Exhibit D (including any and all supplements thereto) and executed by each Subsidiary Guarantor, and any other guaranty agreements as are requested by the Administrative Agent and its counsel, in each case as amended, restated, supplemented or otherwise modified from time to time.

“Swap Agreement” means any agreement with respect to any swap, forward, future or derivative transaction or option or similar agreement involving, or settled by reference to, one or more rates, currencies, commodities, equity or debt instruments or securities, or economic, financial or pricing indices or measures of economic, financial or pricing risk or value or any similar transaction or any combination of these transactions; provided that no phantom stock or similar plan providing for payments only on account of services provided by current or former directors, officers, employees or consultants of the Borrower or the Subsidiaries shall be a Swap Agreement.

“Swap Obligations” of a Person means any and all obligations of such Person, whether absolute or contingent and howsoever and whensoever created, arising, evidenced or acquired (including all renewals, extensions and modifications thereof and substitutions therefor), under (a) any and all Swap Agreements, and (b) any and all cancellations, buy backs, reversals, terminations or assignments of any such Swap Agreement transaction.

“Swingline Exposure” means, at any time, the aggregate principal amount of all Swingline Loans outstanding at such time. The Swingline Exposure of any Lender at any time shall be its Applicable Percentage of the total Swingline Exposure at such time.

“Swingline Lender” means JPMorgan Chase Bank, National Association, in its capacity as lender of Swingline Loans hereunder.

“Swingline Loan” means a Loan made pursuant to Section 2.05.

“Syndication Agent” means BNP Paribas in its capacity as syndication agent for the credit facility evidenced by this Agreement.

“Taxes” means any and all present or future taxes, levies, imposts, duties, deductions, charges or withholdings imposed by any Governmental Authority.

“Transactions” means the execution, delivery and performance by the applicable Loan Parties of this Agreement and the other Loan Documents, the borrowing of Loans and other credit extensions, the use of the proceeds thereof and the issuance of Letters of Credit hereunder.

“Type”, when used in reference to any Loan or Borrowing, refers to whether the rate of interest on such Loan, or on the Loans comprising such Borrowing, is determined by reference to the Adjusted LIBO Rate or the Alternate Base Rate.

“Withdrawal Liability” means liability to a Multiemployer Plan as a result of a complete or partial withdrawal from such Multiemployer Plan, as such terms are defined in Part I of Subtitle E of Title IV of ERISA.

SECTION 1.02. Classification of Loans and Borrowings. For purposes of this Agreement, Loans may be classified and referred to by Class (e.g., a “Revolving Loan”) or by Type (e.g., a “Eurodollar Loan”) or by Class and Type (e.g., a “Eurodollar Revolving Loan”). Borrowings also may be classified and referred to by Class (e.g., a “Revolving Borrowing”) or by Type (e.g., a “Eurodollar Borrowing”) or by Class and Type (e.g., a “Eurodollar Revolving Borrowing”).

SECTION 1.03. Terms Generally. The definitions of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words “include”, “includes” and “including” shall be deemed to be followed by the phrase “without limitation”. The word “will” shall be construed to have the same meaning and effect as the word “shall”. Unless the context requires otherwise (a) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, restated, supplemented or otherwise modified (subject to any restrictions on such amendments, restatements supplements or modifications set forth herein), (b) any reference herein to any Person shall be construed to include such Person’s successors and assigns, (c) the words “herein”, “hereof” and “hereunder”, and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof, (d) all references herein to Articles, Sections, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Exhibits to this Agreement and Schedules to the Disclosure Letter and (e) the words “asset” and “property” shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

SECTION 1.04. Accounting Terms; GAAP. Except as otherwise expressly provided herein, all terms of an accounting or financial nature shall be construed in accordance with GAAP, as in effect from time to time; provided that, if the Borrower notifies the Administrative Agent that the Borrower requests an amendment to any provision hereof to eliminate the effect of any change occurring after the date hereof in GAAP or in the application thereof on the operation of such provision (or if the Administrative Agent notifies the Borrower that the Required Lenders request an amendment to any provision hereof for such purpose), regardless of whether any such notice is given before or after such change in GAAP or in the application thereof, then such provision shall be interpreted on the basis of GAAP as in effect and applied immediately before such change shall have become effective until such notice shall have been withdrawn or such provision amended in accordance herewith.

## ARTICLE II

### The Credits

SECTION 2.01. Commitments. Subject to the terms and conditions set forth herein, each Lender agrees to make Revolving Loans to the Borrower in Dollars from time to time during the Availability Period in an aggregate principal amount that will not result in (a) such Lender's Revolving Credit Exposure exceeding such Lender's Commitment or (b) the sum of the total Revolving Credit Exposures exceeding the total Commitments. Within the foregoing limits and subject to the terms and conditions set forth herein, the Borrower may borrow, prepay and reborrow Revolving Loans.

SECTION 2.02. Loans and Borrowings. (a) Each Revolving Loan shall be made as part of a Borrowing consisting of Revolving Loans made by the Lenders ratably in accordance with their respective Commitments. The failure of any Lender to make any Loan required to be made by it shall not relieve any other Lender of its obligations hereunder; provided that the Commitments of the Lenders are several and no Lender shall be responsible for any other Lender's failure to make Loans as required.

(b) Subject to Section 2.14, each Borrowing shall be comprised entirely of ABR Loans or Eurodollar Loans as the Borrower may request in accordance herewith. Each Swingline Loan shall be an ABR Loan. Each Lender at its option may make any Eurodollar Loan by causing any domestic or foreign branch or Affiliate of such Lender to make such Loan; provided that any exercise of such option shall not affect the obligation of the Borrower to repay such Loan in accordance with the terms of this Agreement.

(c) At the commencement of each Interest Period for any Eurodollar Borrowing, such Borrowing shall be in an aggregate amount that is an integral multiple of \$1,000,000 and not less than \$1,000,000. At the time that each ABR Borrowing is made, such Borrowing shall be in an aggregate amount that is an integral multiple of \$1,000,000 and not less than \$1,000,000; provided that an ABR Borrowing may be in an aggregate amount that is equal to the entire unused balance of the Aggregate Commitment or that is required to finance the reimbursement of an LC Disbursement as contemplated by Section 2.06(e). Each Swingline Loan shall be in an amount that is an integral multiple of \$100,000 and not less than \$500,000. Borrowings of more than one Type and Class may be outstanding at the same time; provided that there shall not at any time be more than a total of fifteen (15) Eurodollar Borrowings outstanding.

(d) Notwithstanding any other provision of this Agreement, the Borrower shall not be entitled to request, or to elect to convert or continue, any Borrowing as a Eurodollar Loan if the Interest Period requested with respect thereto would end after the Maturity Date.



SECTION 2.03. Requests for Borrowings. To request a Borrowing, the Borrower shall notify the Administrative Agent of such request by telephone (a) in the case of a Eurodollar Borrowing, not later than 11:00 a.m., New York City time, three (3) Business Days before the date of the proposed Borrowing or (b) in the case of an ABR Borrowing, not later than 11:00 a.m., New York City time, one Business Day before the date of the proposed Borrowing; provided that any such notice of an ABR Borrowing to finance the reimbursement of an LC Disbursement as contemplated by Section 2.06(e) may be given not later than 10:00 a.m., New York City time, on the date of the proposed Borrowing. Each such telephonic Borrowing Request shall be irrevocable and shall be confirmed promptly by hand delivery or teletype to the Administrative Agent of a written Borrowing Request in a form approved by the Administrative Agent and signed by the Borrower. Each such telephonic and written Borrowing Request shall specify the following information in compliance with Section 2.02:

- (i) the aggregate amount of the requested Borrowing;
- (ii) the date of such Borrowing, which shall be a Business Day;
- (iii) whether such Borrowing is to be an ABR Borrowing or a Eurodollar Borrowing;
- (iv) in the case of a Eurodollar Borrowing, the initial Interest Period to be applicable thereto, which shall be a period contemplated by the definition of the term "Interest Period"; and
- (v) the location and number of the Borrower's account to which funds are to be disbursed, which shall comply with the requirements of Section 2.07.

If no election as to the Type of Borrowing is specified, then the requested Borrowing shall be an ABR Borrowing. If no Interest Period is specified with respect to any requested Eurodollar Borrowing, then the Borrower shall be deemed to have selected an Interest Period of one month's duration. Promptly following receipt of a Borrowing Request in accordance with this Section, the Administrative Agent shall advise each Lender of the details thereof and of the amount of such Lender's Loan to be made as part of the requested Borrowing.

SECTION 2.04. Intentionally Omitted.

SECTION 2.05. Swingline Loans. (a) Subject to the terms and conditions set forth herein, the Swingline Lender agrees to make Swingline Loans in Dollars to the Borrower from time to time during the Availability Period, in an aggregate principal amount at any time outstanding that will not result in (i) the aggregate principal amount of outstanding Swingline Loans exceeding \$10,000,000 or (ii) the sum of the total Revolving Credit Exposures exceeding the Aggregate Commitment; provided that the Swingline Lender shall not be required to make a Swingline Loan to refinance an outstanding Swingline Loan. Within the foregoing limits and subject to the terms and conditions set forth herein, the Borrower may borrow, prepay and reborrow Swingline Loans.

(b) To request a Swingline Loan, the Borrower shall notify the Administrative Agent of such request by telephone (confirmed by teletype), not later than 12:00 noon, New York City time, on the day of a proposed Swingline Loan. Each such notice shall be irrevocable and shall specify the requested date (which shall be a Business Day) and amount of the requested Swingline Loan. The Administrative Agent will promptly advise the Swingline Lender of any such notice received from the Borrower. The Swingline Lender shall make each Swingline Loan available to the Borrower by means of a credit to the general deposit account of the Borrower with the Swingline Lender (or, in the case of a Swingline Loan made to finance the reimbursement of an LC Disbursement as provided in Section 2.06(e), by remittance to the Issuing Bank) by 3:00 p.m., New York City time, on the requested date of such Swingline Loan.

(c) The Swingline Lender may by written notice given to the Administrative Agent not later than 10:00 a.m., New York City time, on any Business Day require the Lenders to acquire participations on such Business Day in all or a portion of the Swingline Loans outstanding. Such notice shall specify the aggregate amount of Swingline Loans in which Lenders will participate. Promptly upon receipt of such notice, the Administrative Agent will give notice thereof to each Lender, specifying in such notice such Lender's Applicable Percentage of such Swingline Loan or Loans. Each Lender hereby absolutely and unconditionally agrees, upon receipt of notice as provided above, to pay to the Administrative Agent, for the account of the Swingline Lender, such Lender's Applicable Percentage of such Swingline Loan or Loans. Each Lender acknowledges and agrees that its obligation to acquire participations in Swingline Loans pursuant to this paragraph is absolute and unconditional and shall not be affected by any circumstance whatsoever, including the occurrence and continuance of a Default or reduction or termination of the Commitments, and that each such payment shall be made without any offset, abatement, withholding or reduction whatsoever. Each Lender shall comply with its obligation under this paragraph by wire transfer of immediately available funds, in the same manner as provided in Section 2.07 with respect to Loans made by such Lender (and Section 2.07 shall apply, mutatis mutandis, to the payment obligations of the Lenders), and the Administrative Agent shall promptly pay to the Swingline Lender the amounts so received by it from the Lenders. The Administrative Agent shall notify the Borrower of any participations in any Swingline Loan acquired pursuant to this paragraph, and thereafter payments in respect of such Swingline Loan shall be made to the Administrative Agent and not to the Swingline Lender. Any amounts received by the Swingline Lender from the Borrower (or other party on behalf of the Borrower) in respect of a Swingline Loan after receipt by the Swingline Lender of the proceeds of a sale of participations therein shall be promptly remitted to the Administrative Agent; any such amounts received by the Administrative Agent shall be promptly remitted by the Administrative Agent to the Lenders that shall have made their payments pursuant to this paragraph and to the Swingline Lender, as their interests may appear; provided that any such payment so remitted shall be repaid to the Swingline Lender or to the Administrative Agent, as applicable, if and to the extent such payment is required to be refunded to the Borrower for any reason. The purchase of participations in a Swingline Loan pursuant to this paragraph shall not relieve the Borrower of any default in the payment thereof.

SECTION 2.06. Letters of Credit. (a) General. Subject to the terms and conditions set forth herein, the Borrower may request the issuance of Letters of Credit denominated in Dollars for its own account, in a form reasonably acceptable to the Administrative Agent and the Issuing Bank, at any time and from time to time during the Availability Period. In the event of any inconsistency between the terms and conditions of this Agreement and the terms and conditions of any form of letter of credit application or other agreement submitted by the Borrower to, or entered into by the Borrower with, the Issuing Bank relating to any Letter of Credit, the terms and conditions of this Agreement shall control.

(b) Notice of Issuance, Amendment, Renewal, Extension; Certain Conditions. To request the issuance of a Letter of Credit (or the amendment, renewal or extension of an outstanding Letter of Credit), the Borrower shall hand deliver or telecopy (or transmit by electronic communication, if arrangements for doing so have been approved by the Issuing Bank) to the Issuing Bank and the Administrative Agent (reasonably in advance of the requested date of issuance, amendment, renewal or extension) a notice requesting the issuance of a Letter of Credit, or identifying the Letter of Credit to be amended, renewed or extended, and specifying the date of issuance, amendment, renewal or extension (which shall be a Business Day), the date on which such Letter of Credit is to expire (which shall comply with paragraph (c) of this Section), the amount of such Letter of Credit, the name and address of the beneficiary thereof and such other information as shall be necessary to prepare, amend, renew or extend such Letter of Credit. If requested by the Issuing Bank, the Borrower also shall submit a letter of credit application on the Issuing Bank's standard form in connection with any request for a Letter of Credit. A Letter of Credit shall be issued, amended,

renewed or extended only if (and upon issuance, amendment, renewal or extension of each Letter of Credit the Borrower shall be deemed to represent and warrant that), after giving effect to such issuance, amendment, renewal or extension (i) the amount of LC Exposure shall not exceed \$50,000,000 and (ii) the total Revolving Credit Exposures shall not exceed the Aggregate Commitment.

(c) Expiration Date. Each Letter of Credit shall expire at or prior to the close of business on the earlier of (i) the date one year after the date of the issuance of such Letter of Credit (or, in the case of any renewal or extension thereof, one year after such renewal or extension) and (ii) the date that is five (5) Business Days prior to the Maturity Date; provided that, upon the Borrower's request, any such Letter of Credit which expires in the final year prior to the Maturity Date may have an expiry date which is one (1) year after the Maturity Date if cash collateralized or covered by standby letter(s) of credit in compliance with Section 2.06(j) below (each such Letter of Credit, an "Extended Letter of Credit").

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

(e) Reimbursement. If the Issuing Bank shall make any LC Disbursement in respect of a Letter of Credit, the Borrower shall reimburse such LC Disbursement by paying to the Administrative Agent in Dollars the amount equal to such LC Disbursement, calculated as of the date the Issuing Bank made such LC Disbursement not later than 12:00 noon, New York City time, on the date that such LC Disbursement is made, if the Borrower shall have received notice of such LC Disbursement prior to 10:00 a.m., New York City time, on such date, or, if such notice has not been received by the Borrower prior to such time on such date, then not later than 12:00 noon, New York City time, on (i) the Business Day that the Borrower receives such notice, if such notice is received prior to 10:00 a.m., New York City time, on the day of receipt, or (ii) the Business Day immediately following the day that the Borrower receives such notice, if such notice is not received prior to such time on the day of receipt; provided that, if such LC Disbursement is not less than \$1,000,000, the Borrower may, subject to the conditions to borrowing set forth herein, request in accordance with Section 2.03 that such payment be financed with an ABR Borrowing or Swingline Loan in an equivalent amount of such LC Disbursement and, to the extent so financed, the Borrower's obligation to make such payment shall be discharged and replaced by the resulting ABR Borrowing or Swingline Loan. If the Borrower fails to make such payment when due, the Administrative Agent shall notify each Lender of the applicable LC Disbursement, the payment then due from the Borrower in respect thereof and such Lender's Applicable Percentage thereof. Promptly following receipt of such notice, each Lender shall pay to the Administrative Agent its Applicable Percentage of the payment then due from the Borrower, in the same manner as provided in Section 2.07 with respect to Loans made by such Lender (and Section 2.07 shall apply, mutatis mutandis, to the payment obligations of the

Lenders), and the Administrative Agent shall promptly pay to the Issuing Bank the amounts so received by it from the Lenders. Promptly following receipt by the Administrative Agent of any payment from the Borrower pursuant to this paragraph, the Administrative Agent shall distribute such payment to the Issuing Bank or, to the extent that Lenders have made payments pursuant to this paragraph to reimburse the Issuing Bank, then to such Lenders and the Issuing Bank as their interests may appear. Any payment made by a Lender pursuant to this paragraph to reimburse the Issuing Bank for any LC Disbursement (other than the funding of ABR Revolving Loans or a Swingline Loan as contemplated above) shall not constitute a Loan and shall not relieve the Borrower of its obligation to reimburse such LC Disbursement.

(f) Obligations Absolute. The Borrower's obligation to reimburse LC Disbursements as provided in paragraph (e) of this Section shall be absolute, unconditional and irrevocable, and shall be performed strictly in accordance with the terms of this Agreement under any and all circumstances whatsoever and irrespective of (i) any lack of validity or enforceability of any Letter of Credit or this Agreement, or any term or provision therein, (ii) any draft or other document presented under a Letter of Credit proving to be forged, fraudulent or invalid in any respect or any statement therein being untrue or inaccurate in any respect, (iii) payment by the Issuing Bank under a Letter of Credit against presentation of a draft or other document that does not comply with the terms of such Letter of Credit, or (iv) any other event or circumstance whatsoever, whether or not similar to any of the foregoing, that might, but for the provisions of this Section, constitute a legal or equitable discharge of, or provide a right of setoff against, the Borrower's obligations hereunder. Neither the Administrative Agent, the Lenders nor the Issuing Bank, nor any of their Related Parties, shall have any liability or responsibility by reason of or in connection with the issuance or transfer of any Letter of Credit or any payment or failure to make any payment thereunder (irrespective of any of the circumstances referred to in the preceding sentence), or any error, omission, interruption, loss or delay in transmission or delivery of any draft, notice or other communication under or relating to any Letter of Credit (including any document required to make a drawing thereunder), any error in interpretation of technical terms or any consequence arising from causes beyond the control of the Issuing Bank; provided that the foregoing shall not be construed to excuse the Issuing Bank from liability to the Borrower to the extent of any direct damages (as opposed to consequential damages, claims in respect of which are hereby waived by the Borrower to the extent permitted by applicable law) suffered by the Borrower that are caused by the Issuing Bank's failure to exercise care when determining whether drafts and other documents presented under a Letter of Credit comply with the terms thereof. The parties hereto expressly agree that, in the absence of gross negligence or willful misconduct on the part of the Issuing Bank (as finally determined by a court of competent jurisdiction), the Issuing Bank shall be deemed to have exercised care in each such determination. In furtherance of the foregoing and without limiting the generality thereof, the parties agree that, with respect to documents presented which appear on their face to be in substantial compliance with the terms of a Letter of Credit, the Issuing Bank may, in its sole discretion, either accept and make payment upon such documents without responsibility for further investigation, regardless of any notice or information to the contrary, or refuse to accept and make payment upon such documents if such documents are not in strict compliance with the terms of such Letter of Credit.

(g) Disbursement Procedures. The Issuing Bank shall, promptly following its receipt thereof, examine all documents purporting to represent a demand for payment under a Letter of Credit. The Issuing Bank shall promptly notify the Administrative Agent and the Borrower by telephone (confirmed by telecopy) of such demand for payment and whether the Issuing Bank has made or will make an LC Disbursement thereunder; provided that any failure to give or delay in giving such notice shall not relieve the Borrower of its obligation to reimburse the Issuing Bank and the Lenders with respect to any such LC Disbursement.

(h) Interim Interest. If the Issuing Bank shall make any LC Disbursement, then, unless the Borrower shall reimburse such LC Disbursement in full on the date such LC Disbursement is made, the unpaid amount thereof shall bear interest, for each day from and including the date such LC Disbursement is made to but excluding the date that the Borrower reimburses such LC Disbursement, at the rate per annum then applicable to ABR Revolving Loans; provided that, if the Borrower fails to reimburse such LC Disbursement when due pursuant to paragraph (e) of this Section, then Section 2.13(c) shall apply. Interest accrued pursuant to this paragraph shall be for the account of the Issuing Bank, except that interest accrued on and after the date of payment by any Lender pursuant to paragraph (e) of this Section to reimburse the Issuing Bank shall be for the account of such Lender to the extent of such payment.

(i) Replacement of Issuing Bank. The Issuing Bank may be replaced at any time by written agreement among the Borrower, the Administrative Agent, the replaced Issuing Bank and the successor Issuing Bank. The Administrative Agent shall notify the Lenders of any such replacement of the Issuing Bank. At the time any such replacement shall become effective, the Borrower shall pay all unpaid fees accrued for the account of the replaced Issuing Bank pursuant to Section 2.12(b). From and after the effective date of any such replacement, (i) the successor Issuing Bank shall have all the rights and obligations of the Issuing Bank under this Agreement with respect to Letters of Credit to be issued thereafter and (ii) references herein to the term "Issuing Bank" shall be deemed to refer to such successor or to any previous Issuing Bank, or to such successor and all previous Issuing Banks, as the context shall require. After the replacement of an Issuing Bank hereunder, the replaced Issuing Bank shall remain a party hereto and shall continue to have all the rights and obligations of an Issuing Bank under this Agreement with respect to Letters of Credit then outstanding and issued by it prior to such replacement, but shall not be required to issue additional Letters of Credit.

(j) Cash Collateralization. If (x) any Event of Default shall occur and be continuing, on the Business Day that the Borrower receives notice from the Administrative Agent or the Required Lenders (or, if the maturity of the Loans has been accelerated, Lenders with LC Exposure representing greater than 50% of the total LC Exposure) demanding the deposit of cash collateral pursuant to this paragraph or (y) the Borrower requests the issuance of an Extended Letter of Credit, the Borrower shall deposit in an account with the Administrative Agent, in the name of the Administrative Agent and for the benefit of the Lenders, an amount in cash equal to 105% of the amount of the LC Exposure in respect of such Extended Letter of Credit (in the case of the foregoing clause (y)) or in the aggregate (in the case of the foregoing clause (x)) as of such date plus any accrued and unpaid interest thereon; provided that the obligation to deposit such cash collateral shall (1) be required by no later than five (5) Business Days prior to the Maturity Date in the case of an Extended Letter of Credit and (2) become effective immediately, and such deposit shall become immediately due and payable, without demand or other notice of any kind, upon the occurrence of any Event of Default with respect to the Borrower described in clause (h) or (i) of Article VII. Such deposit shall be held by the Administrative Agent as collateral for the payment and performance of the Obligations. The Administrative Agent shall have exclusive dominion and control, including the exclusive right of withdrawal, over such account, and the Borrower hereby grants the Administrative Agent a security interest in such account. Other than any interest earned on the investment of such deposits, which investments shall be made at the option and sole discretion of the Administrative Agent and at the Borrower's risk and expense, such deposits shall not bear interest. Interest or profits, if any, on such investments shall accumulate in such account. Moneys in such account shall be applied by the Administrative Agent to reimburse the Issuing Bank for LC Disbursements for which it has not been reimbursed and, to the extent not so applied, shall be held for the satisfaction of the reimbursement obligations of the Borrower for the LC Exposure at such time or, if the maturity of the Loans has been accelerated (but subject to the consent of Lenders with LC Exposure representing greater than 50% of the total LC Exposure), be applied to satisfy other obligations of the Borrower under this Agreement. If the Borrower is required to provide an amount of

cash collateral hereunder as a result of the occurrence of an Event of Default, such amount (to the extent not applied as aforesaid) shall be returned to the Borrower within three (3) Business Days after all Events of Default have been cured or waived.

SECTION 2.07. Funding of Borrowings. (a) Each Lender shall make each Loan to be made by it hereunder on the proposed date thereof by wire transfer of immediately available funds by 12:00 noon, New York City time, to the account of the Administrative Agent most recently designated by it for such purpose by notice to the Lenders; provided that Swingline Loans shall be made as provided in Section 2.05. The Administrative Agent will make such Loans available to the Borrower by promptly crediting the amounts so received, in like funds, to an account of the Borrower maintained with the Administrative Agent in New York City and designated by the Borrower in the applicable Borrowing Request; provided that ABR Revolving Loans made to finance the reimbursement of an LC Disbursement as provided in Section 2.06(e) shall be remitted by the Administrative Agent to the Issuing Bank.

(b) Unless the Administrative Agent shall have received notice from a Lender prior to the proposed date of any Borrowing that such Lender will not make available to the Administrative Agent such Lender's share of such Borrowing, the Administrative Agent may assume that such Lender has made such share available on such date in accordance with paragraph (a) of this Section and may, in reliance upon such assumption, make available to the Borrower a corresponding amount. In such event, if a Lender has not in fact made its share of the applicable Borrowing available to the Administrative Agent, then the applicable Lender and the Borrower severally agree to pay to the Administrative Agent forthwith on demand such corresponding amount with interest thereon, for each day from and including the date such amount is made available to the Borrower to but excluding the date of payment to the Administrative Agent, at (i) in the case of such Lender, the greater of the Federal Funds Effective Rate and a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation or (ii) in the case of the Borrower, the interest rate applicable to ABR Loans. If such Lender pays such amount to the Administrative Agent, then such amount shall constitute such Lender's Loan included in such Borrowing.

SECTION 2.08. Interest Elections. (a) Each Borrowing initially shall be of the Type specified in the applicable Borrowing Request and, in the case of a Eurodollar Borrowing, shall have an initial Interest Period as specified in such Borrowing Request. Thereafter, the Borrower may elect to convert such Borrowing to a different Type or to continue such Borrowing and, in the case of a Eurodollar Borrowing, may elect Interest Periods therefor, all as provided in this Section. The Borrower may elect different options with respect to different portions of the affected Borrowing, in which case each such portion shall be allocated ratably among the Lenders holding the Loans comprising such Borrowing, and the Loans comprising each such portion shall be considered a separate Borrowing. This Section shall not apply to Swingline Borrowings, which may not be converted or continued.

(b) To make an election pursuant to this Section (an "Interest Election Request"), the Borrower shall notify the Administrative Agent of such election by telephone by the time that a Borrowing Request would be required under Section 2.03 if the Borrower were requesting a Borrowing of the Type resulting from such election to be made on the effective date of such election. Each such telephonic Interest Election Request shall be irrevocable and shall be confirmed promptly by hand delivery or telecopy to the Administrative Agent of a written Interest Election Request in a form approved by the Administrative Agent and signed by the Borrower. Notwithstanding any contrary provision herein, this Section shall not be construed to permit the Borrower to elect an Interest Period for Eurodollar Loans that does not comply with Section 2.02(d).

(c) Each telephonic and written Interest Election Request shall specify the following information in compliance with Section 2.02:

(i) the Borrowing to which such Interest Election Request applies and, if different options are being elected with respect to different portions thereof, the portions thereof to be allocated to each resulting Borrowing (in which case the information to be specified pursuant to clauses (iii) and (iv) below shall be specified for each resulting Borrowing);

(ii) the effective date of the election made pursuant to such Interest Election Request, which shall be a Business Day;

(iii) whether the resulting Borrowing is to be an ABR Borrowing or a Eurodollar Borrowing; and

(iv) if the resulting Borrowing is a Eurodollar Borrowing, the Interest Period to be applicable thereto after giving effect to such election, which shall be a period contemplated by the definition of the term "Interest Period".

If any such Interest Election Request requests a Eurodollar Borrowing but does not specify an Interest Period, then the Borrower shall be deemed to have selected an Interest Period of one month's duration.

(d) Promptly following receipt of an Interest Election Request, the Administrative Agent shall advise each Lender of the details thereof and of such Lender's portion of each resulting Borrowing.

(e) If the Borrower fails to deliver a timely Interest Election Request with respect to a Eurodollar Borrowing prior to the end of the Interest Period applicable thereto, then, unless such Borrowing is repaid as provided herein, at the end of such Interest Period such Borrowing shall be continued as a Eurodollar Borrowing with an Interest Period of one month's duration unless such Interest Period would end after the Maturity Date, in which event such Borrowing shall be converted to an ABR Borrowing. Notwithstanding any contrary provision hereof, if an Event of Default has occurred and is continuing and the Administrative Agent, at the request of the Required Lenders, so notifies the Borrower, then, so long as an Event of Default is continuing (i) no outstanding Borrowing may be converted to or continued beyond its then current Interest Period as a Eurodollar Borrowing and (ii) unless repaid, each Eurodollar Borrowing shall be converted to an ABR Borrowing at the end of the Interest Period applicable thereto.

SECTION 2.09. Termination and Reduction of Commitments. (a) Unless previously terminated, the Commitments shall terminate on the Maturity Date.

(b) The Borrower may at any time terminate, or from time to time reduce, the Commitments; provided that (i) each reduction of the Commitments shall be in an amount that is an integral multiple of \$25,000,000 and not less than \$25,000,000 and (ii) the Borrower shall not terminate or reduce the Commitments if, after giving effect to any concurrent prepayment of the Loans in accordance with Section 2.11, the sum of the Revolving Credit Exposures would exceed the Aggregate Commitment.

(c) The Borrower shall notify the Administrative Agent of any election to terminate or reduce the Commitments under paragraph (b) of this Section at least three (3) Business Days prior to the effective date of such termination or reduction, specifying such election and the effective date thereof. Promptly following receipt of any notice, the Administrative Agent shall advise the Lenders of the contents thereof. Each notice delivered by the Borrower pursuant to this Section shall be irrevocable; provided that a notice of termination of the Commitments delivered by the Borrower may state that such notice is conditioned upon the effectiveness of other credit facilities, in which case such

notice may be revoked by the Borrower (by notice to the Administrative Agent on or prior to the specified effective date) if such condition is not satisfied. Any termination or reduction of the Commitments shall be permanent. Each reduction of the Commitments shall be made ratably among the Lenders in accordance with their respective Commitments.

**SECTION 2.10. Repayment of Loans; Evidence of Debt.** (a) The Borrower hereby unconditionally promises to pay (i) to the Administrative Agent for the account of each Lender the then unpaid principal amount of each Revolving Loan on the Maturity Date and (ii) to the Swingline Lender the then unpaid principal amount of each Swingline Loan on the earlier of the Maturity Date and the first date after such Swingline Loan is made that is the 15th or last day of a calendar month and is at least two (2) Business Days after such Swingline Loan is made; provided that on each date that a Revolving Borrowing is made, the Borrower shall repay all Swingline Loans then outstanding.

(b) Each Lender shall maintain in accordance with its usual practice an account or accounts evidencing the indebtedness of the Borrower to such Lender resulting from each Loan made by such Lender, including the amounts of principal and interest payable and paid to such Lender from time to time hereunder.

(c) The Administrative Agent shall maintain accounts in which it shall record (i) the amount of each Loan made hereunder, the Class and Type thereof and the Interest Period applicable thereto, (ii) the amount of any principal or interest due and payable or to become due and payable from the Borrower to each Lender hereunder and (iii) the amount of any sum received by the Administrative Agent hereunder for the account of the Lenders and each Lender's share thereof.

(d) The entries made in the accounts maintained pursuant to paragraph (b) or (c) of this Section shall be, absent manifest error, prima facie evidence of the existence and amounts of the obligations recorded therein; provided that the failure of any Lender or the Administrative Agent to maintain such accounts or any error therein shall not in any manner affect the obligation of the Borrower to repay the Loans in accordance with the terms of this Agreement.

(e) Any Lender may request that Loans made by it be evidenced by a promissory note. In such event, the Borrower shall prepare, execute and deliver to such Lender a promissory note payable to the order of such Lender (or, if requested by such Lender, to such Lender and its registered assigns) and in a form approved by the Administrative Agent. Thereafter, the Loans evidenced by such promissory note and interest thereon shall at all times (including after assignment pursuant to Section 9.04) be represented by one or more promissory notes in such form payable to the order of the payee named therein (or, if such promissory note is a registered note, to such payee and its registered assigns).

**SECTION 2.11. Prepayment of Loans.** (a) The Borrower shall have the right at any time and from time to time to prepay any Borrowing without premium or penalty (but subject to Section 2.16) in whole or in part, subject to prior notice in accordance with paragraph (c) of this Section.

(b) [Intentionally Omitted].

(c) The Borrower shall notify the Administrative Agent (and, in the case of prepayment of a Swingline Loan, the Swingline Lender) by telephone (confirmed by email to claudia.kech@jpmchase.com) or such other email addresses as are specified by the Administrative Agent to the Borrower from time to time) of any prepayment hereunder (i) in the case of prepayment of a Eurodollar Borrowing, not later than 11:00 a.m., New York City time, three (3) Business Days before the date of prepayment, (ii) in the case of prepayment of an ABR Borrowing, not later than 11:00 a.m.,



New York City time, one Business Day before the date of prepayment or (iii) in the case of prepayment of a Swingline Loan, not later than 12:00 noon, New York City time, on the date of prepayment. Each such notice shall be irrevocable and shall specify the prepayment date and the principal amount of each Borrowing or portion thereof to be prepaid; provided that, if a notice of prepayment is given in connection with a conditional notice of termination of the Commitments as contemplated by Section 2.09, then such notice of prepayment may be revoked if such notice of termination is revoked in accordance with Section 2.09. Promptly following receipt of any such notice relating to a Borrowing, the Administrative Agent shall advise the Lenders of the contents thereof. Each partial prepayment of any Borrowing shall be in an amount that would be permitted in the case of an advance of a Borrowing of the same Type as provided in Section 2.02. Each prepayment of a Borrowing shall be applied ratably to the Loans included in such prepaid Borrowing. Prepayments shall be accompanied by (i) accrued interest to the extent required by Section 2.13.

SECTION 2.12. Fees. (a) The Borrower agrees to pay to the Administrative Agent for the account of each Lender a facility fee, which shall accrue at the Applicable Rate on the daily amount of the Commitment of such Lender (whether used or unused) during the period from and including the Effective Date to but excluding the date on which such Commitment terminates; provided that, if such Lender continues to have any Revolving Credit Exposure after its Commitment terminates, then such facility fee shall continue to accrue on the daily amount of such Lender's Revolving Credit Exposure from and including the date on which its Commitment terminates to but excluding the date on which such Lender ceases to have any Revolving Credit Exposure. Accrued facility fees shall be payable in arrears on the last day of March, June, September and December of each year and on the date on which the Commitments terminate, commencing on the first such date to occur after the date hereof; provided that any facility fees accruing after the date on which the Commitments terminate shall be payable on demand. All facility fees shall be computed on the basis of a year of 360 days and shall be payable for the actual number of days elapsed (including the first day but excluding the last day).

(b) The Borrower agrees to pay (i) to the Administrative Agent for the account of each Lender a participation fee with respect to its participations in Letters of Credit, which shall accrue at the same Applicable Rate used to determine the interest rate applicable to Eurodollar Revolving Loans on the average daily amount of such Lender's LC Exposure (excluding any portion thereof attributable to unreimbursed LC Disbursements) during the period from and including the Effective Date to but excluding the later of the date on which such Lender's Commitment terminates and the date on which such Lender ceases to have any LC Exposure and (ii) to the Issuing Bank a fronting fee, which shall accrue at the rate of 0.125% per annum on the average daily amount of the LC Exposure (excluding any portion thereof attributable to unreimbursed LC Disbursements) attributable to Letters of Credit issued by the Issuing Bank during the period from and including the Effective Date to but excluding the later of the date of termination of the Commitments and the date on which there ceases to be any LC Exposure, as well as the Issuing Bank's standard fees and commissions with respect to the issuance, amendment, cancellation, negotiation, transfer, presentment, renewal or extension of any Letter of Credit or processing of drawings thereunder. Unless otherwise specified above, participation fees and fronting fees accrued through and including the last day of March, June, September and December of each year shall be payable on the third (3<sup>rd</sup>) Business Day following such last day, commencing on the first such date to occur after the Effective Date; provided that all such fees shall be payable on the date on which the Commitments terminate and any such fees accruing after the date on which the Commitments terminate shall be payable on demand. Any other fees payable to the Issuing Bank pursuant to this paragraph shall be payable within ten (10) days after demand. All participation fees and fronting fees shall be computed on the basis of a year of 360 days and shall be payable for the actual number of days elapsed (including the first day but excluding the last day).

(c) The Borrower agrees to pay to the Administrative Agent, for its own account, fees payable in the amounts and at the times separately agreed upon between the Borrower and the Administrative Agent.

(d) All fees payable hereunder shall be paid on the dates due, in immediately available funds, to the Administrative Agent (or to the Issuing Bank, in the case of fees payable to it) for distribution, in the case of facility fees and participation fees, to the Lenders. Fees paid shall not be refundable under any circumstances.

SECTION 2.13. Interest. (a) The Loans comprising each ABR Borrowing (including each Swingline Loan) shall bear interest at the Alternate Base Rate.

(b) The Loans comprising each Eurodollar Borrowing shall bear interest at the Adjusted LIBO Rate for the Interest Period in effect for such Borrowing plus the Applicable Rate.

(c) Notwithstanding the foregoing, if any principal of or interest on any Loan or any fee or other amount payable by the Borrower hereunder is not paid when due, whether at stated maturity, upon acceleration or otherwise, such overdue amount shall bear interest, after as well as before judgment, at a rate per annum equal to (i) in the case of overdue principal of any Loan, 2% plus the rate otherwise applicable to such Loan as provided in the preceding paragraphs of this Section or (ii) in the case of any other amount, 2% plus the rate applicable to ABR Loans as provided in paragraph (a) of this Section.

(d) Accrued interest on each Loan shall be payable in arrears on each Interest Payment Date for such Loan and upon termination of the Commitments; provided that (i) interest accrued pursuant to paragraph (c) of this Section shall be payable on demand, (ii) in the event of any repayment or prepayment of any Loan (other than a prepayment of an ABR Revolving Loan prior to the end of the Availability Period), accrued interest on the principal amount repaid or prepaid shall be payable on the date of such repayment or prepayment and (iii) in the event of any conversion of any Eurodollar Revolving Loan prior to the end of the current Interest Period therefor, accrued interest on such Loan shall be payable on the effective date of such conversion.

(e) All interest hereunder shall be computed on the basis of a year of 360 days, except that interest computed by reference to the Alternate Base Rate at times when the Alternate Base Rate is based on the Prime Rate shall be computed on the basis of a year of 365 days (or 366 days in a leap year), and in each case shall be payable for the actual number of days elapsed (including the first day but excluding the last day). The applicable Alternate Base Rate, Adjusted LIBO Rate or LIBO Rate shall be determined by the Administrative Agent, and such determination shall be conclusive absent manifest error.

SECTION 2.14. Alternate Rate of Interest. If prior to the commencement of any Interest Period for a Eurodollar Borrowing:

(a) the Administrative Agent determines (which determination shall be conclusive absent manifest error) that adequate and reasonable means do not exist for ascertaining the Adjusted LIBO Rate or the LIBO Rate, as applicable, for such Interest Period; or

(b) the Administrative Agent is advised by the Required Lenders that the Adjusted LIBO Rate or the LIBO Rate, as applicable, for such Interest Period will not adequately and fairly reflect the cost to such Lenders (or Lender) of making or maintaining their Loans (or its Loan) included in such Borrowing for such Interest Period;

then the Administrative Agent shall give notice thereof to the Borrower and the Lenders by telephone or telecopy as promptly as practicable thereafter and, until the Administrative Agent notifies the Borrower and the Lenders that the circumstances giving rise to such notice no longer exist, (i) any Interest Election Request that requests the conversion of any Borrowing to, or continuation of any Borrowing as, a Eurodollar Borrowing shall be ineffective and (ii) if any Borrowing Request requests a Eurodollar Borrowing, such Borrowing shall be made as an ABR Borrowing.

SECTION 2.15. Increased Costs. (a) If any Change in Law shall:

(i) impose, modify or deem applicable any reserve, special deposit or similar requirement against assets of, deposits with or for the account of, or credit extended by, any Lender (except any such reserve requirement reflected in the Adjusted LIBO Rate) or the Issuing Bank; or

(ii) impose on any Lender or the Issuing Bank or the London interbank market any other condition affecting this Agreement or Eurodollar Loans made by such Lender or any Letter of Credit or participation therein;

and the result of any of the foregoing shall be to increase the cost to such Lender of making or maintaining any Eurodollar Loan or of maintaining its obligation to make any such Loan or to increase the cost to such Lender or the Issuing Bank of participating in, issuing or maintaining any Letter of Credit or to reduce the amount of any sum received or receivable by such Lender or the Issuing Bank hereunder, whether of principal, interest or otherwise, then the Borrower will pay to such Lender or the Issuing Bank, as the case may be, such additional amount or amounts as will compensate such Lender or the Issuing Bank, as the case may be, for such additional costs incurred or reduction suffered.

(b) If any Lender or the Issuing Bank determines that any Change in Law regarding capital requirements has or would have the effect of reducing the rate of return on such Lender's or the Issuing Bank's capital or on the capital of such Lender's or the Issuing Bank's holding company, if any, as a consequence of this Agreement or the Loans made by, or participations in Letters of Credit held by, such Lender, or the Letters of Credit issued by the Issuing Bank, to a level below that which such Lender or the Issuing Bank or such Lender's or the Issuing Bank's holding company could have achieved but for such Change in Law (taking into consideration such Lender's or the Issuing Bank's policies and the policies of such Lender's or the Issuing Bank's holding company with respect to capital adequacy), then from time to time the Borrower will pay to such Lender or the Issuing Bank, as the case may be, such additional amount or amounts as will compensate such Lender or the Issuing Bank or such Lender's or the Issuing Bank's holding company for any such reduction suffered.

(c) A certificate of a Lender or the Issuing Bank setting forth in reasonable detail the calculation of the amount or amounts necessary to compensate such Lender or the Issuing Bank or its holding company, as the case may be, as specified in paragraph (a) or (b) of this Section shall be delivered to the Borrower and shall be conclusive absent manifest error. The Borrower shall pay such Lender or the Issuing Bank, as the case may be, the amount shown as due on any such certificate within thirty (30) days after receipt thereof.

(d) Failure or delay on the part of any Lender or the Issuing Bank to demand compensation pursuant to this Section shall not constitute a waiver of such Lender's or the Issuing Bank's right to demand such compensation; provided that the Borrower shall not be required to compensate a Lender or the Issuing Bank pursuant to this Section for any increased costs or reductions incurred more than 270 days prior to the date that such Lender or the Issuing Bank, as the case may be, notifies the Borrower of the Change in Law giving rise to such increased costs or reductions and of

such Lender's or the Issuing Bank's intention to claim compensation therefor; provided further that, if the Change in Law giving rise to such increased costs or reductions is retroactive, then the 270-day period referred to above shall be extended to include the period of retroactive effect thereof.

SECTION 2.16. Break Funding Payments. In the event of (a) the payment of any principal of any Eurodollar Loan other than on the last day of an Interest Period applicable thereto (including as a result of an Event of Default or as a result of any applicable prepayment pursuant to Section 2.11), (b) the conversion of any Eurodollar Loan other than on the last day of the Interest Period applicable thereto, (c) the failure to borrow, convert, continue or prepay any Eurodollar Loan on the date specified in any notice delivered pursuant hereto (regardless of whether such notice may be revoked under Section 2.11(b) and is revoked in accordance therewith) or (d) the assignment of any Eurodollar Loan other than on the last day of the Interest Period applicable thereto as a result of a request by the Borrower pursuant to Section 2.19, then, in any such event, the Borrower shall compensate each Lender for the loss, cost and expense attributable to such event. In the case of a Eurodollar Loan, such loss, cost or expense to any Lender shall be deemed to include an amount determined by such Lender to be the excess, if any, of (i) the amount of interest which would have accrued on the principal amount of such Loan had such event not occurred, at the Adjusted LIBO Rate that would have been applicable to such Loan, for the period from the date of such event to the last day of the then current Interest Period therefor (or, in the case of a failure to borrow, convert or continue, for the period that would have been the Interest Period for such Loan), over (ii) the amount of interest which would accrue on such principal amount for such period at the interest rate which such Lender would bid were it to bid, at the commencement of such period, for deposits in Dollars of a comparable amount and period from other banks in the eurodollar market. A certificate of any Lender setting forth in reasonable detail the calculation of any amount or amounts that such Lender is entitled to receive pursuant to this Section shall be delivered to the Borrower and shall be conclusive absent manifest error. The Borrower shall pay such Lender the amount shown as due on any such certificate within thirty (30) days after receipt thereof.

SECTION 2.17. Taxes. (a) Any and all payments by or on account of any obligation of the Borrower hereunder shall be made free and clear of and without deduction for any Indemnified Taxes or Other Taxes; provided that if the Borrower shall be required to deduct any Indemnified Taxes or Other Taxes from such payments, then (i) the sum payable shall be increased as necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section) the Administrative Agent, Lender or Issuing Bank (as the case may be) receives an amount equal to the sum it would have received had no such deductions been made, (ii) the Borrower shall make such deductions and (iii) the Borrower shall pay the full amount deducted to the relevant Governmental Authority in accordance with applicable law.

(b) In addition, the Borrower shall pay any Other Taxes imposed on or incurred by the Administrative Agent, a Lender or the Issuing Bank to the relevant Governmental Authority in accordance with applicable law.

(c) The Borrower shall indemnify the Administrative Agent, each Lender and the Issuing Bank, within ten (10) days after written demand therefor, for the full amount of any Indemnified Taxes or Other Taxes paid by the Administrative Agent, such Lender or the Issuing Bank, as the case may be, on or with respect to any payment by or on account of any obligation of the Borrower hereunder (including Indemnified Taxes or Other Taxes imposed or asserted on or attributable to amounts payable under this Section) and any penalties, interest and reasonable expenses arising therefrom or with respect thereto, whether or not such Indemnified Taxes or Other Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate setting forth in reasonable detail the calculation of the amount of such payment or liability delivered to the

Borrower by a Lender or the Issuing Bank, or by the Administrative Agent on its own behalf or on behalf of a Lender or the Issuing Bank, shall be conclusive absent manifest error.

(d) As soon as practicable after any payment of Indemnified Taxes or Other Taxes by the Borrower to a Governmental Authority, the Borrower shall deliver to the Administrative Agent the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of the return reporting such payment or other evidence of such payment reasonably satisfactory to the Administrative Agent.

(e) Any Lender that is entitled to an exemption from or reduction of withholding tax under the law of the jurisdiction in which the Borrower is located, or any treaty to which such jurisdiction is a party, with respect to payments under this Agreement shall deliver to the Borrower (with a copy to the Administrative Agent), at the time or times prescribed by applicable law, such properly completed and executed documentation prescribed by applicable law or reasonably requested by the Borrower as will permit such payments to be made without withholding or at a reduced rate.

(f) If the Administrative Agent or a Lender determines, in its sole discretion, that it has received a refund of any Taxes or Other Taxes as to which it has been indemnified by the Borrower or with respect to which the Borrower has paid additional amounts pursuant to this Section 2.17, it shall pay over such refund to the Borrower (but only to the extent of indemnity payments made, or additional amounts paid, by the Borrower under this Section 2.17 with respect to the Taxes or Other Taxes giving rise to such refund), net of all out-of-pocket expenses of the Administrative Agent or such Lender and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund); provided, that the Borrower, upon the request of the Administrative Agent or such Lender, agrees to repay the amount paid over to the Borrower (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) to the Administrative Agent or such Lender in the event the Administrative Agent or such Lender is required to repay such refund to such Governmental Authority. This Section shall not be construed to require the Administrative Agent or any Lender to make available its tax returns (or any other information relating to its taxes which it deems confidential) to the Borrower or any other Person.

SECTION 2.18. Payments Generally; Pro Rata Treatment; Sharing of Set-offs.

(a) The Borrower shall make each payment required to be made by it hereunder (whether of principal, interest, fees or reimbursement of LC Disbursements, or of amounts payable under Section 2.15, 2.16 or 2.17, or otherwise) prior to 3:00 p.m., New York City time on the date when due, in immediately available funds, without set-off or counterclaim. Any amounts received after such time on any date may, in the discretion of the Administrative Agent, be deemed to have been received on the next succeeding Business Day for purposes of calculating interest thereon. All such payments shall be made to the Administrative Agent at its offices at 270 Park Avenue, New York, New York 10017, except payments to be made directly to the Issuing Bank or Swingline Lender as expressly provided herein and except that payments pursuant to Sections 2.15, 2.16, 2.17 and 9.03 shall be made directly to the Persons entitled thereto. The Administrative Agent shall distribute any such payments received by it for the account of any other Person to the appropriate recipient promptly following receipt thereof. If any payment hereunder shall be due on a day that is not a Business Day, the date for payment shall be extended to the next succeeding Business Day, and, in the case of any payment accruing interest, interest thereon shall be payable for the period of such extension. All payments hereunder shall be made in Dollars.

(b) [Intentionally Omitted].

(c) If at any time insufficient funds are received by and available to the Administrative Agent to pay fully all amounts of principal, unreimbursed LC Disbursements, interest and fees then due hereunder, such funds shall be applied (i) first, towards payment of interest and fees then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of interest and fees then due to such parties, and (ii) second, towards payment of principal and unreimbursed LC Disbursements then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of principal and unreimbursed LC Disbursements then due to such parties.

(d) If any Lender shall, by exercising any right of set-off or counterclaim or otherwise, obtain payment in respect of any principal of or interest on any of its Revolving Loans or participations in LC Disbursements or Swingline Loans resulting in such Lender receiving payment of a greater proportion of the aggregate amount of its Revolving Loans and participations in LC Disbursements and Swingline Loans and accrued interest thereon than the proportion received by any other Lender, then the Lender receiving such greater proportion shall purchase (for cash at face value) participations in the Revolving Loans and participations in LC Disbursements and Swingline Loans of other Lenders to the extent necessary so that the benefit of all such payments shall be shared by the Lenders ratably in accordance with the aggregate amount of principal of and accrued interest on their respective Revolving Loans and participations in LC Disbursements and Swingline Loans; provided that (i) if any such participations are purchased and all or any portion of the payment giving rise thereto is recovered, such participations shall be rescinded and the purchase price restored to the extent of such recovery, without interest, and (ii) the provisions of this paragraph shall not be construed to apply to any payment made by the Borrower pursuant to and in accordance with the express terms of this Agreement or any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Loans or participations in LC Disbursements and Swingline Loans to any assignee or participant, other than to the Borrower or any Subsidiary or Affiliate thereof (as to which the provisions of this paragraph shall apply). The Borrower consents to the foregoing and agrees, to the extent it may effectively do so under applicable law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against the Borrower rights of set-off and counterclaim with respect to such participation as fully as if such Lender were a direct creditor of the Borrower in the amount of such participation.

(e) Unless the Administrative Agent shall have received notice from the Borrower prior to the date on which any payment is due to the Administrative Agent for the account of the Lenders or the Issuing Bank hereunder that the Borrower will not make such payment, the Administrative Agent may assume that the Borrower has made such payment on such date in accordance herewith and may, in reliance upon such assumption, distribute to the Lenders or the Issuing Bank, as the case may be, the amount due. In such event, if the Borrower has not in fact made such payment, then each of the Lenders or the Issuing Bank, as the case may be, severally agrees to repay to the Administrative Agent forthwith on demand the amount so distributed to such Lender or Issuing Bank with interest thereon, for each day from and including the date such amount is distributed to it to but excluding the date of payment to the Administrative Agent, at the greater of the Federal Funds Effective Rate and a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation.

(f) If any Lender shall fail to make any payment required to be made by it pursuant to 2.06(d) or (e), 2.07(b), 2.18(e) or 9.03(c), then the Administrative Agent may, in its discretion (notwithstanding any contrary provision hereof), apply any amounts thereafter received by the Administrative Agent for the account of such Lender to satisfy such Lender's obligations under such Sections until all such unsatisfied obligations are fully paid.

SECTION 2.19. Mitigation Obligations; Replacement of Lenders. (a) If any Lender requests compensation under Section 2.15, or if the Borrower is required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 2.17, then such Lender shall use reasonable efforts to designate a different lending office for funding or booking its Loans hereunder or to assign its rights and obligations hereunder to another of its offices, branches or affiliates, if, in the judgment of such Lender, such designation or assignment (i) would eliminate or reduce amounts payable pursuant to Section 2.15 or 2.17, as the case may be, in the future and (ii) would not subject such Lender to any unreimbursed cost or expense and would not otherwise be disadvantageous to such Lender. The Borrower hereby agrees to pay all reasonable costs and expenses incurred by any Lender in connection with any such designation or assignment.

(b) If any Lender requests compensation under Section 2.15, or if the Borrower is required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 2.17, or if any Lender defaults in its obligation to fund Loans hereunder, then the Borrower may, at its sole expense and effort, upon notice to such Lender and the Administrative Agent, require such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in Section 9.04), all its interests, rights and obligations under the Loan Documents to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment); provided that (i) the Borrower shall have received the prior written consent of the Administrative Agent, which consent shall not unreasonably be withheld, (ii) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and participations in LC Disbursements and Swingline Loans, accrued interest thereon, accrued fees and all other amounts payable to it hereunder, from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrower (in the case of all other amounts) and (iii) in the case of any such assignment resulting from a claim for compensation under Section 2.15 or payments required to be made pursuant to Section 2.17, such assignment will result in a reduction in such compensation or payments. A Lender shall not be required to make any such assignment and delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the Borrower to require such assignment and delegation cease to apply.

SECTION 2.20. Expansion Option. The Borrower may from time to time elect to increase the Commitments or enter into one or more tranches of term loans (each an "Incremental Term Loan"), in each case in minimum increments of \$25,000,000 so long as, after giving effect thereto, the aggregate amount of such increases and all such Incremental Term Loans does not exceed \$250,000,000. The Borrower may arrange for any such increase or tranche to be provided by one or more Lenders (each Lender so agreeing to an increase in its Commitment, or to participate in such Incremental Term Loans, an "Increasing Lender"), or by one or more new banks, financial institutions or other entities (each such new bank, financial institution or other entity, an "Augmenting Lender"), to increase their existing Commitments, or to participate in such Incremental Term Loans, or extend Commitments, as the case may be; provided that (i) each Augmenting Lender, shall be subject to the approval of the Borrower and the Administrative Agent and (ii) (x) in the case of an Increasing Lender, the Borrower and such Increasing Lender execute an agreement substantially in the form of Exhibit F hereto, and (y) in the case of an Augmenting Lender, the Borrower and such Augmenting Lender execute an agreement substantially in the form of Exhibit G hereto. Increases and new Commitments and Incremental Term Loans created pursuant to this Section 2.20 shall become effective on the date agreed by the Borrower, the Administrative Agent and the relevant Increasing Lenders or Augmenting Lenders and the Administrative Agent shall notify each Lender thereof. Notwithstanding the foregoing, no increase in the Commitments (or in the Commitment of any Lender) or tranche of Incremental Term Loans shall become effective under this paragraph unless, (i) on the proposed date of the effectiveness of such increase or Incremental Term Loans, (A) the conditions set forth in paragraphs (a) and (b) of Section 4.02 shall be satisfied or waived by the Required Lenders and the Administrative Agent shall have received a

certificate to that effect dated such date and executed by a Financial Officer of the Borrower and (B) the Borrower shall be in compliance (on a pro forma basis reasonably acceptable to the Administrative Agent) with the covenants contained in Section 6.07 and (ii) the Administrative Agent shall have received documents consistent with those delivered on the Effective Date as to the corporate power and authority of the Borrower to borrow hereunder after giving effect to such increase. On the effective date of any increase in the Commitments or any Incremental Term Loans being made, (i) each relevant Increasing Lender and Augmenting Lender shall make available to the Administrative Agent such amounts in immediately available funds as the Administrative Agent shall determine, for the benefit of the other Lenders, as being required in order to cause, after giving effect to such increase and the use of such amounts to make payments to such other Lenders, each Lender's portion of the outstanding Revolving Loans of all the Lenders to equal its Applicable Percentage of such outstanding Revolving Loans, and (ii) except in the case of any Incremental Term Loans, the Borrower shall be deemed to have repaid and reborrowed all outstanding Revolving Loans as of the date of any increase in the Commitments (with such reborrowing to consist of the Types of Revolving Loans, with related Interest Periods if applicable, specified in a notice delivered by the Borrower, in accordance with the requirements of Section 2.03). The deemed payments made pursuant to clause (ii) of the immediately preceding sentence shall be accompanied by payment of all accrued interest on the amount prepaid and, in respect of each Eurocurrency Loan, shall be subject to indemnification by the Borrower pursuant to the provisions of Section 2.16 if the deemed payment occurs other than on the last day of the related Interest Periods. The Incremental Term Loans (a) shall rank pari passu in right of payment with the Revolving Loans, (b) shall not mature earlier than the Maturity Date (but may have amortization prior to such date) and (c) shall be treated substantially the same as (and in any event no more favorably than) the Revolving Loans; provided that (i) the terms and conditions applicable to any tranche of Incremental Term Loans maturing after the Maturity Date may provide for material additional or different financial or other covenants or prepayment requirements applicable only during periods after the Maturity Date and (ii) the Incremental Term Loans may be priced differently than the Revolving Loans. Incremental Term Loans may be made hereunder pursuant to an amendment (an "Incremental Term Loan Amendment") to this Agreement and, as appropriate, the other Loan Documents, executed by the Borrower, each Augmenting Lender participating in such tranche, if any, and the Administrative Agent. The Incremental Term Loan Amendment may, without the consent of any other Lenders, effect such amendments to this Agreement and the other Loan Documents as may be necessary or appropriate, in the reasonable opinion of the Administrative Agent, to effect the provisions of this Section 2.20.

SECTION 2.21. Senior Debt. The Borrower hereby designates all Obligations now or hereinafter incurred or otherwise outstanding, and agrees that the Obligations shall at all times constitute, senior indebtedness and designated senior indebtedness, or terms of similar import, which are entitled to the benefits of the subordination provisions of all Subordinated Indebtedness.

### ARTICLE III

#### Representations and Warranties

The Borrower represents and warrants to the Lenders that:

SECTION 3.01. Organization; Powers; Subsidiaries. Each of the Borrower and its Subsidiaries is duly incorporated or organized, validly existing and in good standing (to the extent such concept applies to such entity) under the laws of the jurisdiction of its incorporation or organization, as the case may be, has all requisite power and authority to carry on its business as now conducted and, except where the failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect, is qualified to do business in, and is in good standing in, every



jurisdiction where such qualification is required. Schedule 3.01 to the Disclosure Letter (as supplemented from time to time) identifies each Subsidiary, if such Subsidiary is a Material Subsidiary that is a Domestic Subsidiary, the jurisdiction of its incorporation or organization, as the case may be, the percentage of issued and outstanding shares of each class in its capital or other equity interests owned by the Borrower and the other Subsidiaries and, if such percentage is not 100% (excluding directors' qualifying shares as required by law), a description of each class issued and outstanding. All of the outstanding shares in its capital and other equity interests of each Subsidiary are validly issued and outstanding and fully paid and nonassessable and all such shares and other equity interests indicated on Schedule 3.01 to the Disclosure Letter as owned by the Borrower or another Subsidiary are owned, beneficially, legally and/or of record, by the Borrower or any Subsidiary free and clear of all Liens other than Permitted Encumbrances. Except as indicated on Schedule 3.01 to the Disclosure Letter, there are no outstanding commitments or other obligations of the Borrower or any Subsidiary to issue, and no options, warrants or other rights of any Person to acquire, any shares of any class in its capital or other equity interests of the Borrower or any Subsidiary.

SECTION 3.02. Authorization; Enforceability. The Transactions are within each Loan Party's corporate or other powers and have been duly authorized by all necessary corporate and, if required, stockholder or shareholder action. The Loan Documents to which each Loan Party is a party have been duly executed and delivered by such Loan Party and constitute a legal, valid and binding obligation of such Loan Party, enforceable in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other laws affecting creditors' rights generally and subject to general principles of equity, regardless of whether considered in a proceeding in equity or at law.

SECTION 3.03. Governmental Approvals; No Conflicts. The Transactions (a) do not require any consent or approval of, registration or filing with, or any other action by, any Governmental Authority, except such as have been obtained or made and are in full force and effect, (b) will not violate any applicable law or regulation or the charter, by-laws or other organizational documents of the Borrower or any Loan Party or any order of any Governmental Authority, (c) will not violate or result in a default under any indenture, material agreement or other material instrument binding upon the Borrower or any of its Subsidiaries or its assets, or give rise to a right thereunder to require any payment to be made by the Borrower or any of its Subsidiaries, and (d) will not result in the creation or imposition of any Lien on any asset of the Borrower or any of its Subsidiaries.

SECTION 3.04. Financial Condition; No Material Adverse Change. (a) The Borrower has heretofore furnished to the Lenders its consolidated balance sheet and statements of income, stockholders equity and cash flows (i) as of and for the fiscal year ended April 27, 2007 reported on by Deloitte & Touche LLP, independent public accountants, and (ii) as of and for the fiscal quarter and the portion of the fiscal year ended July 27, 2007, certified by its chief financial officer. Such financial statements present fairly, in all material respects, the financial position and results of operations and cash flows of the Borrower and its consolidated Subsidiaries as of such dates and for such periods in accordance with GAAP, subject to year-end audit adjustments and the absence of footnotes in the case of the statements referred to in clause (ii) above.

(b) Since April 27, 2007, there has been no material adverse change in the business, assets, operations or condition, financial or otherwise, of the Borrower and its Subsidiaries, taken as a whole.

SECTION 3.05. Properties and Insurance. (a) Each of the Borrower and its Subsidiaries has good title to, or valid leasehold interests in, all its real and personal property material to its business, except for minor defects in title that do not interfere with its ability to conduct its business as currently conducted or to utilize such properties for their intended purposes. The Borrower maintains, and has

caused each Subsidiary to maintain, with financially sound and reputable insurance companies insurance on all their real and personal property in such amounts, subject to such deductibles and self-insurance retentions and covering such properties and risks as are customarily maintained by companies engaged in the same or similar businesses operating in the same or similar locations. There are no Liens on any of the real or personal properties of the Borrower or any Subsidiary except for Liens permitted by Section 6.02.

(b) Each of the Borrower and its Subsidiaries owns, or is licensed to use, all trademarks, tradenames, copyrights, patents and other intellectual property material to its business, and, to the Borrower's knowledge, the use thereof by the Borrower and its Subsidiaries does not infringe upon the rights of any other Person, except for any such infringements that, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect.

SECTION 3.06. Litigation, Labor Matters and Environmental Matters. (a) There are no actions, suits or proceedings by or before any arbitrator or Governmental Authority pending against or, to the knowledge of the Borrower, threatened against the Borrower or any of its Subsidiaries (i) as to which there is a reasonable possibility of an adverse determination and that, if adversely determined, could reasonably be expected, individually or in the aggregate, to result in a Material Adverse Effect (other than the Disclosed Matters) or (ii) that involve this Agreement or the Transactions.

(b) There are no labor controversies pending against or, to the knowledge of the Borrower, threatened against the Borrower or any of its Subsidiaries (i) which could reasonably be expected, individually or in the aggregate, to result in a Material Adverse Effect or (ii) that involve this Agreement or the Transactions.

(c) Except for the Disclosed Matters and except with respect to any other matters that, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect, none of the Borrower or any of its Subsidiaries (i) has failed to comply with any Environmental Law or to obtain, maintain or comply with any permit, license or other approval required under any Environmental Law, (ii) has become subject to any Environmental Liability, (iii) has received notice of any claim with respect to any Environmental Liability or (iv) knows of any basis for any Environmental Liability.

(d) Since the date of this Agreement, there has been no change in the status of the Disclosed Matters that, individually or in the aggregate, has resulted in, or materially increased the likelihood of, a Material Adverse Effect.

SECTION 3.07. Compliance with Laws and Agreements; No Burdensome Restrictions. Each of the Borrower and its Subsidiaries is in compliance with all laws, regulations and orders of any Governmental Authority applicable to it or its property and all indentures, agreements and other instruments binding upon it or its property, except, in each case, where the failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect. Neither the Borrower nor any Subsidiary is party or subject to any law, regulation, rule or order, or any obligation under any agreement or instrument, that has had, or could reasonably be expected to result in, a Material Adverse Effect. The Borrower is not subject to any Burdensome Restrictions except Burdensome Restrictions permitted by reference to Section 6.06.

SECTION 3.08. Investment Company Status. Neither the Borrower nor any of its Subsidiaries is an "investment company" as defined in, or subject to regulation under, the Investment Company Act of 1940, as amended.

SECTION 3.09. Taxes. Each of the Borrower and its Subsidiaries has timely filed or caused to be filed all Tax returns and reports required to have been filed and has paid or caused to be paid all Taxes required to have been paid by it, except (a) Taxes that are being contested in good faith by appropriate proceedings and for which the Borrower or such Subsidiary, as applicable, has set aside on its books adequate reserves or (b) to the extent that the failure to do so could not reasonably be expected to result in a Material Adverse Effect.

SECTION 3.10. ERISA. No ERISA Event has occurred or is reasonably expected to occur that, when taken together with all other such ERISA Events for which liability is reasonably expected to occur, could reasonably be expected to result in a Material Adverse Effect.

SECTION 3.11. Disclosure. To the extent not previously disclosed pursuant to the Borrower's filings with the Securities and Exchange Commission on or prior to the Effective Date, the Borrower has disclosed to the Lenders all agreements, instruments and corporate or other restrictions to which it or any of its Affiliates is subject, and all other matters known to it, that, individually or in the aggregate, could reasonably be expected to result in a Material Adverse Effect. None of the written reports, financial statements, certificates or other written information furnished by or on behalf of the Borrower or any Subsidiary to the Administrative Agent or any Lender in connection with the negotiation of this Agreement or delivered hereunder (as modified or supplemented by other information so furnished) contains any material misstatement of fact or, when taken together with the Borrower's filings with the Securities and Exchange Commission, omits to state any material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided that, with respect to projected financial information or results, the Borrower represents only that such information was prepared in good faith based upon assumptions believed to be reasonable at the time.

SECTION 3.12. Federal Reserve Regulations. No part of the proceeds of any Loan have been used or will be used, whether directly or indirectly, for any purpose that entails a violation of any of the Regulations of the Board, including Regulations T, U and X. Following the application of the proceeds of each Borrowing, not more than 25% of the value of the assets (either of the Borrower only or of the Borrower and its Subsidiaries on a consolidated basis) subject to the provisions of Section 6.02 or Section 6.03 or subject to any restriction contained in any Loan Document will be "margin stock" within the meaning of Regulation U.

SECTION 3.13. No Default. No Default has occurred and is continuing.

#### ARTICLE IV

##### Conditions

SECTION 4.01. Effective Date. The obligations of the Lenders to make Loans and of the Issuing Bank to issue Letters of Credit hereunder shall not become effective until the date on which each of the following conditions is satisfied (or waived in accordance with Section 9.02):

- (a) The Administrative Agent (or its counsel) shall have received from (i) each party hereto either (A) a counterpart of this Agreement signed on behalf of such party or (B) written evidence satisfactory to the Administrative Agent (which may include telecopy or electronic transmission of a signed signature page of this Agreement) that such party has signed a counterpart of this Agreement and (ii) each initial Subsidiary Guarantor either (A) a counterpart of the Subsidiary Guaranty signed on behalf of such Subsidiary Guarantor or (B) written evidence

satisfactory to the Administrative Agent (which may include telecopy or electronic transmission of a signed signature page of the Subsidiary Guaranty) that such Subsidiary Guarantor has signed a counterpart of the Subsidiary Guaranty.

(b) The Administrative Agent shall have received a favorable written opinion (addressed to the Administrative Agent and the Lenders and dated the Effective Date) of Wilson Sonsini Goodrich & Rosati, P.C., counsel for the Loan Parties, substantially in the form of Exhibit B, and covering such other matters relating to the Loan Parties, the Loan Documents or the Transactions as the Administrative Agent shall reasonably request. The Borrower hereby requests such counsel to deliver such opinion.

(c) The Lenders shall have received (i) satisfactory audited consolidated financial statements of the Borrower for the two most recent fiscal years ended prior to the Effective Date as to which such financial statements are available, (ii) satisfactory unaudited interim consolidated financial statements of the Borrower for each quarterly period ended subsequent to the date of the latest financial statements delivered pursuant to clause (i) of this paragraph as to which such financial statements are publicly available and (iii) satisfactory financial statement projections through and including the Borrower's 2012 fiscal year, together with such information as the Administrative Agent and the Lenders shall reasonably request (including, without limitation, a detailed description of the assumptions used in preparing such projections).

(d) The Administrative Agent shall have received such documents and certificates as the Administrative Agent or its counsel may reasonably request relating to the incorporation or organization, existence and good standing of the initial Loan Parties, the authorization of the Transactions and any other legal matters relating to such Loan Parties, the Loan Documents or the Transactions, all in form and substance reasonably satisfactory to the Administrative Agent and its counsel and as further described in the list of closing documents attached as Exhibit C.

(e) The Administrative Agent shall have received a certificate, dated the Effective Date and signed by the Chief Executive Officer or a Financial Officer, confirming compliance with the conditions set forth in paragraphs (a) and (b) of Section 4.02.

(f) The Administrative Agent shall have received evidence reasonably satisfactory to it that all governmental and third party approvals necessary or, in the discretion of the Administrative Agent, advisable in connection with the Transactions and the continuing operations of the Borrower and its Subsidiaries have been obtained and are in full force and effect.

(g) The Administrative Agent shall have received all fees and other amounts due and payable on or prior to the Effective Date, including, to the extent invoiced, reimbursement or payment of all out-of-pocket expenses required to be reimbursed or paid by the Borrower hereunder.

The Administrative Agent shall notify the Borrower and the Lenders of the Effective Date, and such notice shall be conclusive and binding.

SECTION 4.02. Each Credit Event. The obligation of each Lender to make a Loan on the occasion of any Borrowing, and of the Issuing Bank to issue, amend, renew or extend any Letter of Credit, is subject to the satisfaction of the following conditions:

(a) The representations and warranties of the Borrower set forth in this Agreement shall be true and correct in all material respects on and as of the date of such Borrowing except to the extent such representation and warranty specifically refers to an earlier date, in which case it shall be true and correct in all material respects as of such earlier date.

(b) At the time of and immediately after giving effect to such Borrowing or the issuance, amendment, renewal or extension of such Letter of Credit, as applicable, no Default shall have occurred and be continuing.

Each Borrowing and each issuance, amendment, renewal or extension of a Letter of Credit shall be deemed to constitute a representation and warranty by the Borrower on the date thereof as to the matters specified in paragraphs (a) and (b) of this Section. The Administrative Agent shall notify the Borrower and the Lenders of the Effective Date, and such notice shall be conclusive and binding.

## ARTICLE V

### Affirmative Covenants

Until the Commitments have expired or been terminated and the principal of and interest on each Loan and all fees payable hereunder shall have been paid in full and all Letters of Credit shall have expired or terminated and all LC Disbursements shall have been reimbursed, the Borrower covenants and agrees with the Lenders that:

SECTION 5.01. Financial Statements and Other Information. The Borrower will furnish to the Administrative Agent and each Lender:

(a) within ninety (90) days after the end of each fiscal year of the Borrower, its audited consolidated balance sheet and related statements of operations, shareholders' equity and cash flows as of the end of and for such year, setting forth in each case in comparative form the figures for the previous fiscal year, all reported on by Deloitte & Touche LLP or other independent public accountants of recognized international standing (without a "going concern" or like qualification or exception and without any qualification or exception as to the scope of such audit) to the effect that such consolidated financial statements present fairly in all material respects the financial condition and results of operations of the Borrower and its consolidated Subsidiaries on a consolidated basis in accordance with GAAP consistently applied;

(b) within forty-five (45) days after the end of each of the first three fiscal quarters of each fiscal year of the Borrower, its consolidated balance sheet and related statements of operations, shareholders' equity and cash flows as of the end of and for such fiscal quarter and the then elapsed portion of the fiscal year, setting forth in each case in comparative form the figures for the corresponding period or periods of (or, in the case of the balance sheet, as of the end of) the previous fiscal year, all certified by one of its Financial Officers as presenting fairly in all material respects the financial condition and results of operations of the Borrower and its consolidated Subsidiaries on a consolidated basis in accordance with GAAP consistently applied, subject to normal year-end audit adjustments and the absence of footnotes;

(c) concurrently with any delivery of financial statements under clause (a) or (b) above, a compliance certificate of a Financial Officer of the Borrower in the form of Exhibit E hereto (i) certifying as to whether a Default has occurred and is continuing and, if a Default has occurred and is continuing, specifying the details thereof and any action taken or proposed to be taken with

respect thereto, (ii) setting forth reasonably detailed calculations demonstrating compliance with Section 6.07 and (iii) stating whether any change in GAAP or in the application thereof has occurred since the date of the audited financial statements referred to in Section 3.04 and, if any such change has occurred, specifying the effect of such change on the financial statements accompanying such certificate;

(d) promptly after the same become publicly available, copies of all periodic and other reports, proxy statements and other materials filed by the Borrower or any Subsidiary with the Securities and Exchange Commission, or any Governmental Authority succeeding to any or all of the functions of said Commission, or with any national securities exchange, or distributed by the Borrower to its shareholders generally, as the case may be; and

(e) promptly following any request therefor, such other information regarding the operations, business affairs, assets and financial condition of the Borrower or any Subsidiary, or compliance with the terms of this Agreement, as the Administrative Agent or any Lender may reasonably request.

Reports or financial information required to be delivered pursuant to Sections 5.01(a) or 5.01(b) (to the extent any such financial statements, reports, proxy statements or other materials are included in materials otherwise filed with the Securities and Exchange Commission) may be delivered electronically and if so, shall be deemed to have been delivered on the date on which Borrower posts such report or provides a link thereto on its website on the internet; provided that Borrower shall provide paper copies to the Administrative Agent of the compliance certificates required by Section 5.01(c). Notwithstanding the foregoing, the Borrower shall deliver paper copies of any financial statement referred to in Section 5.01 to the Administrative Agent if the Administrative Agent requests the Borrower to furnish such paper copies until written notice to cease delivering such paper copies is given by the Administrative Agent.

SECTION 5.02. Notices of Material Events. The Borrower will furnish to the Administrative Agent and each Lender prompt written notice of the following:

- (a) the occurrence of any Default;
- (b) the filing or commencement of any action, suit or proceeding by or before any arbitrator or Governmental Authority against the Borrower or any Affiliate thereof that could reasonably be expected to result in a Material Adverse Effect; and
- (c) the occurrence of any ERISA Event that, alone or together with any other ERISA Events that have occurred, could reasonably be expected to result in a Material Adverse Effect; and
- (d) any other development that results in a Material Adverse Effect.

Each notice delivered under this Section shall be accompanied by a statement of a Financial Officer or other executive officer of the Borrower setting forth the details of the event or development requiring such notice and any action taken or proposed to be taken with respect thereto.

SECTION 5.03. Existence; Conduct of Business. The Borrower will, and will cause each of its Subsidiaries to, do or cause to be done all things necessary to preserve, renew and keep in full force and effect its legal existence and the rights, licenses, permits, privileges and franchises material to the conduct of its business except where the failure to do so would not reasonably be expected to result in

a Material Adverse Effect; provided that the foregoing shall not prohibit any merger, consolidation, liquidation or dissolution permitted under Section 6.03.

SECTION 5.04. Payment of Obligations. The Borrower will, and will cause each of its Subsidiaries to, pay its obligations, including Tax liabilities, that, if not paid, could reasonably be expected to result in a Material Adverse Effect before the same shall become delinquent or in default, except where (a) the validity or amount thereof is being contested in good faith by appropriate proceedings, (b) the Borrower or such Subsidiary has set aside on its books adequate reserves with respect thereto in accordance with GAAP and (c) the failure to make payment pending such contest could not reasonably be expected to result in a Material Adverse Effect.

SECTION 5.05. Maintenance of Properties; Insurance. The Borrower will, and will cause each of its Subsidiaries to, (a) keep and maintain all property material to the conduct of its business in good working order and condition, ordinary wear and tear excepted, except where the failure to do so could not reasonably be expected to result in a Material Adverse Effect and (b) maintain, with financially sound and reputable insurance companies, insurance in such amounts and against such risks as are customarily maintained by companies engaged in the same or similar businesses operating in the same or similar locations.

SECTION 5.06. Books and Records; Inspection Rights. The Borrower will, and will cause each of its Subsidiaries to, keep proper books of record and account in which full, true and correct entries are made in all material respects and sufficient to prepare financial statements in accordance with GAAP. The Borrower will, and will cause each of its Material Subsidiaries to, permit any representatives designated by the Administrative Agent or any Lender, upon reasonable prior notice, to visit and inspect its properties, to examine and make extracts from its books and records, and to discuss its affairs, finances and condition with its officers and independent accountants, all at such reasonable times and as often as reasonably requested. Notwithstanding the foregoing, neither the Borrower nor its Subsidiaries shall be required to disclose or discuss, or permit the inspection, examination or making of extracts of any document, book, record or other matter that (i) constitutes non-financial trade secrets or non-financial proprietary information, (ii) in respect of which disclosure to the Administrative Agent, such Lender or their representatives is then prohibited by applicable law or any agreement binding on Borrower or its Subsidiaries or (iii) is protected from disclosure by the attorney-client privilege or the attorney work product privilege.

SECTION 5.07. Compliance with Laws and Contractual Obligations. The Borrower will, and will cause each of its Subsidiaries to, comply with all laws, rules, regulations and orders of any Governmental Authority (including without limitation Environmental Laws), and all agreements and other contractual instruments, applicable to it or its property, except where the failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect.

SECTION 5.08. Use of Proceeds. The proceeds of the Loans will be used only to finance the working capital needs, and for general corporate purposes, of the Borrower and its Subsidiaries in the ordinary course of business. No part of the proceeds of any Loan will be used, whether directly or indirectly, for any purpose that entails a violation of any of the Regulations of the Board, including Regulations T, U and X. Following the application of the proceeds of each Borrowing, not more than 25% of the value of the assets (either of the Borrower only or of the Borrower and its Subsidiaries on a consolidated basis) subject to the provisions of Section 6.02 or Section 6.03 or subject to any restriction contained in any Loan Document will be "margin stock" within the meaning of Regulation U.

SECTION 5.09. Subsidiary Guaranty. As promptly as possible but in any event within thirty (30) days (or such later date as may be agreed upon by the Administrative Agent) after any Domestic Subsidiary qualifies as, or is designated by the Borrower or the Administrative Agent as, a Subsidiary Guarantor pursuant to the definitions of “Material Subsidiary” and “Subsidiary Guarantor”, the Borrower shall provide the Administrative Agent with written notice thereof setting forth information in reasonable detail describing the material assets of such Person and shall cause each such Subsidiary which also qualifies as a Subsidiary Guarantor to deliver to the Administrative Agent a joinder to the Subsidiary Guaranty (in the form contemplated thereby) pursuant to which such Subsidiary agrees to be bound by the terms and provisions of thereof, such Subsidiary Guaranty to be accompanied by appropriate corporate resolutions, other corporate documentation and legal opinions in form and substance reasonably satisfactory to the Administrative Agent and its counsel.

## ARTICLE VI

### Negative Covenants

Until the Commitments have expired or terminated and the principal of and interest on each Loan and all fees payable hereunder have been paid in full and all Letters of Credit have expired or terminated and all LC Disbursements shall have been reimbursed, the Borrower covenants and agrees with the Lenders that:

SECTION 6.01. Subsidiary Indebtedness. The Borrower will not permit any Subsidiary to create, incur, assume or permit to exist any Indebtedness, except:

- (a) the Obligations and any other Indebtedness created under the Loan Documents;
- (b) Indebtedness existing on the date hereof and set forth in Schedule 6.01 to the Disclosure Letter and extensions, renewals and replacements of any such Indebtedness that do not increase the then outstanding principal amount thereof;
- (c) Indebtedness of (i) any Subsidiary to any Loan Party and (ii) any Subsidiary that is not a Loan Party to any other Subsidiary that is not a Loan Party;
- (d) Guarantees by any Subsidiary of Indebtedness of the Borrower or any other Subsidiary;
- (e) Indebtedness of any Subsidiary incurred to finance the acquisition, construction or improvements of any fixed or capital assets, including Capital Lease Obligations and any Indebtedness assumed in connection with the acquisition of any such assets or secured by a Lien on any such assets (and additions, accessions, parts, improvement and attachments thereto and the proceeds thereof) prior to the acquisition thereof, and extensions, renewals and replacements of any such Indebtedness that do not increase the then outstanding principal amount thereof; provided that such Indebtedness is incurred prior to or within 120 days after such acquisition or the completion of such construction or improvement; and extensions, renewals and replacements of any such Indebtedness that do not increase the outstanding principal amount thereof;
- (f) Indebtedness of any Person that becomes a Subsidiary after the date hereof; provided that such Indebtedness exists at the time such Person becomes a Subsidiary and is not created in contemplation of or in connection with such Person becoming a Subsidiary, and extensions,



renewals and replacements of any such Indebtedness that do not increase the outstanding principal amount thereof;

(g) Indebtedness of any Subsidiary as an account party in respect of letters of credit, bank guarantees and bankers' acceptances;

(h) Indebtedness of any Subsidiary as a guarantor under each of (i) the Secured Credit Agreement dated as of October 5, 2007 by and among the Borrower and JPMorgan Chase Bank, National Association as initial lender and as administrative agent and (ii) the Loan Agreement dated as of March 31, 2006 by and among Network Appliance Global Ltd. and JPMorgan Chase Bank, National Association as initial lender and as administrative agent;

(i) Indebtedness in respect of Swap Agreements permitted under Section 6.04;

(j) Indebtedness of Subsidiaries which are not Loan Parties in an aggregate principal amount not exceeding 5% of Consolidated Total Assets at any time outstanding; and

(k) other Indebtedness of any Subsidiary which is a Loan Party so long as, at the time of the incurrence thereof and after giving effect thereto (on a pro forma basis), the Borrower is in pro forma compliance with the maximum Leverage Ratio permitted under Section 6.07(a).

SECTION 6.02. Liens. The Borrower will not, and will not permit any Subsidiary to, create, incur, assume or permit to exist any Lien on any property or asset now owned or hereafter acquired by it (and for purposes hereof, any capital stock issued by the Borrower which is held by the Borrower as treasury stock shall not be deemed to be property or an asset of the Borrower and shall not be subject to this Section 6.02), or assign or sell any income or revenues (including accounts receivable) or rights in respect of any thereof, except:

(a) Permitted Encumbrances;

(b) any Lien on any property or asset of the Borrower or any Subsidiary existing on the date hereof and set forth in Schedule 6.02 to the Disclosure Letter; provided that (i) such Lien shall not apply to any other property or asset of the Borrower or any Subsidiary and (ii) such Lien shall secure only those obligations which it secures on the date hereof and extensions, renewals and replacements thereof that do not increase the outstanding principal amount thereof;

(c) any Lien existing on any property or asset prior to the acquisition thereof by the Borrower or any Subsidiary or existing on any property or asset of any Person that becomes a Subsidiary after the date hereof prior to the time such Person becomes a Subsidiary; provided that (i) such Lien is not created in contemplation of or in connection with such acquisition or such Person becoming a Subsidiary, as the case may be, (ii) such Lien shall not apply to any other property or assets of the Borrower or any Subsidiary and (iii) such Lien shall secure only those obligations which it secures on the date of such acquisition or the date such Person becomes a Subsidiary, as the case may be, and extensions, renewals and replacements thereof that do not increase the outstanding principal amount thereof;

(d) Liens on fixed or capital assets (and additions, accessions, parts, improvements and attachments thereto and the proceeds thereof) acquired, constructed or improved by the Borrower or any Subsidiary; provided that (i) such security interests secure Indebtedness not otherwise prohibited under this Agreement, (ii) such security interests and the Indebtedness secured thereby are incurred prior to or within one hundred twenty (120) days after such acquisition or the completion of

such construction or improvement, (iii) the Indebtedness secured thereby does not exceed the cost of acquiring, constructing or improving such fixed or capital assets and (iv) such security interests shall not apply to any other property or assets of the Borrower or any Subsidiary;

(e) customary bankers' Liens and rights of setoff arising by operation of law or contract and incurred on deposits made in the ordinary course of business or on deposit or securities accounts;

(f) assignments of the right to receive income effected (i) as a part of the sale of a Subsidiary or a business unit or (ii) for factoring in the ordinary course of business;

(g) Liens on any cash earnest money deposit made by the Borrower or any Subsidiary in connection with any letter of intent or acquisition agreement that is not prohibited by this Agreement;

(h) customary Liens granted in favor a trustee to secure fees and other amounts owing to such trustee under an indenture or other agreement pursuant to Indebtedness not otherwise prohibited under this Agreement;

(i) Liens created under the "Collateral Documents" under, and as defined in, the Secured Credit Agreement dated as of October 5, 2007 by and among the Borrower and JPMorgan Chase Bank, National Association as initial lender and as administrative agent and under, and as defined in, the Loan Agreement dated as of March 31, 2006 by and among Network Appliance Global Ltd. and JPMorgan Chase Bank, National Association as initial lender and as administrative agent;

(j) Liens against properties leased or covered under Borrower's synthetic lease facilities to secure Borrower's obligations under the documents governing such facilities, or granted against any such property to secure Indebtedness incurred to repay any such facility or purchase any such property and extensions, renewals and replacements thereof that do not increase the outstanding principal amount thereof; and

(k) other Liens on assets securing Indebtedness or other obligations not prohibited hereunder in an aggregate amount not to exceed \$50,000,000 at any time outstanding.

#### SECTION 6.03. Fundamental Changes and Asset Sales.

(a) The Borrower will not, and will not permit any Subsidiary to, merge into, consolidate with, or otherwise be acquired by, any other Person, or sell, transfer, lease or otherwise dispose (including pursuant to a Sale and Leaseback Transaction) of (in one transaction or in a series of transactions) all or substantially all of its assets, or all or substantially all of the stock of any of its Subsidiaries (in each case, whether now owned or here-after acquired, and for purposes hereof, any capital stock issued by the Borrower which is held by the Borrower as treasury stock shall not be deemed to be property or an asset of the Borrower and shall not be subject to this Section 6.03), or liquidate or dissolve, except that, if at the time thereof and immediately after giving effect thereto no Default shall have occurred and be continuing (i) any Subsidiary may merge into a Loan Party in a transaction in which the surviving entity is such Loan Party (provided that any such merger involving the Borrower must result in the Borrower as the surviving entity), (ii) any wholly owned Subsidiary may merge into or consolidate with any wholly owned Subsidiary in a transaction in which the surviving entity is a wholly owned Subsidiary and no Person other than the Borrower or a wholly owned Subsidiary receives any consideration, provided that if any such merger described in this clause (ii) shall involve a Loan Party, the surviving entity of such merger shall be a Loan Party, (iii) any

Subsidiary may sell, transfer, lease or otherwise dispose of its assets to a Loan Party or any wholly owned Subsidiary pursuant to a transaction not otherwise prohibited under this Agreement, (iv) any Subsidiary may liquidate or dissolve if the Borrower determines in good faith that such liquidation or dissolution is in the best interests of the Borrower, (v) the Borrower may merge with any other Person so long as the Borrower is the surviving entity, (vi) any Subsidiary may merge with any other Person so long as the surviving entity is, in the case of a Subsidiary Guarantor, the Subsidiary Guarantor, and in all other cases, a wholly owned Subsidiary and (vii) any Subsidiary other than a Subsidiary Guarantor may merge into, and Borrower or any Subsidiary may dispose of assets to, any other Person so long as Borrower delivers a certificate to the Administrative Agent demonstrating pro forma compliance with Section 6.07 after giving effect to such transaction.

(b) The Borrower will not, and will not permit any of its Subsidiaries to, engage to any material extent in any business other than businesses of the type conducted by the Borrower and its Subsidiaries on the date of execution of this Agreement and businesses reasonably related thereto.

(c) The Borrower will not, and will not permit any of its Subsidiaries to, change its fiscal year to end on a day other than as such fiscal year end is currently determined or change the Borrower's method of determining fiscal quarters.

**SECTION 6.04. Speculative Swap Agreements.** The Borrower will not, and will not permit any of its Subsidiaries to, enter into any Swap Agreement, except (a) Swap Agreements entered into to hedge or mitigate risks to which the Borrower or any Subsidiary has actual exposure (other than those in respect of Equity Interests or Subordinated Indebtedness of the Borrower or any of its Subsidiaries), and (b) Swap Agreements entered into in order to effectively cap, collar or exchange interest rates (from fixed to floating rates, from one floating rate to another floating rate or otherwise) with respect to any interest-bearing liability or investment of the Borrower or any Subsidiary.

**SECTION 6.05. Transactions with Affiliates.** The Borrower will not, and will not permit any of its Subsidiaries to, sell, lease or otherwise transfer any property or assets to, or purchase, lease or otherwise acquire any property or assets from, or otherwise engage in any other transactions with, any of its Affiliates, except (a) in the ordinary course of business at prices and on terms and conditions not less favorable to the Borrower or such Subsidiary than could be obtained on an arm's-length basis from unrelated third parties, (b) transactions between or among the Borrower and its wholly owned Subsidiaries not involving any other Affiliate, (c) to enter into indemnification arrangements with or to pay customary fees and reimburse out-of-pocket expenses of directors or (d) as set forth on the Disclosure Letter.

**SECTION 6.06. Restrictive Agreements.** The Borrower will not, and will not permit any of its Subsidiaries to, directly or indirectly, enter into, incur or permit to exist any agreement or other arrangement that prohibits, restricts or imposes any condition upon (a) the ability of the Borrower or any Subsidiary to create, incur or permit to exist any Lien upon any of its property or assets, or (b) the ability of any Subsidiary to pay dividends or other distributions with respect to any shares of its capital stock or to make or repay loans or advances to the Borrower or any other Subsidiary or to Guarantee Indebtedness of the Borrower or any other Subsidiary; provided that (i) the foregoing shall not apply to restrictions and conditions imposed by law, by any Loan Document, by any document relating to the Borrower's unsecured syndicated revolving credit facility from certain lenders and JPMorgan Chase Bank, National Association as administrative agent, or by any document relating to the Borrower's synthetic lease facilities, (ii) the foregoing shall not apply to restrictions and conditions existing on the date hereof identified on Schedule 6.06 to the Disclosure Letter (but shall apply to any extension or renewal of, or any amendment or modification expanding the scope of, any such restriction or condition), (iii) the foregoing shall not apply to customary restrictions and conditions contained in agreements relating to the sale of

assets or of a Subsidiary pending such sale, provided such restrictions and conditions apply only to such assets or such Subsidiary that are to be sold and such sale is permitted hereunder, (iv) clause (a) of the foregoing shall not apply to restrictions or conditions imposed by any agreement relating to secured Indebtedness permitted by this Agreement if such restrictions or conditions apply only to the property or assets securing such Indebtedness and (v) clause (a) of the foregoing shall not apply to customary provisions in leases, licenses, joint venture agreements and other agreements entered into in the ordinary course of business restricting the assignment thereof.

SECTION 6.07. Financial Covenants.

(a) Maximum Leverage Ratio. The Borrower will not permit the Leverage Ratio to be greater than 3.0 to 1.0.

(b) Minimum Liquidity. The Borrower and its Subsidiaries on a consolidated basis shall maintain, at all times, Liquidity of not less than \$300,000,000.

ARTICLE VII

Events of Default

If any of the following events ("Events of Default") shall occur:

(a) the Borrower shall fail to pay any principal of any Loan or any reimbursement obligation in respect of any LC Disbursement when and as the same shall become due and payable, whether at the due date thereof or at a date fixed for prepayment thereof or otherwise;

(b) the Borrower shall fail to pay any interest on any Loan or any fee or any other amount (other than an amount referred to in clause (a) of this Article) payable under this Agreement, when and as the same shall become due and payable, and such failure shall continue unremedied for a period of three (3) Business Days;

(c) any written representation or warranty made or deemed made by or on behalf of any Loan Party in or in connection with this Agreement or any other Loan Document or any amendment or modification hereof or thereof or waiver hereunder or thereunder, or in any written report, certificate, financial statement or other document furnished pursuant to or in connection with this Agreement or any other Loan Document or any amendment or modification thereof or waiver thereunder, shall prove to have been incorrect in any material respect when made or deemed made;

(d) (i) the Borrower shall fail to observe or perform any covenant, condition or agreement contained in Section 5.02(a), 5.03 (with respect to the Borrower's existence), 5.08 or 5.09 or in Article VI or (ii) any Loan Document shall for any reason not be or shall cease to be in full force and effect or is declared to be null and void, or the Borrower or any Subsidiary takes any action for the purpose of terminating, repudiating or rescinding any Loan Document or any of its obligations thereunder;

(e) any Loan Party shall fail to observe or perform any covenant, condition or agreement contained in any Loan Document (other than those specified in clause (a), (b) or (d) of this Article) and such failure shall continue unremedied for a period of thirty (30) days after notice thereof from the Administrative Agent to the Borrower (which notice will be given at the request of the Required Lenders);

(f) the Borrower or any Subsidiary shall fail to make any payment of principal or interest in respect of any Material Indebtedness, when and as the same shall become due and payable after giving effect to any applicable grace period;

(g) with respect to any Material Indebtedness, any event or condition occurs that results in such Material Indebtedness becoming due prior to its scheduled maturity (other than by regularly scheduled redemptions or by conversion of any convertible debt instrument pursuant to its terms unless such redemption or conversion results from a default thereunder or an event of the type that constitutes an Event of Default) or that enables or permits (with or without the giving of notice, the lapse of time or both) the holder or holders of such Material Indebtedness or any trustee or agent on its or their behalf to cause such Material Indebtedness to become due, or to require the prepayment, repurchase, redemption or defeasance thereof, prior to its scheduled maturity; provided that this clause (g) shall not apply to secured Indebtedness that becomes due as a result of the voluntary sale or transfer of the property or assets securing such Indebtedness;

(h) an involuntary proceeding shall be commenced or an involuntary petition shall be filed seeking (i) liquidation, reorganization or other relief in respect of the Borrower or any Material Subsidiary or its debts, or of a substantial part of its assets, under any Federal, state or foreign bankruptcy, insolvency, receivership or similar law now or hereafter in effect or (ii) the appointment of a receiver, trustee, custodian, sequester, conservator or similar official for the Borrower or any Material Subsidiary or for a substantial part of its assets, and, in any such case, such proceeding or petition shall continue undismissed for sixty (60) days or an order or decree approving or ordering any of the foregoing shall be entered;

(i) the Borrower or any Material Subsidiary shall (i) voluntarily commence any proceeding or file any petition seeking liquidation, reorganization or other relief under any Federal, state or foreign bankruptcy, insolvency, receivership or similar law now or hereafter in effect, (ii) consent to the institution of, or fail to contest in a timely and appropriate manner, any proceeding or petition described in clause (h) of this Article, (iii) apply for or consent to the appointment of a receiver, trustee, custodian, sequester, conservator or similar official for the Borrower or any Material Subsidiary or for a substantial part of its assets, (iv) file an answer admitting the material allegations of a petition filed against it in any such proceeding, (v) make a general assignment for the benefit of creditors or (vi) take any action for the purpose of effecting any of the foregoing;

(j) the Borrower or any Material Subsidiary shall become unable, admit in writing its inability or fail generally to pay its debts as they become due;

(k) one or more judgments for the payment of money in an aggregate amount in excess of \$50,000,000 (to the extent not covered by a creditworthy insurer), shall be rendered against the Borrower, any Subsidiary or any combination thereof and the same shall remain undischarged for a period of thirty (30) consecutive days during which execution shall not be effectively stayed, or any action shall be legally taken by a judgment creditor holding a judgment in excess of \$50,000,000 to attach or levy upon any assets of the Borrower or any Subsidiary to enforce any such judgment;

(l) an ERISA Event shall have occurred that, in the reasonable opinion of the Required Lenders, when taken together with all other ERISA Events that have occurred, could reasonably be expected to result in a Material Adverse Effect; or

(m) a Change in Control shall occur;

then, and in every such event (other than an event with respect to the Borrower described in clause (h) or (i) of this Article), and at any time thereafter during the continuance of such event, the Administrative Agent may, and at the request of the Required Lenders shall, by notice to the Borrower, take either or both of the following actions, at the same or different times: (i) terminate the Commitments, and thereupon the Commitments shall terminate immediately, and (ii) declare the Loans then outstanding to be due and payable in whole (or in part, in which case any principal not so declared to be due and payable may thereafter be declared to be due and payable), and thereupon the principal of the Loans so declared to be due and payable, together with accrued interest thereon and all fees and other Obligations accrued under the Loan Documents, shall become due and payable immediately, without presentment, demand, protest or other notice of any kind, all of which are hereby waived by the Borrower; and in case of any event with respect to the Borrower described in clause (h) or (i) of this Article, the Commitments shall automatically terminate and the principal of the Loans then outstanding, together with accrued interest thereon and all fees and other Obligations accrued under the Loan Documents, shall automatically become due and payable, without presentment, demand, protest or other notice of any kind, all of which are hereby waived by the Borrower. Upon the occurrence and during the continuance of an Event of Default, the Administrative Agent may, and at the request of the Required Lenders shall, exercise any rights and remedies provided to the Administrative Agent under the Loan Documents or at law or equity.

#### ARTICLE VIII

##### The Administrative Agent

Each of the Lenders and the Issuing Bank hereby irrevocably appoints the Administrative Agent as its agent and authorizes the Administrative Agent to take such actions on its behalf, including execution of the other Loan Documents, and to exercise such powers as are delegated to the Administrative Agent by the terms of the Loan Documents, together with such actions and powers as are reasonably incidental thereto.

The bank serving as the Administrative Agent hereunder shall have the same rights and powers in its capacity as a Lender as any other Lender and may exercise the same as though it were not the Administrative Agent, and such bank and its Affiliates may accept deposits from, lend money to and generally engage in any kind of business with the Borrower or any Subsidiary or other Affiliate thereof as if it were not the Administrative Agent hereunder.

The Administrative Agent shall not have any duties or obligations except those expressly set forth in the Loan Documents. Without limiting the generality of the foregoing, (a) the Administrative Agent shall not be subject to any fiduciary or other implied duties, regardless of whether a Default has occurred and is continuing, (b) the Administrative Agent shall not have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated by the Loan Documents that the Administrative Agent is required to exercise in writing as directed by the Required Lenders (or such other number or percentage of the Lenders as shall be necessary under the circumstances as provided in Section 9.02), and (c) except as expressly set forth in the Loan Documents, the Administrative Agent shall not have any duty to disclose, and shall not be liable for the failure to disclose, any information relating to the Borrower or any of its Subsidiaries that is communicated to or obtained by the bank serving as Administrative Agent or any of its Affiliates in any capacity. The Administrative Agent shall not be liable for any action taken or not taken by it with the consent or at the request of the Required Lenders (or such other number or percentage of the Lenders as shall be necessary under the circumstances as provided in Section 9.02) or in the absence of its own gross negligence or willful misconduct. The Administrative Agent shall be deemed not to have knowledge of any Default unless and until written notice thereof is given to the Administrative Agent by the Borrower

or a Lender, and the Administrative Agent shall not be responsible for or have any duty to ascertain or inquire into (i) any statement, warranty or representation made in or in connection with any Loan Document, (ii) the contents of any certificate, report or other document delivered hereunder or in connection with any Loan Document, (iii) the performance or observance of any of the covenants, agreements or other terms or conditions set forth in any Loan Document, (iv) the validity, enforceability, effectiveness or genuineness of any Loan Document or any other agreement, instrument or document or (v) the satisfaction of any condition set forth in Article IV or elsewhere in any Loan Document, other than to confirm receipt of items expressly required to be delivered to the Administrative Agent.

The Administrative Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing believed by it to be genuine and to have been signed or sent by the proper Person. The Administrative Agent also may rely upon any statement made to it orally or by telephone and believed by it to be made by the proper Person, and shall not incur any liability for relying thereon. The Administrative Agent may consult with legal counsel (who may be counsel for one or more of the Loan Parties), independent accountants and other experts selected by it, and shall not be liable for any action taken or not taken by it in accordance with the advice of any such counsel, accountants or experts.

The Administrative Agent may perform any and all its duties and exercise its rights and powers by or through any one or more sub-agents appointed by the Administrative Agent. The Administrative Agent and any such sub-agent may perform any and all its duties and exercise its rights and powers through their respective Related Parties. The exculpatory provisions of the preceding paragraphs shall apply to any such sub-agent and to the Related Parties of the Administrative Agent and any such sub-agent, and shall apply to their respective activities in connection with the syndication of the credit facilities provided for herein as well as activities as Administrative Agent.

Subject to the appointment and acceptance of a successor Administrative Agent as provided in this paragraph, the Administrative Agent may resign at any time by notifying the Lenders, the Issuing Bank and the Borrower. Upon any such resignation, the Required Lenders shall have the right, in consultation with the Borrower, to appoint a successor. If no successor shall have been so appointed by the Required Lenders and shall have accepted such appointment within thirty (30) days after the retiring Administrative Agent gives notice of its resignation, then the retiring Administrative Agent may, on behalf of the Lenders and the Issuing Bank, appoint a successor Administrative Agent which shall be a bank with an office in New York, New York, or an Affiliate of any such bank. Upon the acceptance of its appointment as Administrative Agent hereunder by a successor, such successor shall succeed to and become vested with all the rights, powers, privileges and duties of the retiring Administrative Agent, and the retiring Administrative Agent shall be discharged from its duties and obligations hereunder. The fees payable by the Borrower to a successor Administrative Agent shall be the same as those payable to its predecessor unless otherwise agreed between the Borrower and such successor. After the Administrative Agent's resignation hereunder, the provisions of this Article and Section 9.03 shall continue in effect for the benefit of such retiring Administrative Agent, its sub-agents and their respective Related Parties in respect of any actions taken or omitted to be taken by any of them while it was acting as Administrative Agent.

Each Lender acknowledges that it has, independently and without reliance upon the Administrative Agent or any other Lender and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Lender also acknowledges that it will, independently and without reliance upon the Administrative Agent or any other Lender and based on such documents and information as it shall from time to time deem appropriate, continue to make its own decisions in taking or not taking action under or based upon this Agreement, any related agreement or any document furnished hereunder or thereunder.

None of the Lenders, if any, identified in this Agreement as a Syndication Agent or Co-Documentation Agent shall have any right, power, obligation, liability, responsibility or duty under this Agreement other than those applicable to all Lenders as such. Without limiting the foregoing, none of such Lenders shall have or be deemed to have a fiduciary relationship with any Lender. Each Lender hereby makes the same acknowledgments with respect to the relevant Lenders in their respective capacities as Syndication Agent or Co-Documentation Agents, as applicable, as it makes with respect to the Administrative Agent in the preceding paragraph.

The Lenders are not partners or co-venturers, and no Lender shall be liable for the acts or omissions of, or (except as otherwise set forth herein in case of the Administrative Agent) authorized to act for, any other Lender. The Administrative Agent shall have the exclusive right on behalf of the Lenders to enforce the payment of the principal of and interest on any Loan after the date such principal or interest has become due and payable pursuant to the terms of this Agreement.

## ARTICLE IX

### Miscellaneous

SECTION 9.01. Notices. (a) Except in the case of notices and other communications expressly permitted to be given by telephone (and subject to paragraph (b) below), all notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by telecopy, as follows:

(i) if to the Borrower, to it at 7301 Kit Creek Road, P.O. Box 13917 Research Triangle Park, North Carolina 27709, Attention of Ingemar Lanevi, Vice President, Corporate Treasurer (Telecopy No. (408) 822-4412), with a copy to 495 East Java Drive, Sunnyvale, California 94089, Attention of Christopher Afarian (Telecopy No. (408) 822-4455);

(ii) if to the Administrative Agent, to JPMorgan Chase Bank, National Association, 10 South Dearborn, 7<sup>th</sup> Floor, Chicago, Illinois 60603, Attention of Claudia Kech (Telecopy No. (312) 385-7096), with a copy to JPMorgan Chase Bank, National Association, 560 Mission Street, 18<sup>th</sup> Floor, San Francisco, California 94105, Attention of Alex McKindra (Telecopy No. (415) 315-8483) and JPMorgan Chase Bank, National Association, 277 Park Avenue, 16<sup>th</sup> Floor, New York, New York 10172, Attention of Anthony Galea (Telecopy No. (866) 682-7113);

(iii) if to the Issuing Bank, to it at JPMorgan Chase Bank, National Association, 10 South Dearborn, 7<sup>th</sup> Floor, Chicago, Illinois 60603, Attention of Claudia Kech (Telecopy No. (312) 385-7096);

(iv) if to the Swingline Lender, to it at JPMorgan Chase Bank, National Association, 10 South Dearborn, 7<sup>th</sup> Floor, Chicago, Illinois 60603, Attention of Claudia Kech (Telecopy No. (312) 385-7096); and

(v) if to any other Lender, to it at its address (or telecopy number) set forth in its Administrative Questionnaire.

(b) Notices and other communications to the Lenders hereunder may be delivered or furnished by electronic communications pursuant to procedures approved by the Administrative Agent; provided that the foregoing shall not apply to notices pursuant to Article II unless otherwise agreed by the Administrative Agent and the applicable Lender. The Administrative Agent or the Borrower may,



in its discretion, agree to accept notices and other communications to it hereunder by electronic communications pursuant to procedures approved by it; provided that approval of such procedures may be limited to particular notices or communications.

(c) Any party hereto may change its address or telecopy number for notices and other communications hereunder by notice to the other parties hereto. All notices and other communications given to any party hereto in accordance with the provisions of this Agreement shall be deemed to have been given on the date of receipt.

SECTION 9.02. Waivers; Amendments. (a) No failure or delay by the Administrative Agent, the Issuing Bank or any Lender in exercising any right or power hereunder or under any other Loan Document shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The rights and remedies of the Administrative Agent, the Issuing Bank and the Lenders hereunder and under the other Loan Documents are cumulative and are not exclusive of any rights or remedies that they would otherwise have. No waiver of any provision of any Loan Document or consent to any departure by the Borrower therefrom shall in any event be effective unless the same shall be permitted by paragraph (b) of this Section, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. Without limiting the generality of the foregoing, the making of a Loan or issuance of a Letter of Credit shall not be construed as a waiver of any Default, regardless of whether the Administrative Agent, any Lender or the Issuing Bank may have had notice or knowledge of such Default at the time.

(b) Neither this Agreement nor any provision hereof may be waived, amended or modified except pursuant to an agreement or agreements in writing entered into by the Borrower and the Required Lenders or by the Borrower and the Administrative Agent with the consent of the Required Lenders; provided that no such agreement shall (i) increase the Commitment of any Lender without the written consent of such Lender, (ii) reduce the principal amount of any Loan or LC Disbursement or reduce the rate of interest thereon, or reduce any fees payable hereunder, without the written consent of each Lender directly affected thereby, (iii) postpone the scheduled date of payment of the principal amount of any Loan or LC Disbursement, or any interest thereon, or any fees payable hereunder, or reduce the amount of, waive or excuse any such payment, or postpone the scheduled date of expiration of any Commitment, without the written consent of each Lender directly affected thereby, (iv) change Section 2.18 (c) or (d) in a manner that would alter the pro rata sharing of payments required thereby, without the written consent of each Lender, (v) change any of the provisions of this Section or the definition of "Required Lenders" or any other provision hereof specifying the number or percentage of Lenders required to waive, amend or modify any rights hereunder or make any determination or grant any consent hereunder, without the written consent of each Lender or (vi) release all or substantially all of the Subsidiary Guarantors from their respective obligations under the Subsidiary Guaranty, without the written consent of each Lender; provided further that no such agreement shall amend, modify or otherwise affect the rights or duties of the Administrative Agent, the Issuing Bank or the Swingline Lender hereunder without the prior written consent of the Administrative Agent, the Issuing Bank or the Swingline Lender, as the case may be.

SECTION 9.03. Expenses; Indemnity; Damage Waiver. (a) The Borrower shall pay (i) all reasonable out-of-pocket expenses incurred by the Administrative Agent and its Affiliates, including the reasonable fees, charges and disbursements of counsel for the Administrative Agent, in connection with the preparation and administration of the Loan Documents or any amendments, modifications or waivers of the provisions hereof or thereof (whether or not the transactions contemplated hereby or thereby shall be consummated), (ii) all reasonable out-of-pocket expenses incurred by the Issuing Bank in

connection with the issuance, amendment, renewal or extension of any Letter of Credit or any demand for payment thereunder and (iii) all reasonable out-of-pocket expenses incurred by the Administrative Agent, the Issuing Bank or any Lender, including the reasonable fees, charges and disbursements of any counsel for the Administrative Agent, the Issuing Bank or any Lender, in connection with the enforcement or protection of its rights in connection with the Loan Documents, including its rights under this Section, or in connection with the Loans made or Letters of Credit issued hereunder, including all such out-of-pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans or Letters of Credit.

(b) The Borrower shall indemnify the Administrative Agent, the Issuing Bank and each Lender, and each Related Party of any of the foregoing Persons (each such Person being called an “Indemnitee”) against, and hold each Indemnitee harmless from, any and all losses, claims, damages, liabilities and related reasonable expenses, including the reasonable fees, charges and disbursements of any counsel for any Indemnitee, incurred by or asserted against any Indemnitee arising out of, in connection with, or as a result of (i) the execution or delivery of any Loan Document or any agreement or instrument contemplated thereby, the performance by the parties hereto of their respective obligations thereunder or the consummation of the Transactions or any other transactions contemplated thereby, (ii) any Loan or Letter of Credit or the use of the proceeds therefrom (including any refusal by the Issuing Bank to honor a demand for payment under a Letter of Credit if the documents presented in connection with such demand do not strictly comply with the terms of such Letter of Credit), (iii) any actual or alleged presence or release of Hazardous Materials on or from any property owned or operated by the Borrower or any of its Subsidiaries, or any Environmental Liability of the Borrower or any of its Subsidiaries, or (iv) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory to the extent any Indemnitee is a party thereto; provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Indemnitee.

(c) To the extent that the Borrower fails to pay any amount required to be paid by it to the Administrative Agent, the Issuing Bank or the Swingline Lender under paragraph (a) or (b) of this Section, each Lender severally agrees to pay to the Administrative Agent, the Issuing Bank or the Swingline Lender, as the case may be, such Lender’s Applicable Percentage (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought) of such unpaid amount (it being understood that the Borrower’s failure to pay any such amount shall not relieve the Borrower of any default in the payment thereof); provided that the unreimbursed expense or indemnified loss, claim, damage, liability or related expense, as the case may be, was incurred by or asserted against the Administrative Agent, the Issuing Bank or the Swingline Lender in its capacity as such.

(d) To the extent permitted by applicable law, the Borrower shall not assert, and hereby waives, any claim against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, the Loan Documents or any agreement or instrument contemplated thereby, the Transactions, any Loan or Letter of Credit or the use of the proceeds thereof.

(e) All amounts due under this Section shall be payable promptly after written demand therefor.

SECTION 9.04. Successors and Assigns. (a) The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby (including any Affiliate of the Issuing Bank that issues any Letter of Credit), except that

(i) the Borrower may not assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of each Lender (and any attempted assignment or transfer by the Borrower without such consent shall be null and void) and (ii) no Lender may assign or otherwise transfer its rights or obligations hereunder except in accordance with this Section. Nothing in this Agreement, expressed or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby (including any Affiliate of the Issuing Bank that issues any Letter of Credit), Participants (to the extent provided in paragraph (c) of this Section) and, to the extent expressly contemplated hereby, the Related Parties of each of the Administrative Agent, the Issuing Bank and the Lenders) any legal or equitable right, remedy or claim under or by reason of this Agreement.

(b)(i) Subject to the conditions set forth in paragraph (b)(ii) below, any Lender may assign to one or more assignees all or a portion of its rights and obligations under this Agreement (including all or a portion of its Commitment and the Loans at the time owing to it) with the prior written consent (such consent not to be unreasonably withheld) of (A) the Administrative Agent, (B) the Issuing Bank and (C) so long as no Event of Default has occurred and is continuing or the assignment is to a Person other than a Lender, an Affiliate of a Lender or an Approved Fund, the Borrower.

(ii) Assignments shall be subject to the following additional conditions:

(A) except in the case of an assignment to a Lender or an Affiliate of a Lender or an Approved Fund or an assignment of the entire remaining amount of the assigning Lender's Commitment or Loans of any Class, the amount of the Commitment or Loans of the assigning Lender subject to each such assignment (determined as of the date the Assignment and Assumption with respect to such assignment is delivered to the Administrative Agent) shall not be less than \$5,000,000 unless the Administrative Agent otherwise consents;

(B) each partial assignment shall be made as an assignment of a proportionate part of all the assigning Lender's rights and obligations in respect of one Class of Commitments or Loans;

(C) the parties to each assignment shall execute and deliver to the Administrative Agent an Assignment and Assumption, together with a processing and recordation fee of \$3,500; and

(D) the assignee, if it shall not be a Lender, shall deliver to the Administrative Agent an Administrative Questionnaire in which the assignee designates one or more credit contacts to whom all syndicate-level information (which may contain material non-public information about the Borrower and its affiliates, the Loan Parties and their related parties or their respective securities) will be made available and who may receive such information in accordance with the assignee's compliance procedures and applicable laws, including Federal and state securities laws.

For the purposes of this Section 9.04(b), the term "Approved Fund" has the following meaning:

"Approved Fund" means any Person (other than a natural person) that is engaged in making, purchasing, holding or investing in bank loans and similar extensions of credit in the ordinary course of its business and that is administered or managed by (a) a Lender, (b) an Affiliate of a Lender or (c) an entity or an Affiliate of an entity that administers or manages a Lender.

(iii) Subject to acceptance and recording thereof pursuant to paragraph (b)(iv) of this Section, from and after the effective date specified in each Assignment and Assumption the assignee thereunder shall be a party hereto and, to the extent of the interest assigned by such Assignment and Assumption, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Assumption, be released from its obligations under this Agreement (and, in the case of an Assignment and Assumption covering all of the assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto but shall continue to be entitled to the benefits of Sections 2.15, 2.16, 2.17 and 9.03). Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this Section 9.04 shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with paragraph (c) of this Section.

(iv) The Administrative Agent, acting for this purpose as an agent of the Borrower, shall maintain at one of its offices a copy of each Assignment and Assumption delivered to it and a register for the recordation of the names and addresses of the Lenders, and the Commitment of, and principal amount of the Loans and LC Disbursements owing to, each Lender pursuant to the terms hereof from time to time (the "Register"). The entries in the Register shall be conclusive absent manifest error, and the Borrower, the Administrative Agent, the Issuing Bank and the Lenders may treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. The Register shall be available for inspection by the Borrower, the Issuing Bank and any Lender, at any reasonable time and from time to time upon reasonable prior notice.

(v) Upon its receipt of a duly completed Assignment and Assumption executed by an assigning Lender and an assignee, the assignee's completed Administrative Questionnaire (unless the assignee shall already be a Lender hereunder), the processing and recordation fee referred to in paragraph (b) of this Section and any written consent to such assignment required by paragraph (b) of this Section, the Administrative Agent shall accept such Assignment and Assumption and record the information contained therein in the Register; provided that if either the assigning Lender or the assignee shall have failed to make any payment required to be made by it pursuant to 2.06(d) or (e), 2.07(b), 2.18(d) or 9.03(c), the Administrative Agent shall have no obligation to accept such Assignment and Assumption and record the information therein in the Register unless and until such payment shall have been made in full, together with all accrued interest thereon. No assignment shall be effective for purposes of this Agreement unless it has been recorded in the Register as provided in this paragraph.

(c) (i) Any Lender may, without the consent of the Borrower, the Administrative Agent, the Issuing Bank or the Swingline Lender, sell participations to one or more banks or other entities (a "Participant") in all or a portion of such Lender's rights and obligations under this Agreement (including all or a portion of its Commitment and the Loans owing to it); provided that (A) such Lender's obligations under this Agreement shall remain unchanged, (B) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations and (C) the Borrower, the Administrative Agent, the Issuing Bank and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement. Any agreement or instrument pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement; provided that such agreement or instrument may provide that such Lender will not, without the consent of the Participant, agree to any amendment, modification or waiver described in the first proviso to Section 9.02(b) that affects such Participant. Subject to paragraph (c)(ii) of this Section, the Borrower agrees that each Participant shall be entitled to the benefits of Sections 2.15, 2.16 and 2.17 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to paragraph (b) of this Section. To the extent permitted by law, each Participant

also shall be entitled to the benefits of Section 9.08 as though it were a Lender, provided such Participant agrees to be subject to Section 2.18(d) as though it were a Lender.

(ii) A Participant shall not be entitled to receive any greater payment under Section 2.15 or 2.17 than the applicable Lender would have been entitled to receive with respect to the participation sold to such Participant, unless the sale of the participation to such Participant is made with the Borrower's prior written consent. A Participant shall not be entitled to the benefits of Section 2.17 unless the Borrower is notified of the participation sold to such Participant and such Participant agrees, for the benefit of the Borrower, to comply with Section 2.17(e) and (f) as though it were a Lender.

(d) Any Lender may at any time pledge or assign a security interest in all or any portion of its rights under this Agreement to secure obligations of such Lender, including without limitation any pledge or assignment to secure obligations to a Federal Reserve Bank, and this Section shall not apply to any such pledge or assignment of a security interest; provided that no such pledge or assignment of a security interest shall release a Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto.

SECTION 9.05. Survival. All covenants, agreements, representations and warranties made by the Loan Parties in the Loan Documents and in the certificates or other instruments delivered in connection with or pursuant to this Agreement or any other Loan Document shall be considered to have been relied upon by the other parties hereto and shall survive the execution and delivery of the Loan Documents and the making of any Loans and issuance of any Letters of Credit, regardless of any investigation made by any such other party or on its behalf and notwithstanding that the Administrative Agent, the Issuing Bank or any Lender may have had notice or knowledge of any Default or incorrect representation or warranty at the time any credit is extended hereunder, and shall continue in full force and effect as long as the principal of or any accrued interest on any Loan or any fee or any other amount payable under this Agreement or any other Loan Document is outstanding and unpaid or any Letter of Credit is outstanding and so long as the Commitments have not expired or terminated. The provisions of Sections 2.15, 2.16, 2.17 and 9.03 and Article VIII shall survive and remain in full force and effect regardless of the consummation of the transactions contemplated hereby, the repayment of the Loans, the expiration or termination of the Letters of Credit and the Commitments or the termination of this Agreement or any other Loan Document or any provision hereof or thereof.

SECTION 9.06. 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. This Agreement, the other Loan Documents and any separate letter agreements with respect to fees payable to the Administrative Agent constitute the entire contract among the parties relating to the subject matter hereof and supersede any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. Except as provided in Section 4.01, this Agreement shall become effective when it shall have been executed by the Administrative Agent and when the Administrative Agent shall have received counterparts hereof which, when taken together, bear the signatures of each of the other parties hereto, and thereafter shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. 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.

SECTION 9.07. Severability. Any provision of any Loan Document 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 thereof; and the invalidity of a particular provision in a particular jurisdiction shall not invalidate such provision in any other jurisdiction.

SECTION 9.08. Right of Setoff. If an Event of Default shall have occurred and be continuing, each Lender and each of its Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other obligations at any time owing by such Lender or Affiliate to or for the credit or the account of the Borrower against any of and all the Obligations now or hereafter existing held by such Lender, irrespective of whether or not such Lender shall have made any demand under this Agreement and although such obligations may be unmatured. The rights of each Lender under this Section are in addition to other rights and remedies (including other rights of setoff) which such Lender may have.

SECTION 9.09. Governing Law; Jurisdiction; Consent to Service of Process; Waiver of Immunity. (a) This Agreement shall be construed in accordance with and governed by the law of the State of New York.

(b) The Borrower hereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of the Supreme Court of the State of New York sitting in New York County and of the United States District Court of the Southern District of New York, and any appellate court from any thereof, in any action or proceeding arising out of or relating to any Loan Document, 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 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 or any other Loan Document shall affect any right that the Administrative Agent, the Issuing Bank or any Lender may otherwise have to bring any action or proceeding relating to this Agreement or any other Loan Document against any Loan Party or its properties in the courts of any jurisdiction.

(c) The Borrower hereby irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or any other Loan Document in any court referred to in paragraph (b) of this Section. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

(d) Each party to this Agreement irrevocably consents to service of process in the manner provided for notices in Section 9.01. Nothing in this Agreement or any other Loan Document will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

SECTION 9.10. WAIVER OF JURY TRIAL. 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, ANY OTHER LOAN DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) 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 (B) 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 9.11. Headings. Article and Section headings and the Table of Contents 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 9.12. Confidentiality. Each of the Administrative Agent, the Issuing Bank and the Lenders agrees to maintain the confidentiality of the Information (as defined below), except that Information may be disclosed (a) on a need to know basis to its and its Affiliates' directors, officers, employees and agents, including accountants, legal counsel and other advisors (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and instructed to keep such Information confidential), (b) to the extent requested by any regulatory authority, (c) to the extent required by applicable laws or regulations or by any subpoena or similar legal process, (d) to any other party to this Agreement, (e) in connection with the exercise of any remedies hereunder or any suit, action or proceeding relating to this Agreement or any other Loan Document or the enforcement of rights hereunder or thereunder, (f) subject to an agreement containing provisions substantially the same as those of this Section, to (i) any assignee of or Participant in, or any prospective assignee of or Participant in, any of its rights or obligations under this Agreement or (ii) any actual or prospective counterparty (or its advisors) to any swap or derivative transaction relating to the Borrower and its obligations, (g) with the consent of the Borrower, (h) to the National Association of Insurance Commissioners or any similar organization or any nationally recognized rating agency that requires access to information about a Lender's investment portfolio in connection with ratings issued with respect to such Lender or (i) to the extent such Information (i) becomes publicly available other than as a result of a breach of this Section or any agreement contemplated by clause (f) of this Section or (ii) becomes available to the Administrative Agent, the Issuing Bank or any Lender on a nonconfidential basis from a source other than the Borrower. For the purposes of this Section, "Information" means all information received from the Borrower relating to the Borrower, any Subsidiary or their respective business, other than any such information that is available to the Administrative Agent, the Issuing Bank or any Lender on a nonconfidential basis prior to disclosure by the Borrower; provided that, in the case of information received from the Borrower after the date hereof, such information is clearly identified at the time of delivery as confidential. Any Person required to maintain the confidentiality of Information as provided in this Section shall be considered to have complied with its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information.

**EACH LENDER ACKNOWLEDGES THAT INFORMATION AS DEFINED IN SECTION 9.12 FURNISHED TO IT PURSUANT TO THIS AGREEMENT MAY INCLUDE MATERIAL NON-PUBLIC INFORMATION CONCERNING THE BORROWER AND ITS RELATED PARTIES OR THEIR RESPECTIVE SECURITIES, AND CONFIRMS THAT IT HAS DEVELOPED COMPLIANCE PROCEDURES REGARDING THE USE OF MATERIAL NON-PUBLIC INFORMATION AND THAT IT WILL HANDLE SUCH MATERIAL NON-PUBLIC INFORMATION IN ACCORDANCE WITH THOSE PROCEDURES AND APPLICABLE LAW, INCLUDING FEDERAL AND STATE SECURITIES LAWS.**

**ALL INFORMATION, INCLUDING REQUESTS FOR WAIVERS AND AMENDMENTS, FURNISHED BY THE BORROWER OR THE ADMINISTRATIVE AGENT PURSUANT TO, OR IN THE COURSE OF ADMINISTERING, THIS AGREEMENT WILL BE SYNDICATE-LEVEL INFORMATION, WHICH MAY CONTAIN MATERIAL NON-PUBLIC**

**INFORMATION ABOUT THE BORROWER AND ITS AFFILIATES, THE LOAN PARTIES AND THEIR RELATED PARTIES OR THEIR RESPECTIVE SECURITIES) AND ITS SECURITIES. ACCORDINGLY, EACH LENDER REPRESENTS TO THE BORROWER AND THE ADMINISTRATIVE AGENT THAT IT HAS IDENTIFIED IN ITS ADMINISTRATIVE QUESTIONNAIRE A CREDIT CONTACT WHO MAY RECEIVE INFORMATION THAT MAY CONTAIN MATERIAL NON-PUBLIC INFORMATION IN ACCORDANCE WITH ITS COMPLIANCE PROCEDURES AND APPLICABLE LAW.**

SECTION 9.13. USA PATRIOT Act. Each Lender that is subject to the requirements of the USA PATRIOT Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "Act") hereby notifies the Borrower that pursuant to the requirements of the Act, it is required to obtain, verify and record information that identifies the Borrower, which information includes the name and address of the Borrower and other information that will allow such Lender to identify the Borrower in accordance with the Act.

SECTION 9.14. Lender Relationship. Each Lender and its Affiliates may have economic interests that conflict with those of the Borrower. The Borrower agrees that nothing in the Loan Documents or otherwise will be deemed to create an advisory, fiduciary or agency relationship or fiduciary or other implied duty between the Lenders or their Affiliates and the Borrower, its stockholders or its affiliates. The Borrower acknowledges and agrees that (i) the transactions contemplated by the Loan Documents are arm's-length commercial transactions between the Lenders, on the one hand, and the Borrower, on the other, (ii) in connection therewith and with the process leading to such transaction, each of the Lenders is acting solely as a principal and not the agent or fiduciary of the Borrower, its management, stockholders, creditors or any other person, (iii) no Lender has assumed an advisory or fiduciary responsibility in favor of the Borrower with respect to the transactions contemplated hereby or the process leading thereto (irrespective of whether any Lender or any of its Affiliates has advised or is currently advising the Borrower on other matters) or any other obligation to the Borrower except the obligations expressly set forth in the Loan Documents and (iv) the Borrower has consulted its own legal and financial advisors to the extent it deemed appropriate. The Borrower further acknowledges and agrees that it is responsible for making its own independent judgment with respect to such transactions and the process leading thereto. The Borrower agrees that it will not claim that any Lender has rendered advisory services of any nature or respect, or owes a fiduciary or similar duty to the Borrower, in connection with such transaction or the process leading thereto.

[Signature Pages Follow]



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

NETWORK APPLIANCE, INC.,  
as the Borrower

By \_\_\_\_\_  
Name:  
Title:

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,  
individually as a Lender, as the Swingline Lender, as the  
Issuing Bank and as Administrative Agent

By \_\_\_\_\_  
Name:  
Title:

BNP PARIBAS, individually as a Lender and as Syndication  
Agent

By \_\_\_\_\_  
Name:  
Title:

By \_\_\_\_\_  
Name:  
Title:

[OTHER BANKS]

Signature Page to Credit Agreement  
Network Appliance, Inc.  
November 2007

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SCHEDULE 2.01  
COMMITMENTS

<u>LENDER</u>	<u>COMMITMENT</u>
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION	\$ 50,000,000
BNP PARIBAS	\$ 35,000,000
BANK OF AMERICA, N.A.	\$ 35,000,000
CITICORP USA, INC.	\$ 35,000,000
STANDARD CHARTERED BANK	\$ 25,000,000
GOLDMAN SACHS BANK USA	\$ 20,000,000
MERRILL LYNCH BANK USA	\$ 15,000,000
DEUTSCHE BANK AG NEW YORK BRANCH	\$ 15,000,000
WELLS FARGO BANK, N.A.	\$ 10,000,000
KEYBANK NATIONAL ASSOCIATION	\$ 10,000,000
<b>TOTAL COMMITMENTS</b>	<b>\$ 250,000,000</b>

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EXHIBIT A

FORM OF ASSIGNMENT AND ASSUMPTION

This Assignment and Assumption (the "Assignment and Assumption") is dated as of the Effective Date set forth below and is entered into by and between [*Insert name of Assignor*] (the "Assignor") and [*Insert name of Assignee*] (the "Assignee"). Capitalized terms used but not defined herein shall have the meanings given to them in the Credit Agreement identified below (as amended, the "Credit Agreement"), receipt of a copy of which is hereby acknowledged by the Assignee. The Standard Terms and Conditions set forth in Annex 1 attached hereto are hereby agreed to and incorporated herein by reference and made a part of this Assignment and Assumption as if set forth herein in full.

For an agreed consideration, the Assignor hereby irrevocably sells and assigns to the Assignee, and the Assignee hereby irrevocably purchases and assumes from the Assignor, subject to and in accordance with the Standard Terms and Conditions and the Credit Agreement, as of the Effective Date inserted by the Administrative Agent as contemplated below (i) all of the Assignor's rights and obligations in its capacity as a Lender under the Credit Agreement and any other documents or instruments delivered pursuant thereto to the extent related to the amount and percentage interest identified below of all of such outstanding rights and obligations of the Assignor under the respective facilities identified below (including any letters of credit, guarantees, and swingline loans included in such facilities) and (ii) to the extent permitted to be assigned under applicable law, all claims, suits, causes of action and any other right of the Assignor (in its capacity as a Lender) against any Person, whether known or unknown, arising under or in connection with the Credit Agreement, any other documents or instruments delivered pursuant thereto or the loan transactions governed thereby or in any way based on or related to any of the foregoing, including contract claims, tort claims, malpractice claims, statutory claims and all other claims at law or in equity related to the rights and obligations sold and assigned pursuant to clause (i) above (the rights and obligations sold and assigned pursuant to clauses (i) and (ii) above being referred to herein collectively as the "Assigned Interest"). Such sale and assignment is without recourse to the Assignor and, except as expressly provided in this Assignment and Assumption, without representation or warranty by the Assignor.

1. Assignor: \_\_\_\_\_
2. Assignee: \_\_\_\_\_  
[and is an Affiliate/Approved Fund of [identify Lender]<sup>1</sup>]
3. Borrower(s): Network Appliance, Inc. \_\_\_\_\_
4. Administrative Agent: JPMorgan Chase Bank, National Association, as the administrative agent under the Credit Agreement
5. Credit Agreement: The Credit Agreement dated as of November 2, 2007 among Network Appliance, Inc., the Lenders parties thereto and JPMorgan Chase Bank, National Association, as Administrative Agent
6. Assigned Interest: \_\_\_\_\_

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<sup>1</sup> Select as applicable.

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Aggregate Amount of Commitment/Loans for all Lenders	Amount of Commitment/ Loans Assigned	Percentage Assigned of Commitment/Loans <sup>2</sup>
\$	\$	%
\$	\$	%
\$	\$	%

Effective Date: \_\_\_\_\_, 20\_\_ [ TO BE INSERTED BY ADMINISTRATIVE AGENT AND WHICH SHALL BE THE EFFECTIVE DATE OF RECORDATION OF TRANSFER IN THE REGISTER THEREFOR.]

The Assignee agrees to deliver to the Administrative Agent a completed Administrative Questionnaire in which the Assignee designates one or more credit contacts to whom all syndicate-level information (which may contain material non-public information about the Borrower, the Loan Parties and their related parties or their respective securities) will be made available and who may receive such information in accordance with the Assignee's compliance procedures and applicable laws, including Federal and state securities laws.

The terms set forth in this Assignment and Assumption are hereby agreed to:

ASSIGNOR

[NAME OF ASSIGNOR]

By: \_\_\_\_\_  
Title:

ASSIGNEE

[NAME OF ASSIGNEE]

By: \_\_\_\_\_  
Title:

Consented to and Accepted:

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, as  
Administrative Agent and Issuing Bank

By: \_\_\_\_\_  
Title:

[Consented to:]<sup>3</sup>

NETWORK APPLIANCE, INC.

By: \_\_\_\_\_  
Title:

<sup>2</sup> Set forth, to at least 9 decimals, as a percentage of the Commitment/Loans of all Lenders thereunder.

<sup>3</sup> To be added only if the consent of the Borrower is required by the terms of the Credit Agreement.

[ ]<sup>1</sup>  
STANDARD TERMS AND CONDITIONS FOR  
ASSIGNMENT AND ASSUMPTION

**1. Representations and Warranties.**

1.1 Assignor. The Assignor (a) represents and warrants that (i) it is the legal and beneficial owner of the Assigned Interest, (ii) the Assigned Interest is free and clear of any lien, encumbrance or other adverse claim and (iii) it has full power and authority, and has taken all action necessary, to execute and deliver this Assignment and Assumption and to consummate the transactions contemplated hereby; and (b) assumes no responsibility with respect to (i) any statements, warranties or representations made in or in connection with the Credit Agreement or any other Loan Document, (ii) the execution, legality, validity, enforceability, genuineness, sufficiency or value of the Loan Documents or any collateral thereunder, (iii) the financial condition of the Borrower, any of its Subsidiaries or Affiliates or any other Person obligated in respect of any Loan Document or (iv) the performance or observance by the Borrower, any of its Subsidiaries or Affiliates or any other Person of any of their respective obligations under any Loan Document.

1.2. Assignee. The Assignee (a) represents and warrants that (i) it has full power and authority, and has taken all action necessary, to execute and deliver this Assignment and Assumption and to consummate the transactions contemplated hereby and to become a Lender under the Credit Agreement, (ii) it satisfies the requirements, if any, specified in the Credit Agreement that are required to be satisfied by it in order to acquire the Assigned Interest and become a Lender, (iii) from and after the Effective Date, it shall be bound by the provisions of the Credit Agreement as a Lender thereunder and, to the extent of the Assigned Interest, shall have the obligations of a Lender thereunder, (iv) it has received a copy of the Credit Agreement, together with copies of the most recent financial statements delivered pursuant to Section 5.01 thereof, as applicable, and such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into this Assignment and Assumption and to purchase the Assigned Interest on the basis of which it has made such analysis and decision independently and without reliance on the Administrative Agent or any other Lender, and (v) if it is a Foreign Lender, attached to the Assignment and Assumption is any documentation required to be delivered by it pursuant to the terms of the Credit Agreement, duly completed and executed by the Assignee; and (b) agrees that (i) it will, independently and without reliance on the Administrative Agent, the Assignor or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under the Loan Documents, and (ii) it will perform in accordance with their terms all of the obligations which by the terms of the Loan Documents are required to be performed by it as a Lender.

2. Payments. From and after the Effective Date, the Administrative Agent shall make all payments in respect of the Assigned Interest (including payments of principal, interest, fees and other amounts) to the Assignor for amounts which have accrued to but excluding the Effective Date and to the Assignee for amounts which have accrued from and after the Effective Date.

3. General Provisions. This Assignment and Assumption shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns. This Assignment

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<sup>1</sup> Describe Credit Agreement at option of Administrative Agent.

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and Assumption may be executed in any number of counterparts, which together shall constitute one instrument. Delivery of an executed counterpart of a signature page of this Assignment and Assumption by telecopy shall be effective as delivery of a manually executed counterpart of this Assignment and Assumption. This Assignment and Assumption shall be governed by, and construed in accordance with, the law of the State of New York.

EXHIBIT B  
OPINION OF COUNSEL FOR THE LOAN PARTIES  
[ATTACHED]

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EXHIBIT C  
LIST OF CLOSING DOCUMENTS  
**NETWORK APPLIANCE, INC.**  
**CREDIT FACILITY**

November 2, 2007

LIST OF CLOSING DOCUMENTS<sup>1</sup>

**A. LOAN DOCUMENTS**

1. Credit Agreement (the "Credit Agreement") by and among Network Appliance, Inc., a Delaware corporation (the "Borrower"), the institutions from time to time parties thereto as Lenders (the "Lenders") and JPMorgan Chase Bank, National Association, in its capacity as Administrative Agent for itself and the other Lenders (the "Administrative Agent"), evidencing an unsecured revolving credit facility to the Borrower from the Lenders in an initial aggregate principal amount of \$250,000,000.

EXHIBITS

Exhibit A	—	Form of Assignment and Assumption
Exhibit B	—	Form of Opinion of Loan Parties' Counsel
Exhibit C	—	List of Closing Documents
Exhibit D	—	Form of Subsidiary Guaranty
Exhibit E	—	Form of Compliance Certificate
Exhibit F	—	Form of Increasing Lender Supplement
Exhibit G	—	Form of Augmenting Lender Supplement

2. Disclosure Letter executed by the Borrower in favor of the Administrative Agent and the Lenders.
3. Notes executed by the Borrower in favor of each of the Lenders, if any, which has requested a note pursuant to Section 2.10(e) of the Credit Agreement.

**B. CORPORATE DOCUMENTS**

4. *Certificate of a Director, Secretary or Assistant Secretary or other duly appointed and authorized officer of the Borrower certifying (i) that there have been no changes in the Certificate of Incorporation or other charter document of the Borrower, as attached thereto and as certified as of a recent date by the Secretary of State (or analogous governmental entity) of the jurisdiction of its incorporation or organization, since the date of the certification thereof by such secretary of state, (ii) the By-Laws or other applicable organizational*

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<sup>1</sup> Each capitalized term used herein and not defined herein shall have the meaning assigned to such term in the above-defined Credit Agreement. Items appearing in **bold** and *italics* shall be prepared and/or provided by the Borrower and/or Borrower's counsel

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*document, as attached thereto, of the Borrower as in effect on the date of such certification, (iii) resolutions of the Board of Directors or other governing body of the Borrower authorizing the execution, delivery and performance of each Loan Document to which it is a party, and (iv) the names and true signatures of the incumbent officers of the Borrower authorized to sign the Loan Documents to which it is a party and authorized to request a Borrowing under the Credit Agreement.*

5. *Good Standing Certificate for the Borrower from the Secretary of State (or analogous governmental entity) of the jurisdiction of its organization.*

#### C. OPINIONS

6. *Opinion of Wilson Sonsini Goodrich & Rosati, P.C., counsel for the Borrower.*

#### D. CLOSING CERTIFICATES AND MISCELLANEOUS

7. *A Certificate signed by a Financial Officer certifying the following: (i) all of the representations and warranties of the Borrower set forth in the Credit Agreement are true and correct and (ii) no Default has occurred and is then continuing.*

EXHIBIT D  
FORM OF SUBSIDIARY GUARANTY  
GUARANTY

THIS GUARANTY (as amended, restated, supplemented or otherwise modified from time to time, this "Guaranty") is made as of [\_\_\_\_\_], 200\_, by and among each of the undersigned (the "Initial Guarantors" and along with any additional Subsidiaries of the Borrower which become parties to this Guaranty by executing a supplement hereto in the form attached as Annex I, the "Guarantors") in favor of the Administrative Agent, for the ratable benefit of the Holders of Guaranteed Obligations (as defined below), under the Credit Agreement referred to below.

WITNESSETH

WHEREAS, NETWORK APPLIANCE, INC., a Delaware corporation (the "Borrower"), the institutions from time to time parties thereto as lenders (the "Lenders"), and JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, in its capacity as contractual representative (the "Administrative Agent"), have entered into a certain Credit Agreement dated as of November 2, 2007 (as the same may be amended, modified, supplemented and/or restated, and as in effect from time to time, the "Credit Agreement"), providing, subject to the terms and conditions thereof, for extensions of credit and other financial accommodations to be made by the Lenders to the Borrower;

WHEREAS, it is a condition precedent to the extensions of credit by the Lenders under the Credit Agreement that each of the Guarantors (constituting all of the Subsidiaries of the Borrower required to execute this Guaranty pursuant to Section 5.09 of the Credit Agreement) execute and deliver this Guaranty, whereby each of the Guarantors shall guarantee the payment when due of all Obligations; and

WHEREAS, in consideration of the direct and indirect financial and other support that the Borrower has provided, and such direct and indirect financial and other support as the Borrower may in the future provide, to the Guarantors, and in order to induce the Lenders and the Administrative Agent to enter into the Credit Agreement, each of the Guarantors is willing to guarantee the Obligations of the Borrower;

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

SECTION 1. Definitions. Terms defined in the Credit Agreement and not otherwise defined herein have, as used herein, the respective meanings provided for therein.

SECTION 2. Representations, Warranties and Covenants. Each of the Guarantors represents and warrants (which representations and warranties shall be deemed to have been renewed at the time of the making, conversion or continuation of any Loan or issuance of any Letter of Credit) that:

(A) It is a corporation, partnership or limited liability company duly and properly incorporated or organized, as the case may be, validly existing and (to the extent such concept applies to such entity) in good standing under the laws of its jurisdiction of incorporation, organization or formation and has all requisite authority to conduct its business in each

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jurisdiction in which its business is conducted, except to the extent that the failure to have such authority could not reasonably be expected to have a Material Adverse Effect.

(B) It (to the extent applicable) has the requisite power and authority and legal right to execute and deliver this Guaranty and to perform its obligations hereunder. The execution and delivery by each Guarantor of this Guaranty and the performance by each of its obligations hereunder have been duly authorized by proper proceedings, and this Guaranty constitutes a legal, valid and binding obligation of such Guarantor, respectively, enforceable against such Guarantor, respectively, in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency or similar laws affecting the enforcement of creditors' rights generally and subject to general principles of equity, regardless of whether considered in a proceeding in equity or at law.

(C) Neither the execution and delivery by it of this Guaranty, nor the consummation by it of the transactions herein contemplated, nor compliance by it with the provisions hereof will (i) violate any law, rule, regulation, order, writ, judgment, injunction, decree or award binding on it or its articles or certificate of incorporation (or equivalent charter documents), limited liability company or partnership agreement, certificate of partnership, articles or certificate of organization, by-laws, or operating agreement or other management agreement, as the case may be, or the provisions of any indenture, material instrument or material agreement to which the Borrower or any of its Subsidiaries is a party or is subject, or by which it, or its property, is bound, or (ii) conflict with, or constitute a default under, or result in, or require, the creation or imposition of any Lien in, of or on its property pursuant to the terms of, any such indenture, material instrument or material agreement (other than any Loan Document). No order, consent, adjudication, approval, license, authorization, or validation of, or filing, recording or registration with, or exemption by, or other action in respect of any governmental or public body or authority, or any subdivision thereof, which has not been obtained by it, is required to be obtained by it in connection with the execution, delivery and performance by it of, or the legality, validity, binding effect or enforceability against it of, this Guaranty.

In addition to the foregoing, each of the Guarantors covenants that, so long as any Lender has any Commitment outstanding under the Credit Agreement or any amount payable under the Credit Agreement or any other Guaranteed Obligations (as defined below) shall remain unpaid, it will, and, if necessary, will enable the Borrower to, fully comply with those covenants and agreements of the Borrower applicable to such Guarantor set forth in the Credit Agreement.

SECTION 3. The Guaranty. Each of the Guarantors hereby unconditionally guarantees, jointly with the other Guarantors and severally, the full and punctual payment and performance when due (whether at stated maturity, upon acceleration or otherwise) of the Obligations, including, without limitation, (i) the principal of and interest on each Loan made to the Borrower pursuant to the Credit Agreement, (ii) any obligations of the Borrower to reimburse LC Disbursements ("Reimbursement Obligations"), (iii) all obligations of the Borrower owing to any Lender or any affiliate of any Lender under any Swap Agreement or Banking Services Agreement, (iv) all other amounts payable by the Borrower or any of its Subsidiaries under the Credit Agreement, any Swap Agreement, any Banking Services Agreement and the other Loan Documents and (v) the punctual and faithful performance, keeping, observance, and fulfillment by the Borrower of all of the agreements, conditions, covenants, and obligations of the Borrower contained in the Loan Documents (all of the foregoing being referred to collectively as the "Guaranteed Obligations" and the holders from time to time of the Guaranteed Obligations being referred to collectively as the "Holders of Guaranteed Obligations"). Upon (x) the failure by the Borrower or any of its Affiliates, as applicable, to pay punctually any such amount or perform such obligation, and (y) such failure continuing beyond any applicable grace or notice and cure period, each of the Guarantors agrees that it shall forthwith on demand pay such amount or perform such

obligation at the place and in the manner specified in the Credit Agreement, any Swap Agreement, any Banking Services Agreement or the relevant Loan Document, as the case may be. Each of the Guarantors hereby agrees that this Guaranty is an absolute, irrevocable and unconditional guaranty of payment and is not a guaranty of collection.

SECTION 4. Guaranty Unconditional. The obligations of each of the Guarantors hereunder shall be unconditional and absolute and, without limiting the generality of the foregoing, shall not be released, discharged or otherwise affected by:

(A) any extension, renewal, settlement, indulgence, compromise, waiver or release of or with respect to the Guaranteed Obligations or any part thereof or any agreement relating thereto, or with respect to any obligation of any other guarantor of any of the Guaranteed Obligations, whether (in any such case) by operation of law or otherwise, or any failure or omission to enforce any right, power or remedy with respect to the Guaranteed Obligations or any part thereof or any agreement relating thereto, or with respect to any obligation of any other guarantor of any of the Guaranteed Obligations;

(B) any modification or amendment of or supplement to the Credit Agreement, any Swap Agreement, any Banking Services Agreement or any other Loan Document, including, without limitation, any such amendment which may increase the amount of, or the interest rates applicable to, any of the Obligations guaranteed hereby;

(C) any release, surrender, compromise, settlement, waiver, subordination or modification, with or without consideration, of any collateral securing the Guaranteed Obligations or any part thereof, any other guaranties with respect to the Guaranteed Obligations or any part thereof, or any other obligation of any person or entity with respect to the Guaranteed Obligations or any part thereof, or any nonperfection or invalidity of any direct or indirect security for the Guaranteed Obligations;

(D) any change in the corporate, partnership or other existence, structure or ownership of the Borrower or any other guarantor of any of the Guaranteed Obligations, or any insolvency, bankruptcy, reorganization or other similar proceeding affecting the Borrower or any other guarantor of the Guaranteed Obligations, or any of their respective assets or any resulting release or discharge of any obligation of the Borrower or any other guarantor of any of the Guaranteed Obligations;

(E) the existence of any claim, setoff or other rights which the Guarantors may have at any time against the Borrower, any other guarantor of any of the Guaranteed Obligations, the Administrative Agent, any Holder of Guaranteed Obligations or any other Person, whether in connection herewith or in connection with any unrelated transactions; provided that nothing herein shall prevent the assertion of any such claim by separate suit or compulsory counterclaim;

(F) the enforceability or validity of the Guaranteed Obligations or any part thereof or the genuineness, enforceability or validity of any agreement relating thereto or with respect to any collateral securing the Guaranteed Obligations or any part thereof, or any other invalidity or unenforceability relating to or against the Borrower or any other guarantor of any of the Guaranteed Obligations, for any reason related to the Credit Agreement, any Swap Agreement, any Banking Services Agreement, any other Loan Document, or any provision of applicable law, decree, order or regulation of any jurisdiction purporting to prohibit the payment by the Borrower or any other guarantor of the Guaranteed Obligations, of any of the Guaranteed Obligations or otherwise affecting any term of any of the Guaranteed Obligations;

(G) the failure of the Administrative Agent to take any steps to perfect and maintain any security interest in, or to preserve any rights to, any security or collateral for the Guaranteed Obligations, if any;

(H) the election by, or on behalf of, any one or more of the Holders of Guaranteed Obligations, in any proceeding instituted under Chapter 11 of Title 11 of the United States Code (11 U.S.C. 101 et seq.) (the "Bankruptcy Code"), of the application of Section 1111(b)(2) of the Bankruptcy Code;

(I) any borrowing or grant of a security interest by the Borrower, as debtor-in-possession, under Section 364 of the Bankruptcy Code;

(J) the disallowance, under Section 502 of the Bankruptcy Code, of all or any portion of the claims of the Holders of Guaranteed Obligations or the Administrative Agent for repayment of all or any part of the Guaranteed Obligations;

(K) the failure of any other guarantor to sign or become party to this Guaranty or any amendment, change, or reaffirmation hereof by or with any other guarantor; or

(L) any other act or omission to act or delay of any kind by the Borrower, any other guarantor of the Guaranteed Obligations, the Administrative Agent, any Holder of Guaranteed Obligations or any other Person or any other circumstance whatsoever which might, but for the provisions of this Section 4, constitute a legal or equitable discharge of any Guarantor's obligations hereunder except as provided in Section 5.

SECTION 5. Discharge Only Upon Payment In Full: Reinstatement In Certain Circumstances. Each of the Guarantors' obligations hereunder shall remain in full force and effect until all Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) shall have been paid in full in cash and the Commitments and all Letters of Credit (other than Extended Letters of Credit) issued under the Credit Agreement shall have terminated or expired. If at any time any payment of the principal of or interest on any Loan, any Reimbursement Obligation or any other amount payable by the Borrower or any other party under the Credit Agreement, any Swap Agreement, any Banking Services Agreement or any other Loan Document is rescinded or must be otherwise restored or returned upon the insolvency, bankruptcy or reorganization of the Borrower or otherwise, each of the Guarantors' obligations hereunder with respect to such payment shall be reinstated as though such payment had been due but not made at such time. The parties hereto acknowledge and agree that each of the Guaranteed Obligations shall be due and payable in the same currency as such Guaranteed Obligation is denominated, but if currency control or exchange regulations are imposed in the country which issues such currency with the result that such currency (the "Original Currency") no longer exists or the relevant Guarantor is not able to make payment in such Original Currency, then all payments to be made by such Guarantor hereunder in such currency shall instead be made when due in Dollars in an amount equal to the Dollar Amount (as of the date of payment) of such payment due, it being the intention of the parties hereto that each Guarantor takes all risks of the imposition of any such currency control or exchange regulations. As used herein, "Dollar Amount" of any currency means the equivalent in such currency of such amount of dollars, most recently calculated by the Administrative Agent on the basis of the arithmetical mean of the buy and sell spot rates of exchange of the Administrative Agent for such currency on the London market.

SECTION 6. General Waivers; Additional Waivers.

(A) General Waivers. Each of the Guarantors irrevocably waives acceptance hereof, presentment, demand or action on delinquency, protest, the benefit of any statutes of limitations and, to the fullest extent permitted by law, any notice not provided for herein, as well as any requirement that at any time any action be taken by any Person against the Borrower, any other guarantor of the Guaranteed Obligations, or any other Person.

(B) Additional Waivers. Notwithstanding anything herein to the contrary, each of the Guarantors hereby absolutely, unconditionally, knowingly, and expressly waives:

(i) any right it may have to revoke this Guaranty as to future indebtedness under the Loan Documents;

(ii) (a) notice of acceptance hereof; (b) notice of any loans or other financial accommodations made or extended under the Loan Documents or the creation or existence of any Guaranteed Obligations; (c) notice of the amount of the Guaranteed Obligations, subject, however, to each Guarantor's right to make inquiry of Administrative Agent and Holders of Guaranteed Obligations to ascertain the amount of the Guaranteed Obligations at any reasonable time; (d) notice of any adverse change in the financial condition of the Borrower or of any other fact that might increase such Guarantor's risk hereunder; (e) notice of presentment for payment, demand, protest, and notice thereof as to any instruments among the Loan Documents; (f) notice of any Default or Event of Default; and (g) all other notices (except if such notice is specifically required to be given to such Guarantor hereunder or under the Loan Documents) and demands to which each Guarantor might otherwise be entitled;

(iii) its right, if any, to require the Administrative Agent and the other Holders of Guaranteed Obligations to institute suit against, or to exhaust any rights and remedies which the Administrative Agent and the other Holders of Guaranteed Obligations has or may have against, the other Guarantors or any third party; and each Guarantor further waives any defense arising by reason of any disability or other defense (other than the defense that the Guaranteed Obligations shall have been fully and finally performed and indefeasibly paid) of the other Guarantors or by reason of the cessation from any cause whatsoever of the liability of the other Guarantors in respect thereof;

(iv) (a) any rights to assert against the Administrative Agent and the other Holders of Guaranteed Obligations any defense (legal or equitable), set-off, counterclaim, or claim which such Guarantor may now or at any time hereafter have against the other Guarantors or any other party liable to the Administrative Agent and the other Holders of Guaranteed Obligations; (b) any defense, set-off, counterclaim, or claim, of any kind or nature, arising directly or indirectly from the present or future lack of perfection, sufficiency, validity, or enforceability of the Guaranteed Obligations or any security therefor; (c) any defense such Guarantor has to performance hereunder, and any right such Guarantor has to be exonerated, arising by reason of: the impairment or suspension of the Administrative Agent's and the other Holders of Guaranteed Obligations' rights or remedies against the other Guarantors; the alteration by the Administrative Agent and the other Holders of Guaranteed Obligations of the Guaranteed Obligations; any discharge of the other Guarantors' obligations to the Administrative Agent and the other Holders of Guaranteed Obligations by operation of law as a result of the Administrative Agent's and the other Holders of Guaranteed Obligations' intervention or omission; or the acceptance by the Administrative Agent and the other Holders of Guaranteed Obligations of anything in partial satisfaction of the Guaranteed Obligations;

and (d) the benefit of any statute of limitations affecting such Guarantor's liability hereunder or the enforcement thereof, and any act which shall defer or delay the operation of any statute of limitations applicable to the Guaranteed Obligations shall similarly operate to defer or delay the operation of such statute of limitations applicable to such Guarantor's liability hereunder; and

(v) any defense arising by reason of or deriving from (a) any claim or defense based upon an election of remedies by the Administrative Agent and the other Holders of Guaranteed Obligations; or (b) any election by the Administrative Agent and the other Holders of Guaranteed Obligations under Section 1111(b) of Title 11 of the United States Code entitled "Bankruptcy", as now and hereafter in effect (or any successor statute), to limit the amount of, or any collateral securing, its claim against the Guarantors.

**SECTION 7. Subordination of Subrogation; Subordination of Intercompany Indebtedness.**

(A) **Subordination of Subrogation.** Until the Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) have been indefeasibly paid in full in cash, the Guarantors (i) shall have no right of subrogation with respect to such Guaranteed Obligations and (ii) waive any right to enforce any remedy which the Holders of Guaranteed Obligations, the Issuing Bank or the Administrative Agent now have or may hereafter have against the Borrower, any endorser or any guarantor of all or any part of the Guaranteed Obligations or any other Person, and, until the Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) have been indefeasibly paid in cash, the Guarantors waive any benefit of, and any right to participate in, any security or collateral given to the Holders of Guaranteed Obligations, the Issuing Bank and the Administrative Agent to secure the payment or performance of all or any part of the Guaranteed Obligations or any other liability of the Borrower to the Holders of Guaranteed Obligations or the Issuing Bank. Should any Guarantor have the right, notwithstanding the foregoing, to exercise its subrogation rights, each Guarantor hereby expressly and irrevocably (A) subordinates any and all rights at law or in equity to subrogation, reimbursement, exoneration, contribution, indemnification or set off that such Guarantor may have to the indefeasible payment in full in cash of the Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) and (B) waives any and all defenses available to a surety, guarantor or accommodation co-obligor until the Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) are indefeasibly paid in full in cash. Each Guarantor acknowledges and agrees that this subordination is intended to benefit the Administrative Agent and the other Holders of Guaranteed Obligations and shall not limit or otherwise affect such Guarantor's liability hereunder or the enforceability of this Guaranty, and that the Administrative Agent, the other Holders of Guaranteed Obligations and their respective successors and assigns are intended third party beneficiaries of the waivers and agreements set forth in this Section 7(A).

(B) **Subordination of Intercompany Indebtedness.** Each Guarantor agrees that any and all claims of such Guarantor against the Borrower or any other Guarantor hereunder (each an "Obligor") with respect to any "Intercompany Indebtedness" (as hereinafter defined), any endorser, obligor or any other guarantor of all or any part of the Guaranteed Obligations, or against any of its properties shall be subordinate and subject in right of payment to the prior payment, in full and in cash, of all Guaranteed Obligations (other than contingent indemnity

obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements); provided that, as long as no Event of Default has occurred and is continuing, such Guarantor may receive payments of principal and interest from any Obligor with respect to Intercompany Indebtedness. Notwithstanding any right of any Guarantor to ask, demand, sue for, take or receive any payment from any Obligor, all rights, liens and security interests of such Guarantor, whether now or hereafter arising and howsoever existing, in any assets of any other Obligor shall be and are subordinated to the rights of the Holders of Guaranteed Obligations and the Administrative Agent in those assets. No Guarantor shall have any right to possession of any such asset or to foreclose upon any such asset, whether by judicial action or otherwise, unless and until all of the Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) shall have been fully paid and satisfied (in cash) and all financing arrangements pursuant to any Loan Document have been terminated. If all or any part of the assets of any Obligor, or the proceeds thereof, are subject to any distribution, division or application to the creditors of such Obligor, whether partial or complete, voluntary or involuntary, and whether by reason of liquidation, bankruptcy, arrangement, receivership, assignment for the benefit of creditors or any other action or proceeding, or if the business of any such Obligor is dissolved or if substantially all of the assets of any such Obligor are sold, then, and in any such event (such events being herein referred to as an “Insolvency Event”), any payment or distribution of any kind or character, either in cash, securities or other property, which shall be payable or deliverable upon or with respect to any indebtedness of any Obligor to any Guarantor (“Intercompany Indebtedness”) shall be paid or delivered directly to the Administrative Agent for application on any of the Guaranteed Obligations, due or to become due, until such Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) shall have first been fully paid and satisfied (in cash). Should any payment, distribution, security or instrument or proceeds thereof be received by the applicable Guarantor upon or with respect to the Intercompany Indebtedness after any Insolvency Event and prior to the satisfaction of all of the Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) and the termination of all financing arrangements pursuant to any Loan Document among the Borrower and the Holders of Guaranteed Obligations, such Guarantor shall receive and hold the same in trust, as trustee, for the benefit of the Holders of Guaranteed Obligations and shall forthwith deliver the same to the Administrative Agent, for the benefit of the Holders of Guaranteed Obligations, in precisely the form received (except for the endorsement or assignment of the Guarantor where necessary), for application to any of the Guaranteed Obligations, due or not due, and, until so delivered, the same shall be held in trust by the Guarantor as the property of the Holders of Guaranteed Obligations. If any such Guarantor fails to make any such endorsement or assignment to the Administrative Agent, the Administrative Agent or any of its officers or employees is irrevocably authorized to make the same. Each Guarantor agrees that until the Guaranteed Obligations (other than the contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) have been paid in full (in cash) and satisfied and all financing arrangements pursuant to any Loan Document among the Borrower and the Holders of Guaranteed Obligations have been terminated, except as otherwise permitted by the Credit Agreement, no Guarantor will assign or transfer to any Person (other than the Administrative Agent) any claim any such Guarantor has or may have against any Obligor.

SECTION 8. Contribution with Respect to Guaranteed Obligations.

(A) To the extent that any Guarantor shall make a payment under this Guaranty (a “Guarantor Payment”) which, taking into account all other Guarantor Payments then previously



or concurrently made by any other Guarantor, exceeds the amount which otherwise would have been paid by or attributable to such Guarantor if each Guarantor had paid the aggregate Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) satisfied by such Guarantor Payment in the same proportion as such Guarantor's "Allocable Amount" (as defined below) (as determined immediately prior to such Guarantor Payment) bore to the aggregate Allocable Amounts of each of the Guarantors as determined immediately prior to the making of such Guarantor Payment, then, following indefeasible payment in full in cash of the Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) and termination of the Credit Agreement, such Guarantor shall be entitled to receive contribution and indemnification payments from, and be reimbursed by, each other Guarantor for the amount of such excess, pro rata based upon their respective Allocable Amounts in effect immediately prior to such Guarantor Payment.

(B) As of any date of determination, the "Allocable Amount" of any Guarantor shall be equal to the maximum amount of the claim which could then be recovered from such Guarantor under this Guaranty without rendering such claim voidable or avoidable under Section 548 of Chapter 11 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or similar statute or common law.

(C) This Section 8 is intended only to define the relative rights of the Guarantors, and nothing set forth in this Section 8 is intended to or shall impair the obligations of the Guarantors, jointly and severally, to pay any amounts as and when the same shall become due and payable in accordance with the terms of this Guaranty.

(D) The parties hereto acknowledge that the rights of contribution and indemnification hereunder shall constitute assets of the Guarantor or Guarantors to which such contribution and indemnification is owing.

(E) The rights of the indemnifying Guarantors against other Guarantors under this Section 8 shall be exercisable upon the full and indefeasible payment of the Guaranteed Obligations (other than contingent indemnity obligations and Guaranteed Obligations in respect of Swap Agreements and Banking Services Agreements) in cash and the termination of the Credit Agreement.

**SECTION 9. Stay of Acceleration.** If acceleration of the time for payment of any amount payable by the Borrower under the Credit Agreement, any Swap Agreement, any Banking Services Agreement or any other Loan Document is stayed upon the insolvency, bankruptcy or reorganization of the Borrower, all such amounts otherwise subject to acceleration under the terms of the Credit Agreement, any Swap Agreement, any Banking Services Agreement or any other Loan Document shall nonetheless be payable by each of the Guarantors hereunder forthwith on demand by the Administrative Agent.

**SECTION 10. Notices.** All notices, requests and other communications to any party hereunder shall be given in the manner prescribed in Article IX of the Credit Agreement with respect to the Administrative Agent at its notice address therein and with respect to any Guarantor, in care of the Borrower at the address of the Borrower set forth in the Credit Agreement or such other address or teletype number as such party may hereafter specify for such purpose by notice to the Administrative Agent in accordance with the provisions of such Article IX.

SECTION 11. No Waivers. No failure or delay by the Administrative Agent or any other Holder of Guaranteed Obligations in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided in this Guaranty, the Credit Agreement, any Swap Agreement, any Banking Services Agreement and the other Loan Documents shall be cumulative and not exclusive of any rights or remedies provided by law.

SECTION 12. Successors and Assigns. This Guaranty is for the benefit of the Administrative Agent and the other Holders of Guaranteed Obligations and their respective successors and permitted assigns; provided, that no Guarantor shall have any right to assign its rights or obligations hereunder without the consent of the Required Lenders, and any such assignment in violation of this Section 12 shall be null and void; and in the event of an assignment of any amounts payable under the Credit Agreement, any Swap Agreement, any Banking Services Agreement or the other Loan Documents in accordance with the respective terms thereof, the rights hereunder, to the extent applicable to the indebtedness so assigned, may be transferred with such indebtedness. This Guaranty shall be binding upon each of the Guarantors and their respective successors and assigns.

SECTION 13. Changes in Writing. Other than in connection with the addition of additional Subsidiaries, which become parties hereto by executing a supplement hereto in the form attached as Annex I, neither this Guaranty nor any provision hereof may be changed, waived, discharged or terminated orally, but only in writing signed by each of the Guarantors and the Administrative Agent with the consent of the Required Lenders under the Credit Agreement.

SECTION 14. GOVERNING LAW. THIS GUARANTY SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAW OF THE STATE OF NEW YORK.

SECTION 15. CONSENT TO JURISDICTION; SERVICE OF PROCESS; JURY TRIAL; IMMUNITY.

(A) CONSENT TO JURISDICTION. EACH GUARANTOR HEREBY IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF ANY UNITED STATES FEDERAL OR NEW YORK STATE COURT SITTING IN THE CITY OF NEW YORK IN ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS GUARANTY AND EACH GUARANTOR HEREBY IRREVOCABLY AGREES THAT ALL CLAIMS IN RESPECT OF SUCH ACTION OR PROCEEDING MAY BE HEARD AND DETERMINED IN ANY SUCH COURT AND IRREVOCABLY WAIVES ANY OBJECTION IT MAY NOW OR HEREAFTER HAVE AS TO THE VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN SUCH A COURT OR THAT SUCH COURT IS AN INCONVENIENT FORUM. NOTHING HEREIN SHALL LIMIT THE RIGHT OF THE ADMINISTRATIVE AGENT, THE ISSUING BANK OR ANY LENDER TO BRING PROCEEDINGS AGAINST ANY GUARANTOR IN THE COURTS OF ANY OTHER JURISDICTION. ANY JUDICIAL PROCEEDING BY ANY GUARANTOR AGAINST THE ADMINISTRATIVE AGENT, THE ISSUING BANK OR ANY LENDER OR ANY AFFILIATE OF THE ADMINISTRATIVE AGENT, THE ISSUING BANK OR ANY LENDER INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER IN ANY WAY ARISING OUT OF, RELATED TO, OR CONNECTED WITH THIS GUARANTY OR ANY OTHER LOAN DOCUMENT SHALL BE BROUGHT ONLY IN A COURT IN THE CITY OF NEW YORK.

(B) WAIVER OF JURY TRIAL. EACH GUARANTOR HEREBY WAIVES TRIAL BY JURY IN ANY JUDICIAL PROCEEDING INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER (WHETHER SOUNDING IN TORT, CONTRACT OR OTHERWISE) IN ANY

WAY ARISING OUT OF, RELATED TO, OR CONNECTED WITH THIS GUARANTY OR ANY OTHER LOAN DOCUMENT OR THE RELATIONSHIP ESTABLISHED THEREUNDER AND FURTHER WAIVES ANY RIGHT TO INTERPOSE ANY COUNTERCLAIM (OTHER THAN ANY COMPULSORY COUNTERCLAIM) RELATED TO THIS GUARANTY OR THE TRANSACTIONS CONTEMPLATED HEREBY IN SUCH ACTION.

(C) TO THE EXTENT THAT ANY GUARANTOR HAS OR HEREAFTER MAY ACQUIRE ANY IMMUNITY FROM JURISDICTION OF ANY COURT OR FROM ANY LEGAL PROCESS (WHETHER FROM SERVICE OR NOTICE, ATTACHMENT PRIOR TO JUDGMENT, ATTACHMENT IN AID OF EXECUTION OF A JUDGMENT, EXECUTION OR OTHERWISE), EACH GUARANTOR HEREBY IRREVOCABLY WAIVES SUCH IMMUNITY IN RESPECT OF ITS OBLIGATIONS UNDER THIS GUARANTY.

SECTION 16. No Strict Construction. The parties hereto have participated jointly in the negotiation and drafting of this Guaranty. In the event an ambiguity or question of intent or interpretation arises, this Guaranty shall be construed as if drafted jointly by the parties hereto and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Guaranty.

SECTION 17. Taxes, Expenses of Enforcement, etc.

(A) Taxes.

(i) All payments by any Guarantor to or for the account of any Lender, the Issuing Bank, the Administrative Agent or any other Holder of Guaranteed Obligations hereunder or under any promissory note or application for a Letter of Credit shall be made free and clear of and without deduction for any and all Taxes (other than Excluded Taxes). If any Guarantor shall be required by law to deduct any Taxes (other than Excluded Taxes) from or in respect of any sum payable hereunder to any Lender, the Issuing Bank, the Administrative Agent or any other Holder of Guaranteed Obligations, (a) the sum payable shall be increased as necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section 17(A)) such Lender, the Issuing Bank, the Administrative Agent or any other Holder of Guaranteed Obligations (as the case may be) receives an amount equal to the sum it would have received had no such deductions been made, (b) such Guarantor shall make such deductions, (c) such Guarantor shall pay the full amount deducted to the relevant authority in accordance with applicable law and (d) such Guarantor shall furnish to the Administrative Agent the original copy of a receipt evidencing payment thereof within thirty (30) days after such payment is made.

(ii) In addition, the Guarantors hereby agree to pay any present or future stamp or documentary taxes and any other excise or property taxes, charges or similar levies which arise from any payment made hereunder or under any promissory note or application for a Letter of Credit or from the execution or delivery of, or otherwise with respect to, this Guaranty or any promissory note or application for a Letter of Credit ("Other Taxes").

(iii) The Guarantors hereby agree to indemnify the Administrative Agent, the Issuing Bank, each Lender and any other Holder of Guaranteed Obligations for the full amount of Taxes or Other Taxes (including, without limitation, any Taxes or Other Taxes imposed on amounts payable under this Section 17(A)) paid by the Administrative Agent, the Issuing Bank, such Lender or such other Holder of Guaranteed Obligations and any liability (including penalties, interest and expenses) arising therefrom or with respect thereto. Payments due under this

indemnification shall be made within thirty (30) days of the date the Administrative Agent, the Issuing Bank, such Lender or such other Holder of Guaranteed Obligations makes demand therefor.

(iv) By accepting the benefits hereof, each Foreign Lender agrees that it will comply with Section 2.17(e) of the Credit Agreement.

(B) Expenses of Enforcement, Etc. Subject to the terms of the Credit Agreement, after the occurrence and during the continuance of an Event of Default under the Credit Agreement, the Lenders shall have the right at any time to direct the Administrative Agent to commence enforcement proceedings with respect to the Guaranteed Obligations. The Guarantors agree to reimburse the Administrative Agent and the other Holders of Guaranteed Obligations for any reasonable costs and out-of-pocket expenses (including reasonable attorneys' fees and time charges of attorneys for the Administrative Agent and the other Holders of Guaranteed Obligations, which attorneys may be employees of the Administrative Agent or the other Holders of Guaranteed Obligations) paid or incurred by the Administrative Agent or any other Holder of Guaranteed Obligations in connection with the collection and enforcement of amounts due under the Loan Documents, including without limitation this Guaranty. The Administrative Agent agrees to distribute payments received from any of the Guarantors hereunder to the other Holders of Guaranteed Obligations on a pro rata basis for application in accordance with the terms of the Credit Agreement.

SECTION 18. Setoff. At any time after all or any part of the Guaranteed Obligations have become due and payable (by acceleration or otherwise), each Holder of Guaranteed Obligations (including the Administrative Agent) may, without notice to any Guarantor and regardless of the acceptance of any security or collateral for the payment hereof, appropriate and apply in accordance with the terms of the Credit Agreement toward the payment of all or any part of the Guaranteed Obligations (i) any indebtedness due or to become due from such Holder of Guaranteed Obligations or the Administrative Agent to any Guarantor, and (ii) any moneys, credits or other property belonging to any Guarantor, at any time held by or coming into the possession of such Holder of Guaranteed Obligations (including the Administrative Agent) or any of their respective affiliates.

SECTION 19. Financial Information. Each Guarantor hereby assumes responsibility for keeping itself informed of the financial condition of the Borrower and any and all endorsers and/or other Guarantors of all or any part of the Guaranteed Obligations, and of all other circumstances bearing upon the risk of nonpayment of the Guaranteed Obligations, or any part thereof, that diligent inquiry would reveal, and each Guarantor hereby agrees that none of the Holders of Guaranteed Obligations (including the Administrative Agent) shall have any duty to advise such Guarantor of information known to any of them regarding such condition or any such circumstances. In the event any Holder of Guaranteed Obligations (including the Administrative Agent), in its sole discretion, undertakes at any time or from time to time to provide any such information to a Guarantor, such Holder of Guaranteed Obligations (including the Administrative Agent) shall be under no obligation (i) to undertake any investigation not a part of its regular business routine, (ii) to disclose any information which such Holder of Guaranteed Obligations (including the Administrative Agent), pursuant to accepted or reasonable commercial finance or banking practices, wishes to maintain confidential or (iii) to make any other or future disclosures of such information or any other information to such Guarantor.

SECTION 20. Severability. Wherever possible, each provision of this Guaranty shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Guaranty shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent

of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Guaranty.

SECTION 21. Merger. This Guaranty represents the final agreement of each of the Guarantors with respect to the matters contained herein and may not be contradicted by evidence of prior or contemporaneous agreements, or subsequent oral agreements, between the Guarantor and any Holder of Guaranteed Obligations (including the Administrative Agent).

SECTION 22. Headings. Section headings in this Guaranty are for convenience of reference only and shall not govern the interpretation of any provision of this Guaranty.

SECTION 23. Judgment Currency. If for the purposes of obtaining judgment in any court it is necessary to convert a sum due from any Guarantor hereunder in the currency expressed to be payable herein (the "specified currency") into another currency, the parties hereto agree, to the fullest extent that they may effectively do so, that the rate of exchange used shall be that at which in accordance with normal banking procedures the Administrative Agent could purchase the specified currency with such other currency at the Administrative Agent's main New York City office on the Business Day preceding that on which final, non-appealable judgment is given. The obligations of each Guarantor in respect of any sum due hereunder shall, notwithstanding any judgment in a currency other than the specified currency, be discharged only to the extent that on the Business Day following receipt by any Holder of Guaranteed Obligations (including the Administrative Agent), as the case may be, of any sum adjudged to be so due in such other currency such Holder of Guaranteed Obligations (including the Administrative Agent), as the case may be, may in accordance with normal, reasonable banking procedures purchase the specified currency with such other currency. If the amount of the specified currency so purchased is less than the sum originally due to such Holder of Guaranteed Obligations (including the Administrative Agent), as the case may be, in the specified currency, each Guarantor agrees, to the fullest extent that it may effectively do so, as a separate obligation and notwithstanding any such judgment, to indemnify such Holder of Guaranteed Obligations (including the Administrative Agent), as the case may be, against such loss, and if the amount of the specified currency so purchased exceeds (a) the sum originally due to any Holder of Guaranteed Obligations (including the Administrative Agent), as the case may be, in the specified currency and (b) amounts shared with other Holders of Guaranteed Obligations as a result of allocations of such excess as a disproportionate payment to such other Holder of Guaranteed Obligations under Section 2.18 of the Credit Agreement, such Holder of Guaranteed Obligations (including the Administrative Agent), as the case may be, agrees, by accepting the benefits hereof, to remit such excess to such Guarantor.

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IN WITNESS WHEREOF, each of the Initial Guarantors has caused this Guaranty to be duly executed by its authorized officer as of the day and year first above written.

[INITIAL GUARANTORS TO COME]

By: \_\_\_\_\_  
Name:  
Title:

Acknowledged and Agreed  
as of the date first written above:

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,  
as Administrative Agent

By: \_\_\_\_\_  
Name:  
Title:

ANNEX I TO GUARANTY

Reference is hereby made to the Guaranty (the "Guaranty") made as of [\_\_\_\_], 2007 by and among [INITIAL GUARANTORS TO COME] (the "Initial Guarantors") and along with any additional Subsidiaries of the Borrower, which become parties thereto and together with the undersigned, the "Guarantors") in favor of the Administrative Agent, for the ratable benefit of the Holders of Guaranteed Obligations, under the Credit Agreement. Capitalized terms used herein and not defined herein shall have the meanings given to them in the Guaranty. By its execution below, the undersigned [NAME OF NEW GUARANTOR], a [corporation] [partnership] [limited liability company], agrees to become, and does hereby become, a Guarantor under the Guaranty and agrees to be bound by such Guaranty as if originally a party thereto. By its execution below, the undersigned represents and warrants as to itself that all of the representations and warranties contained in Section 2 of the Guaranty are true and correct in all respects as of the date hereof.

IN WITNESS WHEREOF, [NAME OF NEW GUARANTOR], a [corporation] [partnership] [limited liability company] has executed and delivered this Annex I counterpart to the Guaranty as of this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.



[NAME OF NEW GUARANTOR]

By: \_\_\_\_\_  
Its:

EXHIBIT E  
FORM OF COMPLIANCE CERTIFICATE

To: The Lenders parties to the  
Credit Agreement Described Below

This Compliance Certificate is furnished pursuant to that certain Credit Agreement dated as of November 2, 2007 (as amended, modified, renewed or extended from time to time, the "Agreement") among Network Appliance, Inc. (the "Borrower"), the Lenders party thereto and JPMorgan Chase Bank, National Association, as Administrative Agent for the Lenders. Unless otherwise defined herein, capitalized terms used in this Compliance Certificate have the meanings ascribed thereto in the Agreement.

THE UNDERSIGNED HEREBY CERTIFIES THAT:

1. I am the duly elected \_\_\_\_\_ of the Borrower;
2. I have reviewed the terms of the Agreement and I have made, or have caused to be made under my supervision, a detailed review of the transactions and conditions of the Borrower and its Subsidiaries during the accounting period covered by the attached financial statements **[for quarterly financial statements add: and such financial statements present fairly in all material respects the financial condition and results of operations of the Borrower and its consolidated Subsidiaries on a consolidated basis in accordance with GAAP consistently applied (except as set forth below), subject to normal year-end audit adjustments and the absence of footnotes];**
3. Except as set forth below, the examinations described in paragraph 2 did not disclose, and I have no knowledge of (i) the existence of any condition or event which constitutes a Default during or at the end of the accounting period covered by the attached financial statements or as of the date of this Certificate or (ii) any change in GAAP or in the application thereof that has occurred since the date of the audited financial statements referred to in Section 3.04 of the Agreement; and
4. Schedule I attached hereto sets forth financial data and computations evidencing the Borrower's compliance with Section 6.07 of the Agreement, all of which data and computations are true, complete and correct.
5. Schedule II attached hereto sets forth the computations necessary to determine the Applicable Rate.

Described below are the exceptions, if any, to paragraph 3 by listing, in detail, (i) the nature of the condition or event, the period during which it has existed and the action which the Borrower has taken, is taking, or proposes to take with respect to each such condition or event or (ii) the change in GAAP or the application thereof and the effect of such change on the attached financial statements:

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The foregoing certifications, together with the computations set forth in Schedules I and II hereto and the financial statements delivered with this Certificate in support hereof, are made and delivered this \_\_\_\_ day of \_\_\_\_, \_\_.

NETWORK APPLIANCE, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

SCHEDULE I

Compliance as of \_\_\_\_\_, \_\_\_ with  
Provisions of \_\_\_ and \_\_\_ of  
the Agreement

SCHEDULE II  
Borrower's Applicable Rate Calculation

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EXHIBIT F

FORM OF INCREASING LENDER SUPPLEMENT

INCREASING LENDER SUPPLEMENT, dated \_\_\_\_\_, 20\_\_ (this "Supplement"), by and among each of the signatories hereto, to the Credit Agreement, dated as of November 2, 2007 (as amended, restated, supplemented or otherwise modified from time to time, the "Credit Agreement"), among Network Appliance, Inc. (the "Borrower"), the Lenders party thereto and JPMorgan Chase Bank, National Association, as administrative agent (in such capacity, the "Administrative Agent").

WITNESSETH

WHEREAS, pursuant to Section 2.20 of the Credit Agreement, the Borrower has the right, subject to the terms and conditions thereof, to effectuate from time to time an increase in the aggregate Commitments and/or one or more tranches of Incremental Term Loans under the Credit Agreement by requesting one or more Lenders to increase the amount of its Commitment and/or to participate in such a tranche;

WHEREAS, the Borrower has given notice to the Administrative Agent of its intention to [increase the aggregate Commitments] [and] [enter into a tranche of Incremental Term Loans] pursuant to such Section 2.20; and

WHEREAS, pursuant to Section 2.20 of the Credit Agreement, the undersigned Increasing Lender now desires to [increase the amount of its Commitment] [and] [participate in a tranche of Incremental Term Loans] under the Credit Agreement by executing and delivering to the Borrower and the Administrative Agent this Supplement;

NOW, THEREFORE, each of the parties hereto hereby agrees as follows:

1. The undersigned Increasing Lender agrees, subject to the terms and conditions of the Credit Agreement, that on the date of this Supplement it shall [have its Commitment increased by \$[\_\_\_\_\_], thereby making the aggregate amount of its total Commitments equal to \$[\_\_\_\_\_]] [and] [participate in a tranche of Incremental Term Loans with a commitment amount equal to \$[\_\_\_\_\_] with respect thereto].
2. The Borrower hereby represents and warrants that no Default or Event of Default has occurred and is continuing on and as of the date hereof.
3. Terms defined in the Credit Agreement shall have their defined meanings when used herein.
4. This Supplement shall be governed by, and construed in accordance with, the laws of the State of New York.
5. This Supplement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same document.

IN WITNESS WHEREOF, each of the undersigned has caused this Supplement to be executed and delivered by a duly authorized officer on the date first above written.

[INSERT NAME OF INCREASING LENDER]

By: \_\_\_\_\_  
Name:  
Title:

Accepted and agreed to as of the date first written above:

NETWORK APPLIANCE, INC.

By: \_\_\_\_\_  
Name:  
Title:

Acknowledged as of the date first written above:

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION as  
Administrative Agent

By: \_\_\_\_\_  
Name:  
Title:

EXHIBIT G

FORM OF AUGMENTING LENDER SUPPLEMENT

AUGMENTING LENDER SUPPLEMENT, dated \_\_\_\_\_, 20\_\_ (this "Supplement"), to the Credit Agreement, dated as of November 2, 2007 (as amended, restated, supplemented or otherwise modified from time to time, the "Credit Agreement"), among Network Appliance, Inc. (the "Borrower"), the Lenders party thereto and JPMorgan Chase Bank, National Association, as administrative agent (in such capacity, the "Administrative Agent").

WITNESSETH

WHEREAS, the Credit Agreement provides in Section 2.20 thereof that any bank, financial institution or other entity may [extend Commitments] [and] [participate in tranches of Incremental Term Loans] under the Credit Agreement subject to the approval of the Borrower and the Administrative Agent, by executing and delivering to the Borrower and the Administrative Agent a supplement to the Credit Agreement in substantially the form of this Supplement; and

WHEREAS, the undersigned Augmenting Lender was not an original party to the Agreement but now desires to become a party thereto;

NOW, THEREFORE, each of the parties hereto hereby agrees as follows:

1. The undersigned Augmenting Lender agrees to be bound by the provisions of the Credit Agreement and agrees that it shall, on the date of this Supplement, become a Lender for all purposes of the Credit Agreement to the same extent as if originally a party thereto, with a [Commitment with respect to Revolving Loans of \$[\_\_\_\_\_] ] [and] [a commitment with respect to Incremental Term Loans of \$[\_\_\_\_\_] ].

2. The undersigned Augmenting Lender (a) represents and warrants that it is legally authorized to enter into this Supplement; (b) confirms that it has received a copy of the Credit Agreement, together with copies of the most recent financial statements delivered pursuant to Section 5.01 thereof, as applicable, and has reviewed such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into this Supplement; (c) agrees that it will, independently and without reliance upon the Administrative Agent or any other Lender and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under the Credit Agreement or any other instrument or document furnished pursuant hereto or thereto; (d) appoints and authorizes the Administrative Agent to take such action as agent on its behalf and to exercise such powers and discretion under the Credit Agreement or any other instrument or document furnished pursuant hereto or thereto as are delegated to the Administrative Agent by the terms thereof, together with such powers as are incidental thereto; and (e) agrees that it will be bound by the provisions of the Credit Agreement and will perform in accordance with its terms all the obligations which by the terms of the Credit Agreement are required to be performed by it as a Lender.

3. The undersigned's address for notices for the purposes of the Credit Agreement is as follows:

[\_\_\_\_\_]



4. The Borrower hereby represents and warrants that no Default or Event of Default has occurred and is continuing on and as of the date hereof.
5. Terms defined in the Credit Agreement shall have their defined meanings when used herein.
6. This Supplement shall be governed by, and construed in accordance with, the laws of the State of New York.
7. This Supplement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same document.

[remainder of this page intentionally left blank]

IN WITNESS WHEREOF, each of the undersigned has caused this Supplement to be executed and delivered by a duly authorized officer on the date first above written.

[INSERT NAME OF AUGMENTING LENDER]

By: \_\_\_\_\_  
Name:  
Title:

Accepted and agreed to as of the date first written above:

NETWORK APPLIANCE, INC.

By: \_\_\_\_\_  
Name:  
Title:

Acknowledged as of the date first written above:

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION as Administrative Agent

By: \_\_\_\_\_  
Name:  
Title:

**CLOSING CERTIFICATE  
AND AGREEMENT  
(MOFFETT BUSINESS CENTER)**

**BETWEEN**

**NETWORK APPLIANCE, INC.  
("NAI")**

**AND**

**BNP PARIBAS LEASING CORPORATION  
("BNPPLC")**

**November 29, 2007**

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**CLOSING CERTIFICATE  
AND AGREEMENT  
(MOFFETT BUSINESS CENTER)**

This CLOSING CERTIFICATE AND AGREEMENT (MOFFETT BUSINESS CENTER) (this "**Certificate**"), dated as of November 29, 2007 (the "**Effective Date**"), is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and NETWORK APPLIANCE, INC. ("**NAI**"), a Delaware corporation.

**RECITALS**

Contemporaneously with the execution of this Certificate, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement (Moffett Business Center) dated as of the Effective Date (the "**Common Definitions and Provisions Agreement**"), which by this reference is incorporated into and made a part of this Certificate for all purposes. *As used in this Certificate, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Certificate are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

Also contemporaneously with this Certificate, BNPPLC is acquiring the Land described in Exhibit A and existing Improvements on the Land pursuant to the Existing Contract.

Also contemporaneously with this Certificate, BNPPLC and NAI are executing a Lease Agreement (Moffett Business Center) dated as of the Effective Date (the "**Lease**"), pursuant to which NAI is leasing from BNPPLC the Land, which is described in Exhibit A, and all Improvements on such Land.

Also contemporaneously with this Certificate, BNPPLC and NAI are executing a Purchase Agreement (Moffett Business Center) dated as of the Effective Date (the "**Purchase Agreement**"), pursuant to which NAI may purchase or arrange for the purchase of the Property and BNPPLC may collect a Supplemental Payment from NAI sufficient to cover all or a substantial portion of the Lease Balance not otherwise repaid to BNPPLC from the proceeds of any sale of the Property.

As a condition to BNPPLC's acquisition of the Land and its execution of the other Operative Documents, BNPPLC requires the representations and covenants of NAI set out below.

**AGREEMENTS**

In consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

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**1 Representations, Covenants and Acknowledgments of NAI Concerning the Property.** To induce BNPPLC to purchase the Property from the Prior Owner and to enter into this Certificate and the other Operative Documents, NAI represents, covenants and acknowledges as follows:

(A) Prior Inspections and Investigations Concerning the Property. NAI has thoroughly inspected, investigated and evaluated the condition of and title to the Property and Applicable Laws which will govern the use and operation of the Property required or permitted by the Operative Documents, as necessary to make the representations concerning the Property set forth in this Certificate and other Operative Documents.

(B) Title. Because of the conveyance from the Prior Owner to BNPPLC contemporaneously with the execution of this Certificate, good and indefeasible title to the Land and Improvements is currently vested in BNPPLC, subject only to the Permitted Encumbrances described in Exhibit B, the rights of NAI itself under the Operative Documents and any Liens Removable by BNPPLC. NAI will not, without the prior consent of BNPPLC, create, place or authorize, or through any act or failure to act, acquiesce to or suffer the placing of, any deed of trust, mortgage or other Lien, whether statutory, constitutional or contractual against or covering the Property or any part thereof (other than Permitted Encumbrances and Liens Removable by BNPPLC), regardless of whether the same are expressly or otherwise subordinate to the Operative Documents or BNPPLC's interest in the Property.

(C) Title Insurance. Without limiting NAI's obligations under the preceding subparagraph, contemporaneously with the execution of this Certificate NAI must provide to BNPPLC a title insurance policy or binder committing the applicable title insurer to issue a title insurance policy, without the payment of further premiums (as the case may be, the "**Title Policy**") in an amount equal to the purchase price paid by BNPPLC to the Prior Owner for the Property, in form and substance satisfactory to BNPPLC (including comprehensive, survey, variable rate, access, and such other endorsements as may be requested by BNPPLC), written by one or more title insurance companies satisfactory to BNPPLC and insuring BNPPLC's fee estate in the Land and Improvements.

(D) Condition of the Property. The Land described in Exhibit A is the same as the land described in the Title Policy and as shown on the plat included as part of the ALTA/ACSM Survey prepared by Kier & Wright, Civil Engineers & Surveyors, Inc., dated October 8, 2007, Job No. A07175 (the "**Survey**"), which survey was delivered to BNPPLC at the request of NAI. All material improvements on the Land as of the Effective Date are as shown on the Survey, and except as shown on the Survey there are no easements or encroachments encumbering or affecting the Property. No part of the Land is within a flood plain as designated by any governmental authority. The Improvements are in good condition, free from latent or patent defects or deficiencies that, either individually or in the aggregate, could materially and adversely affect the use or occupancy of the Property as permitted by the Lease or could



reasonably be anticipated to cause injury or death to any person. The Property and use thereof permitted by the Lease comply in all material respects with all Applicable Laws, including laws regarding access and use by disabled persons and local zoning ordinances. Adequate provision has been made for the Property to be served by electric, gas, storm and sanitary sewers, sanitary water supply, telephone and other utilities required for the use thereof. All streets, alleys and easements necessary to serve the Property for the uses permitted by the Lease have been completed and are serviceable. No extraordinary circumstances (including any use of the Land as a habitat for endangered species) exist that would materially and adversely affect such uses of the Property. The Improvements are useable for their intended purpose without the need to obtain any additional easements, rights-of-way or concessions from any third party or parties.

(E) Environmental Representations. Except as otherwise disclosed in the Environmental Report, to the knowledge of NAI: (i) no Hazardous Substances Activity has occurred prior to the Effective Date; (ii) no owner or operator of the Property has reported or been required to report any release of any Hazardous Substances on or from the Property pursuant to any Environmental Law; and (iii) no owner or operator of the Property has received from any federal, state or local governmental authority any warning, citation, notice of violation or other communication regarding a suspected or known release or discharge of Hazardous Substances on or from the Property or regarding a suspected or known violation of Environmental Laws concerning the Property. Further, NAI represents, to its knowledge, that the Environmental Report taken as a whole is not misleading or inaccurate in any material respect.

(F) Cooperation by NAI and its Affiliates.

(1) After the Designated Sale Date, if neither NAI nor an Applicable Purchaser has purchased BNPPLC's interest in the Property pursuant to the Purchase Agreement, and if a use of the Property by BNPPLC or any new Improvements or any removal or modification of Improvements proposed by BNPPLC would violate any Permitted Encumbrance or Applicable Law unless NAI or any of its Affiliates, as an owner of adjacent property or otherwise, gave its consent or approval thereto or agreed to join in a modification of a Permitted Encumbrance, then NAI must give and cause its Affiliates to give such consent or approval or join in such modification.

(2) After the Designated Sale Date, if neither NAI nor an Applicable Purchaser has purchased BNPPLC's interest in the Property pursuant to the Purchase Agreement, and if any Permitted Encumbrance or Applicable Law requires the consent or approval of NAI or any of its Affiliates or of any other Person to an assignment of any interest in the Property by BNPPLC or by any of its successors or assigns, NAI will without charge give and cause its Affiliates to give such consent or approval and will cooperate in any way reasonably requested by BNPPLC to assist BNPPLC to obtain such consent or approval from the other Person.

(3) NAI's obligations under this subparagraph 1(F) will be binding upon any successor or assign of NAI or its Affiliates with respect to the Land and other properties encumbered or benefitted by the Permitted Encumbrances, and such obligations will survive any sale of the Property by BNPPLC, other than to NAI or an Applicable Purchaser under the Purchase Agreement, for the benefit of BNPPLC's assignees.

(G) Compliance with Covenants and Laws. The use of the Property permitted by the Lease complies, or will comply after NAI obtains readily available permits ( as the tenant under the Lease), in all material respects with all Applicable Laws. NAI has obtained or can and will promptly obtain all utility, building, health and operating permits required by any governmental authority or municipality having jurisdiction over the Property for the use of the Property permitted by the Lease.

**2 Representations and Covenants by NAI.** NAI also represents and covenants to BNPPLC as follows:

(A) Concerning NAI and the Operative Documents.

(1) *Entity Status.* NAI is a corporation duly incorporated and validly existing in the State of Delaware and is authorized to do business in and is in good standing under the laws of California.

(2) *Authority.* The Constituent Documents of NAI permit the execution, delivery and performance of the Operative Documents by NAI, and all actions and approvals necessary to bind NAI under the Operative Documents have been taken and obtained. Without limiting the foregoing, the Operative Documents will be binding upon NAI when signed on behalf of NAI by Ingemar Lanevi, Vice President and Corporate Treasurer of NAI. NAI has all requisite power and all governmental certificates of authority, licenses, permits and qualifications to carry on its business as now conducted and contemplated to be conducted and to perform the Operative Documents.

(3) *Solvency.* NAI is not "insolvent" on the Effective Date (that is, the sum of NAI's absolute and contingent liabilities — including the obligations of NAI under the Operative Documents — does not exceed the fair market value of NAI's assets), and NAI has no outstanding liens, suits, garnishments or court actions which could render NAI insolvent or bankrupt. NAI's capital is adequate for the businesses in which NAI is engaged and intends to be engaged. NAI has not incurred (whether by the Operative Documents or otherwise), nor does NAI intend to incur or believe that it will incur, debts which will be beyond its ability to pay as such debts mature. No petition or answer has been filed by or, to NAI's knowledge, against NAI in bankruptcy or other legal proceedings that seeks an assignment for the benefit of creditors, the appointment of a receiver, trustee, custodian or liquidator with respect to NAI or any significant portion of

NAI's property, a reorganization, arrangement, rearrangement, composition, extension, liquidation or dissolution of NAI or similar relief under the federal Bankruptcy Code or any state law.

(4) *Financial Reports.* All reports, financial statements and other data furnished by NAI to BNPPLC in connection with the agreements set forth in the Operative Documents are true and correct in all material respects and do not omit to state any fact or circumstance necessary to make the statements contained therein not misleading. No material adverse change has occurred since the dates of such reports, statements and other data in the financial condition of NAI.

(5) *Pending Legal Proceedings.* No judicial or administrative investigations, actions, suits or proceedings are pending or, to the knowledge of NAI, threatened against or affecting NAI by or before any court or other Governmental Authority that have or could reasonably be expected to have a Material Adverse Effect. NAI is not in default with respect to any order, writ, injunction, decree or demand of any court or other Governmental Authority in a manner that has or could reasonably be expected to have a Material Adverse Effect.

(6) *No Default or Violation.* The execution and performance by NAI of the Operative Documents do not and will not contravene or result in a breach of or default under any other agreement to which NAI is a party or by which NAI is bound or which affects any assets of NAI. Such execution and performance by NAI do not contravene any law, order, decree, rule or regulation to which NAI is subject. Further, such execution and performance by NAI will not result in the creation or imposition of (or the obligation to create or impose) any lien, charge or encumbrance on, or security interest in, any property of NAI pursuant to the provisions of any such other agreement.

(7) *Use of Proceeds.* In no event will the funds from any Funding Advance be used directly or indirectly for personal, family, household or agricultural purposes or for the purpose, whether immediate, incidental or ultimate, of purchasing, acquiring or carrying any "margin stock" or any "margin securities" (as such terms are defined in Regulation U promulgated by the Board of Governors of the Federal Reserve System) or to extend credit to others directly or indirectly for the purpose of purchasing or carrying any such margin stock or margin securities. NAI represents that NAI is not engaged principally, or as one of NAI's important activities, in the business of extending credit to others for the purpose of purchasing or carrying such margin stock or margin securities.

(8) *Enforceability.* The Operative Documents constitute the legal, valid and binding obligations of NAI enforceable in accordance with their terms, subject to the effect of bankruptcy, insolvency, reorganization, receivership and other similar laws affecting the rights of creditors generally.

(9) *Pari Passu*. The claims of BNPPLC against NAI under the Operative Documents rank at least *pari passu* with the claims of all its other unsecured creditors, except those whose claims are preferred solely by any laws of general application having effect in relation to bankruptcy, insolvency, liquidation or other similar events.

(10) *Conduct of Business and Maintenance of Existence*. So long as any obligations of NAI under the Operative Documents remain outstanding, NAI will continue to engage in business of the same general type as now conducted by it and will preserve, renew and keep in full force and effect its corporate existence and its rights, privileges and franchises necessary or desirable in the normal conduct of business.

(11) *Investment Company Act, etc.* NAI is not and will not become, by reason of the Operative Documents or any business or transactions in which it participates voluntarily, (a) an “investment company” or a company “controlled” by an “investment company” (as each of the quoted terms is defined or used in the Investment Company Act of 1940, as amended), or (b) subject to regulation under the Federal Power Act, or any foreign, federal or local statute or regulation limiting NAI’s ability to incur or guarantee indebtedness or obligations, or to pledge its assets to secure indebtedness or obligations, as contemplated by any of the Operative Documents.

(12) *Not a Foreign Person*. NAI is not a “foreign person” within the meaning of Sections 1445 and 7701 of the Code (i.e. NAI is not a non-resident alien, foreign corporation, foreign partnership, foreign trust or foreign estate as those terms are defined in the Code and regulations promulgated thereunder).

(13) *ERISA*. NAI is not and will not become an “employee benefit plan” (as defined in Section 3(3) of ERISA) which is subject to Title I of ERISA. The assets of NAI do not and will not in the future constitute “plan assets” of one or more such plans within the meaning of 29 C.F.R. Section 2510.3-101. NAI is not and will not become a “governmental plan” within the meaning of Section 3(32) of ERISA. Transactions by or with NAI are not subject to state statutes regulating investments of and fiduciary obligations with respect to governmental plans. No ERISA Termination Event has occurred with respect to any Plan, and NAI and its Subsidiaries are in compliance with ERISA. Neither NAI nor its Subsidiaries are required to contribute to, or has any other absolute or contingent liability in respect of, any Multiemployer Plan. As of the Effective Date no “accumulated funding deficiency” (as defined in Section 412(a) of the Code) exists with respect to any Plan, whether or not waived by the Secretary of the Treasury or his delegate, and there are no Unfunded Benefit Liabilities with respect to any Plan.

(14) *Compliance With Laws*. NAI and its Subsidiaries comply and will comply with all Applicable Laws (including environmental laws and ERISA and the rules and

regulations thereunder), except when the necessity of compliance is contested in good faith by appropriate proceedings which do not have and could not reasonably be expected to have a Material Adverse Effect. Neither NAI nor its Subsidiaries have received any notice asserting or describing a material failure on the part of NAI or any Subsidiary to comply with Applicable Laws, other than failures that have been fully rectified by NAI or the Subsidiary, as the case may be, in a manner approved or accepted by Governmental Authorities responsible for the enforcement of the Applicable Laws.

(15) *Payment of Taxes Generally.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect (taking into account any appropriate contest of taxes), NAI and its Subsidiaries have filed and will file all tax declarations, reports and returns which are required by (and in the form required by) Applicable Laws and have paid and will pay all taxes or other charges shown to be due and payable on such declarations, reports and returns and all assessments made against it or its assets by any Governmental Authority; and no liens have been filed or established by any Governmental Authority against NAI or its assets or against any Subsidiary or its assets to secure the payment of taxes or assessments that are past due or claimed to be past due.

(16) *Maintenance of Insurance Generally.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have maintained and will maintain insurance with respect to its properties and businesses, with financially sound and reputable insurers, having coverages against losses or damages of the kinds customarily insured against by reputable companies in the same or similar businesses, such insurance being the types, and in amounts no less than the amounts, which are customary for such companies under similar circumstances.

(17) *Franchises, Licenses, etc.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and comply with, and will have and will comply with, all franchises, certificates, licenses, permits and other authorizations from Governmental Authorities that are necessary for the ownership, maintenance and operation of its properties and assets.

(18) *Patents, Trademarks, etc.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and will have and maintain in full force and effect all patents, trademarks, service marks, trade names, copyrights, licenses and other such rights, free from burdensome restrictions, which are necessary for the operation of its businesses. Without limiting the foregoing, to the knowledge of NAI, no product, process, method, service or other item presently sold by or employed by NAI or any Subsidiary in

connection with its business as presently conducted infringes any patents, trademark, service mark, trade name, copyright, license or other right owned by any other Person. No claim or litigation is presently pending, or to the knowledge of NAI, threatened against or affecting NAI or any Subsidiary that contests its right to sell or use any such product, process, method, substance or other item and that has or could reasonably be expected to have a Material Adverse Effect.

(19) *Labor*. Neither NAI nor any of its Subsidiaries has experienced strikes, labor disputes, slow downs or work stoppages due to labor disagreements that currently have or could reasonably be expected to have a Material Adverse Effect, and to the knowledge of NAI there are no such strikes, disputes, slow downs or work stoppages threatened against it or against any Subsidiary. The hours worked and payment made to employees of NAI and its Subsidiaries have not been in violation in any material respect of the Fair Labor Standards Act or any other Applicable Laws dealing with such matters. All material payments due on account of wages or employee health and welfare insurance and other benefits from NAI or from any Subsidiary have been paid or accrued as liabilities on its books.

(20) *Title to Properties Generally*. Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and will have and maintain good and indefeasible fee simple title to or valid leasehold interests in all of its real property and good title to or a valid leasehold interest in all of its other material assets, as such properties and assets are reflected in the most recent financial statements delivered to BNPPPLC, other than properties or assets disposed of in the ordinary course of business since such date; *subject, however*, in the case of the Property, to Permitted Encumbrances and Liens created by the Operative Documents. NAI enjoys peaceful and undisturbed possession under all of its leases.

(21) *Books and Records*. NAI will keep proper books of record and account, containing complete and accurate entries of all its financial and business transactions.

(B) Further Assurances. NAI will, upon the reasonable request of BNPPPLC, (i) execute, acknowledge, deliver and record or file such further instruments and do such further acts as may be necessary, desirable or proper to carry out more effectively the purposes of the Operative Documents and to subject to any of the Operative Documents any property intended by the terms thereof to be covered thereby, including specifically, but without limitation, any renewals, additions, substitutions, replacements or appurtenances to the Property; (ii) execute, acknowledge, deliver, procure and record or file any document or instrument deemed advisable by BNPPPLC to protect its rights in and to the Property against the rights or interests of third persons; and (iii) provide such certificates, documents, reports, information, affidavits and other instruments and do such further acts as may be necessary, desirable or proper in the reasonable determination of BNPPPLC to enable BNPPPLC to comply with the requirements or requests of

any agency or authority having jurisdiction over it.

(C) Syndication. Without limiting the foregoing, NAI will cooperate with BNPPLC as reasonably required to allow BNPPLC to induce banks not affiliated with BNPPLC to become Participants. Such cooperation will include the execution of any modification proposed by BNPPLC to any of the Operative Documents at the request of a prospective Participant; *subject, however*, to the conditions that (i) in no event will NAI be required to approve or accept an increase in the Spread or other modifications that change the economics of the transactions contemplated by the Operative Documents to NAI, and (ii) in other respects the form and substance of any such modification agreement must not be reasonably objectionable to NAI.

(D) Financial Statements; Required Notices; Certificates. Throughout the Term of the Lease, NAI will deliver to BNPPLC and to each Participant of which NAI has been notified:

(1) as soon as available and in any event within 45 days after the end of each of the first three fiscal quarters of each fiscal year of NAI, the unaudited consolidated balance sheet of NAI and its Subsidiaries as of the end of such quarter and consolidated unaudited statements of income, stockholders' equity and cash flow of NAI and its Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such quarter, setting forth in comparative form figures for the corresponding period in the preceding fiscal year, in the case of such statements of income, stockholders' equity and cash flow, and figures for the preceding fiscal year in the case of such balance sheet, all in reasonable detail, in accordance with GAAP, and certified in a manner acceptable to BNPPLC by a Responsible Financial Officer of NAI (subject to normal year-end adjustments); *provided*, that so long as NAI is a company subject to the periodic reporting requirements of Section 12 of the Securities Exchange Act of 1934, as amended, NAI will be deemed to have satisfied its obligations under this clause (1) if NAI delivers to BNPPLC the same quarterly reports, certified by a Responsible Financial Officer of NAI (subject to year-end adjustments), that NAI delivers to its shareholders;

(2) as soon as available and in any event within ninety days after the end of each fiscal year of NAI, the consolidated balance sheet of NAI and its Subsidiaries as of the end of such fiscal year and consolidated statements of income, stockholders' equity and cash flow of NAI and its Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such fiscal year, setting forth in comparative form figures for the preceding fiscal year, all in reasonable detail, in accordance with GAAP, and certified in a manner acceptable to BNPPLC by independent public accountants of recognized national standing reasonably acceptable to BNPPLC; *provided*, that so long as NAI is a company subject to the periodic reporting requirements of Section 12 of the Securities Exchange Act of 1934, as amended, NAI will be deemed to have satisfied its obligations under this clause (ii) if NAI delivers to BNPPLC the

same annual report and report and opinion of accountants that NAI delivers to its shareholders;

(3) in each case if requested in writing by BNPPLC, together with the financial statements furnished in accordance with subparagraph 2(D)(1) and 2(D)(2), a certificate of a Responsible Financial Officer of NAI in the form of certificate attached hereto as Exhibit C (a) representing that no Event of Default or material Default by NAI has occurred (or, if an Event of Default or material Default by NAI has occurred, stating the nature thereof and the action which NAI has taken or proposes to take to rectify it), (b) stating that the representations and warranties by NAI contained herein are true and complete in all material respects on and as of the date of such certificate as though made on and as of such date, and (c) setting forth calculations which show whether NAI is complying with financial covenants set forth in subparagraph 3(C);

(4) as soon as possible and in any event within five days after the occurrence of each Event of Default or material Default known to a Responsible Financial Officer of NAI, a statement of NAI setting forth details of such Event of Default or material Default and the action which NAI has taken and proposes to take with respect thereto;

(5) promptly after the sending or filing thereof, copies of all such financial statements, proxy statements, notices and reports which NAI or any Subsidiary sends to its public stockholders, and copies of all reports and registration statements (without exhibits) which NAI or any Subsidiary files with the Securities and Exchange Commission (or any governmental body or agency succeeding to the functions of the Securities and Exchange Commission) or any national securities exchange;

(6) as soon as practicable and in any event within thirty days after a Responsible Financial Officer of NAI knows or has reason to know that any ERISA Termination Event with respect to any Plan has occurred, a statement of a Responsible Financial Officer of NAI describing such ERISA Termination Event and the action, if any, which NAI proposes to take with respect thereto;

(7) upon request by BNPPLC, a statement in writing certifying that the Operative Documents are unmodified and in full effect (or, if there have been modifications, that the Operative Documents are in full effect as modified, and setting forth such modifications) and either stating that no Default exists under the Operative Documents or specifying each such Default; it being intended that any such statement by NAI may be relied upon by any prospective purchaser or mortgagee of the Property or any prospective Participant; and

(8) such other information respecting the condition or operations, financial or otherwise, of NAI, of its Subsidiaries or of the Property as BNPPLC or BNPPLC's Parent



or any Participant through BNPPLC may from time to time reasonably request.

Reports and financial statements required to be delivered pursuant to paragraphs (1), (2) and (5) of this subparagraph 2(D) shall be deemed to have been delivered on the date on which such reports, or reports containing such financial statements, are posted for downloading (in a "PDF" or other readily available format) on one of NAI's internet websites at [www.netapp.com](http://www.netapp.com) or [www.investors.netapp.com](http://www.investors.netapp.com) or on the SEC's internet website at [www.sec.gov](http://www.sec.gov); provided, however, that after being posted they remain available for downloading at the applicable website for at least 90 days.

BNPPLC is hereby authorized to deliver a copy of any information or certificate delivered to it pursuant to this subparagraph 2(D) to any Participant and to any regulatory body having jurisdiction over BNPPLC, BNPPLC's Parent or any Participant that requires or requests it.

(E) Omissions. None of NAI's representations in the Operative Documents or in any other document, certificate or written statement furnished to BNPPLC by or on behalf of NAI contains any untrue statement of a material fact or omits a material fact necessary in order to make the statements contained herein or therein (when taken in their entireties) not misleading.

(F) OFAC. None of NAI or any subsidiary or affiliate of NAI: (i) is a person named on the list of Specially Designated Nationals or Blocked Persons maintained by the U.S. Department of the Treasury's Office of Foreign Assets Control available at <http://www.treas.gov/offices/eotffc/ofac/sdn/index.html>, or as otherwise published from time to time; or (ii) is (A) an agency of the government of a country, (B) an organization controlled by a country, or (C) a person resident in a country that is subject to a sanctions program identified on the list maintained by OFAC and available at <http://www.treas.gov/offices/eotffc/ofac/sanctions/index.html>, or as otherwise published from time to time, as such program may be applicable to such agency, organization or person; or (iii) derives more than 15% of its assets or operating income from investments in or transactions with any such country, agency, organization or person. Further, none of the proceeds from the Initial Advance will be used to finance any operations, investments or activities in, or make any payments to, any such country, agency, organization, or person.

(G) U.S. Patriot Act. NAI acknowledges that BNPPLC, BNPPLC's Parent and Participants may be required, pursuant to the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "**Patriot Act**"), to obtain, verify, record and disclose to law enforcement authorities information that identifies the NAI, including the name and address of NAI. NAI will provide to BNPPLC and Participants any such information they may request pursuant to the Patriot Act, and NAI agrees that any of BNPPLC, BNPPLC's Parent and Participants may disclose such information to law enforcement authorities if the authorities make a request or demand for disclosure pursuant to the Patriot Act. NAI also acknowledges that, in such event, none of BNPPLC, BNPPLC's Parent or Participants may be required or even

permitted by the Patriot Act to notify NAI of the request or demand for disclosure.

3 **Financial Covenants and Negative Covenants of NAI.** NAI represents and covenants as follows:

(A) Definitions Applicable in this Paragraph. As used in (and only for purposes of) this Paragraph 3:

“**Accepted Contest Requirements**” means, with respect to any Tax or other payment due or claimed to be due from NAI or any Subsidiary or any demand for payment made upon NAI or any Subsidiary, that (a) NAI or such Subsidiary must contest the validity or amount thereof in good faith by appropriate proceedings, (b) NAI or such Subsidiary has set aside on its books adequate reserves with respect thereto in accordance with GAAP and (c) the failure to make payment thereof pending such contest could not reasonably be expected to result in a Material Adverse Effect.

“**Capital Lease Obligations**” of any Person means the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP, and the amount of such obligations shall be the capitalized amount thereof determined in accordance with GAAP.

“**Change in Control**” means (a) the acquisition of ownership, directly or indirectly, beneficially or of record, by any Person or group (within the meaning of the Securities Exchange Act of 1934 and the rules of the Securities and Exchange Commission thereunder as in effect on the date hereof), of Equity Interests representing more than 40% of the aggregate ordinary voting power represented by the issued and outstanding Equity Interests of NAI; (b) occupation of a majority of the seats (other than vacant seats) on the board of directors of NAI by Persons who were neither (i) nominated by the board of directors of NAI nor (ii) appointed by directors so nominated; or (c) NAI ceasing to own, directly or indirectly, 100% of the issued and outstanding Equity Interests of each Material Domestic Subsidiary except in accordance with subparagraph 3(B)(3) below.

“**Consolidated Debt for Borrowed Money**” means at any time (1) the sum, without duplication, of (a) items that, in accordance with GAAP, would be classified as indebtedness on the consolidated balance sheet of NAI and its Subsidiaries and (b) the capitalized portion of any synthetic leases, minus (2) the then aggregate outstanding principal amount of Indebtedness under NAI’s Secured Revolver and under that certain Loan Agreement dated as of March 31, 2006 by and among Network Appliance Global Ltd. and JPMorgan Chase Bank, National Association as initial lender and as

administrative agent. (In clause (b) of this definition, “capitalized portion” means, with respect to any synthetic lease, the price for which the lessee can purchase the leased property or could purchase it if the synthetic lease expired on the date of the applicable calculation of the Consolidated Debt for Borrowed Money. Thus, for example, the “capitalized portion” of the transactions governed by the Operative Documents will equal the Lease Balance.)

“**Consolidated EBITDA**” means, with reference to any period, the sum of the following: (a) Consolidated Net Income for such period, plus (b) without duplication and to the extent deducted from revenues in determining such Consolidated Net Income, the sum of (i) Consolidated Interest Expense for such period, (ii) expense for taxes paid or accrued during such period, (iii) all amounts attributable to depreciation, (iv) amortization during such period, (v) extraordinary non-cash charges incurred other than in the ordinary course of business during such period, (vi) nonrecurring extraordinary non-cash restructuring charges, and (vii) share-based non-cash compensation expense minus without duplication and to the extent included in determining such Consolidated Net Income, (c) interest income, (d) extraordinary non-cash gains realized other than in the ordinary course of business and (e) any cash payments made during such period in respect of the item described in clause (vii) above subsequent to the fiscal quarter in which the relevant share-based non-cash compensation expense was incurred, all calculated for NAI and its Subsidiaries in accordance with GAAP on a consolidated basis. For the purposes of calculating Consolidated EBITDA for any period of four consecutive fiscal quarters (each, a “Reference Period”), (i) if at any time during such Reference Period NAI or any Subsidiary shall have made any Material Disposition, the Consolidated EBITDA for such Reference Period shall be reduced by an amount equal to the Consolidated EBITDA (if positive) attributable to the property that is the subject of such Material Disposition for such Reference Period or increased by an amount equal to the Consolidated EBITDA (if negative) attributable thereto for such Reference Period, and (ii) if during such Reference Period NAI or any Subsidiary shall have made a Material Acquisition, Consolidated EBITDA for such Reference Period shall be calculated after giving pro forma effect thereto as if such Material Acquisition occurred on the first day of such Reference Period. As used in this definition, “Material Acquisition” means any acquisition of property or series of related acquisitions of property that (a) constitutes (i) assets comprising all or substantially all or any significant portion of a business or operating unit of a business, or (ii) all or substantially all of the common stock or other Equity Interests of a Person, and (b) involves the payment of consideration by NAI and its Subsidiaries in excess of \$50,000,000; and “Material Disposition” means any sale, transfer or disposition of property or series of related sales, transfers, or dispositions of property that yields gross proceeds to NAI or any of its Subsidiaries in excess of \$50,000,000.

“**Consolidated Interest Expense**” means, with reference to any period, the

interest expense (including without limitation interest expense under Capital Lease Obligations that is treated as interest in accordance with GAAP) of NAI and its Subsidiaries calculated on a consolidated basis for such period with respect to (a) all outstanding Indebtedness of NAI and its Subsidiaries allocable to such period in accordance with GAAP and (b) Swap Agreements (including, without limitation, all commissions, discounts and other fees and charges owed with respect to letters of credit and bankers acceptance financing and net costs under interest rate Swap Agreements to the extent such net costs are allocable to such period in accordance with GAAP). In addition, for purposes of calculating the Leverage Ratio only, rents payable for any period pursuant to NAI's synthetic leases shall be included in Consolidated Interest Expense for such period; excluding, however, any amounts (whether or not designated as rents) paid or to be paid as compensation for or reimbursement of any Losses, and also excluding any payments which reduce or will reduce the outstanding lease balance of any synthetic lease. For example, Base Rents payable under the Lease will be included in Consolidated Interest Expense, but not Additional Rents.

**"Consolidated Net Income"** means, with reference to any period, the net income (or loss) of NAI and its Subsidiaries calculated in accordance with GAAP on a consolidated basis (without duplication) for such period.

**"Consolidated Total Assets"** means, as of the date of any determination thereof, total assets of NAI and its Subsidiaries calculated in accordance with GAAP on a consolidated basis as of such date.

**"Disclosure Letter"** means the disclosure letter (the form of which is attached to this Certificate as Exhibit D) given by NAI to Chase Bank, National Association, as Administrative Agent, in connection with NAI's recently executed Credit Agreement dated as of November 2, 2007, as amended or supplemented from time to time by NAI with the written consent of BNPPLC.

**"Domestic Subsidiary"** means any Subsidiary that is incorporated or organized under the laws of the United States of America, any state thereof or in the District of Columbia.

**"Equity Interests"** means shares of capital stock, partnership interests, membership interests in a limited liability company, beneficial interests in a trust or other equity ownership interests in a Person, and any warrants, options or other rights entitling the holder thereof to purchase or acquire any such equity interest.

**"Governmental Authority"** means the government of the United States of America, any other nation or any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity

exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

**“Guarantee”** of or by any Person (the “guarantor”) means any obligation, contingent or otherwise, of the guarantor guaranteeing or having the economic effect of guaranteeing any Indebtedness or other obligation of any other Person (the “primary obligor”) in any manner, whether directly or indirectly, and including any obligation of the guarantor, direct or indirect, (a) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness or other obligation or to purchase (or to advance or supply funds for the purchase of) any security for the payment thereof, (b) to purchase or lease property, securities or services for the purpose of assuring the owner of such Indebtedness or other obligation of the payment thereof, (c) to maintain working capital, equity capital or any other financial statement condition or liquidity of the primary obligor so as to enable the primary obligor to pay such Indebtedness or other obligation or (d) as an account party in respect of any letter of credit or letter of guaranty issued to support such Indebtedness or obligation; provided, that the term Guarantee shall not include endorsements for collection or deposit in the ordinary course of business.

**“Indebtedness”** of any Person means, without duplication, (a) all obligations of such Person for borrowed money, (b) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such Person upon which interest charges are paid or payable, (d) all obligations of such Person under conditional sale or other title retention agreements relating to property acquired by such Person, (e) all obligations of such Person in respect of the deferred purchase price of property or services (excluding accounts payable incurred in the ordinary course of business), (f) all Indebtedness of others secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) any Lien on property owned or acquired by such Person, whether or not the Indebtedness secured thereby has been assumed, (g) all Guarantees by such Person of Indebtedness of others, (h) all Capital Lease Obligations of such Person, (i) all obligations, contingent or otherwise, of such Person as an account party in respect of letters of credit and letters of guaranty, (j) all obligations, contingent or otherwise, of such Person in respect of bankers’ acceptances, (k) the Net Mark-to Market Exposure of all Swap Obligations of such Person, and (l) any other Off-Balance Sheet Liability. The Indebtedness of any Person shall include the Indebtedness of any other entity (including any partnership in which such Person is a general partner) to the extent such Person is liable therefor as a result of such Person’s ownership interest in or other relationship with such entity, except to the extent the terms of such Indebtedness provide that such Person is not liable therefor.

**“Leverage Ratio”** means the ratio, determined as of the end of each fiscal quarter of NAI, of Consolidated Debt for Borrowed Money as of the end of such fiscal quarter to Consolidated EBITDA for the period of 4 consecutive fiscal quarters ending with the end

of such fiscal quarter.

“**Lien**” means, with respect to any asset, (a) any mortgage, deed of trust, lien, pledge, hypothecation, encumbrance, charge or other security interest in, on or of such asset and (b) the interest of a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement (or any financing lease having substantially the same economic effect as any of the foregoing) relating to such asset.

“**Liquidity**” means, with respect to NAI and its Subsidiaries as of any date of determination, the sum of all unrestricted cash and unrestricted Permitted Investments which are not subject to any Lien (other than Liens permitted under subparagraph 3(B)(2)(e)) and which would be included on the consolidated balance sheet of NAI and such Subsidiaries in accordance with GAAP as of such date of determination.

“**Material Adverse Effect**” means a material adverse effect on (a) the business, assets, operations or condition, financial or otherwise, of NAI and its Subsidiaries taken as a whole, or (b) the ability of NAI or any Material Domestic Subsidiary to perform any of its obligations under any of the Operative Documents or (c) the rights of or benefits available to BNPPPLC under any of the Operative Documents.

“**Material Domestic Subsidiary**” means each Material Subsidiary that is a Domestic Subsidiary. The Material Domestic Subsidiaries on the Effective Date are identified as such in Schedule 3.01 to the Disclosure Letter.

“**Material Subsidiary**” means each Subsidiary (a) which, as of the most recent fiscal quarter of NAI, for the period covering the then most recently ended fiscal year and the portion of the then current fiscal year ending at the end of such fiscal quarter, for which financial statements have been delivered pursuant to subparagraph 2(D), contributed greater than five percent (5%) of NAI’s Consolidated EBITDA for such period or (b) which contributed greater than five percent (5%) of NAI’s Consolidated Total Assets as of such date.

“**Moody’s**” means Moody’s Investors Service, Inc.

“**NAI’s Secured Revolver**” means the Secured Credit Agreement dated as of October 5, 2007 by and among NAI, certain lenders and JPMorgan Chase Bank, National Association, as administrative agent, as it exists and is in force on the Effective Date.

“**Net Mark-to-Market Exposure**” of a Person means, as of any date of determination, the excess (if any) of all unrealized losses over all unrealized profits of such Person arising from each Swap Agreement transaction. “Unrealized losses” means the fair market value of the cost to such Person of replacing such transaction as of the

date of determination (assuming such transaction were to be terminated as of that date), and “unrealized profits” means the fair market value of the gain to such Person of replacing such transaction as of the date of determination (assuming such transaction was to be terminated as of that date).

“**Off-Balance Sheet Liability**” of a Person means (a) any repurchase obligation or liability of such Person with respect to accounts or notes receivable sold by such Person that is related to retained credit risk, or (b) any indebtedness, liability or obligation under any so-called “synthetic lease” transaction entered into by such Person.

“**Permitted Liens or Encumbrances**” means:

(a) Liens imposed by law for Taxes or other governmental charges that are not yet due or are being contested in accordance with Accepted Contest Requirements;

(b) carriers’, warehousemen’s, mechanics’, materialmen’s, repairmen’s, landlord’s and other like Liens imposed by law, arising in the ordinary course of business and securing obligations that are not overdue by more than sixty (60) days or are being contested in accordance with Accepted Contest Requirements;

(c) pledges and deposits made in the ordinary course of business in compliance with workers’ compensation, unemployment insurance and other social security laws or regulations;

(d) deposits to secure the performance of bids, trade contracts, leases, statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature, in each case in the ordinary course of business;

(e) judgment liens in respect of judgments that do not constitute an Event of Default under clause (J) of the definition thereof in the Common Definitions and Provisions Agreement;

(f) easements, zoning restrictions, rights-of-way and similar encumbrances on real property imposed by law or arising in the ordinary course of business that do not secure any monetary obligations and do not materially detract from the value of the affected property or interfere in any material respect with the ordinary conduct of business of NAI or any Subsidiary;

(g) leases or subleases granted to other Persons and not interfering in any material respect with the business of the lessor or sublessor;

- (h) Liens arising from precautionary Uniform Commercial Code filings or similar filings relating to operating leases;
- (i) Liens in favor of customs and revenue authorities arising as a matter of law to secure payment of customs duties in connection with the importation of goods;
- (j) Liens on insurance proceeds securing the premium of financed insurance proceeds;
- (k) Liens incurred in the ordinary course of business on cash collateral to secure letters of credit, bank guarantees and banker's acceptances and Swap Agreements;
- (l) licenses of intellectual property in the ordinary course of business;
- (m) any interest or title of a lessor or sublessor under any lease of real property or personal property; and
- (n) other Liens on assets securing Indebtedness or other obligations not prohibited under provisions of the Operative Documents other than this Paragraph 3 in an aggregate amount not to exceed \$50,000,000 at any time outstanding;

provided that the term "Permitted Liens or Encumbrances" shall not include any Lien securing Indebtedness.

**"Permitted Investments"** means:

- (a) direct obligations of, or obligations the principal of and interest on which are unconditionally guaranteed by, the United States of America (or by any agency thereof to the extent such obligations are backed by the full faith and credit of the United States of America), in each case maturing within one year from the date of acquisition thereof;
- (b) investments in commercial paper maturing within 365 days from the date of acquisition thereof and having, at such date of acquisition, a rating of "A-2" (or better) from S&P or "P-2" (or better) from Moody's;
- (c) investments in certificates of deposit, banker's acceptances and time deposits maturing within 180 days from the date of acquisition thereof issued or guaranteed by or placed with, and money market deposit accounts issued or



offered by, any domestic office of any commercial bank organized under the laws of the United States of America or any State thereof or any other country which has a combined capital and surplus and undivided profits of not less than \$500,000,000;

(d) fully collateralized repurchase agreements with a term of not more than thirty (30) days for securities described in clause (a) above and entered into with a financial institution satisfying the criteria described in clause (c) above;

(e) money market funds that (i) comply with the criteria set forth in Securities and Exchange Commission Rule 2a-7 under the Investment Company Act of 1940, as amended, to the extent such money market fund is governed thereby, (ii) are rated AA by S&P and Aa by Moody's and (iii) have portfolio assets of at least \$5,000,000,000;

(f) investments made pursuant to a cash management investment policy approved by the board of directors of the Person making such investment and as in effect on the Effective Date, as such policy may be amended or otherwise modified from time to time with the written consent of BNPPPLC; and

(g) investments described in the following table:

<u>Type of Security</u>	<u>Remaining Maturity/ S&amp;P/ Moody's Rating</u>
JPMorgan Certificates of Deposit	
US Treasury Treasuries	
US Agency Securities	Less than 30 years
USD Commercial Paper	A1/P1 Less than or equal to 270 days
Money Market Funds (Must be through JPMorgan)	US Gov't Treasury Plus Cash Management 100% US Treasury Federal Money Market
Medium Term Notes, Corporate Bonds, Corporate Debentures, Floating Rate Notes, and Auction Rate Securities	A or better

“**S&P**” means Standard & Poor’s, a division of the McGraw-Hill Companies.

“**Sale and Leaseback Transaction**” means any sale or other transfer of assets or property by any Person with the intent to lease any such asset or property as lessee.

“**Subordinated Indebtedness**” means any Indebtedness of NAI or any Subsidiary the payment of which is subordinated to payment of the obligations under the Operative Documents to the written satisfaction of BNPPLC.

“**subsidiary**” means, with respect to any Person (the “parent”) at any date, any corporation, limited liability company, partnership, association or other entity the accounts of which would be consolidated with those of the parent in the parent’s consolidated financial statements if such financial statements were prepared in accordance with GAAP as of such date, as well as any other corporation, limited liability company, partnership, association or other entity (a) of which securities or other ownership interests representing more than 50% of the equity or more than 50% of the ordinary voting power or, in the case of a partnership, more than 50% of the general partnership interests are, as of such date, owned, controlled or held, or (b) that is, as of such date, otherwise Controlled, by the parent or one or more subsidiaries of the parent or by the parent and one or more subsidiaries of the parent.

“**Subsidiary**” means any subsidiary of NAI.

“**Swap Agreement**” means any agreement with respect to any swap, forward, future or derivative transaction or option or similar agreement involving, or settled by reference to, one or more rates, currencies, commodities, equity or debt instruments or securities, or economic, financial or pricing indices or measures of economic, financial or pricing risk or value or any similar transaction or any combination of these transactions; provided that no phantom stock or similar plan providing for payments only on account of services provided by current or former directors, officers, employees or consultants of NAI or the Subsidiaries shall be a Swap Agreement.

“**Swap Obligations**” of a Person means any and all obligations of such Person, whether absolute or contingent and howsoever and whensoever created, arising, evidenced or acquired (including all renewals, extensions and modifications thereof and substitutions therefor), under (a) any and all Swap Agreements, and (b) any and all cancellations, buy backs, reversals, terminations or assignments of any such Swap Agreement transaction.

“**Taxes**” means any and all present or future taxes, levies, imposts, duties, deductions, charges or withholdings imposed by any Governmental Authority.

(B) Negative Covenants. Prior to the Designated Sale Date and so long thereafter as any amount shall continue to be due and payable by NAI to BNPPPLC pursuant to any of the Operative Documents, NAI covenants and agrees as follows:

(1) *Subsidiary Indebtedness*. NAI will not permit any Subsidiary to create, incur, assume or permit to exist any Indebtedness, except:

(a) by Guarantee or assumption of any obligations evidenced or created by (x) any of the Operative Documents, (y) or other comparable agreements between BNPPPLC and NAI covering other properties, or (z) the Credit Agreement referenced on the first page of the Disclosure Letter;

(b) Indebtedness existing on the date hereof and set forth in Schedule 6.01 to the Disclosure Letter and extensions, renewals and replacements of any such Indebtedness that do not increase the then outstanding principal amount thereof;

(c) Indebtedness of (i) any Subsidiary to any Material Domestic Subsidiary and (ii) any Subsidiary that is not a Material Domestic Subsidiary to any other Subsidiary that is not a Material Domestic Subsidiary;

(d) Guarantees by any Subsidiary of Indebtedness of NAI or any other Subsidiary;

(e) Indebtedness of any Subsidiary incurred to finance the acquisition, construction or improvements of any fixed or capital assets, including Capital Lease Obligations and any Indebtedness assumed in connection with the acquisition of any such assets or secured by a Lien on any such assets (and additions, accessions, parts, improvement and attachments thereto and the proceeds thereof) prior to the acquisition thereof, and extensions, renewals and replacements of any such Indebtedness that do not increase the then outstanding principal amount thereof; provided that such Indebtedness is incurred prior to or within 120 days after such acquisition or the completion of such construction or improvement; and extensions, renewals and replacements of any such Indebtedness that do not increase the outstanding principal amount thereof;

(f) Indebtedness of any Person that becomes a Subsidiary after the date hereof; provided that such Indebtedness exists at the time such Person becomes a Subsidiary and is not created in contemplation of or in connection with such Person becoming a Subsidiary, and extensions, renewals and replacements of any such Indebtedness that do not increase the outstanding principal amount thereof;

(g) Indebtedness of any Subsidiary as an account party in respect of

letters of credit, bank guarantees and bankers' acceptances;

(h) Indebtedness in respect of Swap Agreements permitted under subparagraph 3(B)(4);

(i) Indebtedness of Subsidiaries which are not Material Domestic Subsidiaries in an aggregate principal amount not exceeding 5% of Consolidated Total Assets at any time outstanding; and

(j) other Indebtedness of any Subsidiary which is a Material Domestic Subsidiary so long as, at the time of the incurrence thereof and after giving effect thereto (on a pro forma basis), NAI is in pro forma compliance with the maximum Leverage Ratio permitted under subparagraph 3(C)(1).

(2) *Liens.* NAI will not, and will not permit any Subsidiary to, create, incur, assume or permit to exist any Lien on any property or asset now owned or hereafter acquired by it (and for purposes hereof, any capital stock issued by NAI which is held by NAI as treasury stock shall not be deemed to be property or an asset of NAI and shall not be subject to this subparagraph 3(B)(2)), or assign or sell any income or revenues (including accounts receivable) or rights in respect of any thereof, except that the following shall be permitted so long as they do not encumber any interest in the Property in violation of other provisions of the Operative Documents:

(a) Permitted Liens or Encumbrances;

(b) any Lien on any property or asset of NAI or any Subsidiary existing on the date hereof and set forth in Schedule 6.02 to the Disclosure Letter; provided that (i) such Lien shall not apply to any other property or asset of NAI or any Subsidiary and (ii) such Lien shall secure only those obligations which it secures on the date hereof and extensions, renewals and replacements thereof that do not increase the outstanding principal amount thereof;

(c) any Lien existing on any property or asset prior to the acquisition thereof by NAI or any Subsidiary or existing on any property or asset of any Person that becomes a Subsidiary after the date hereof prior to the time such Person becomes a Subsidiary; provided that (i) such Lien is not created in contemplation of or in connection with such acquisition or such Person becoming a Subsidiary, as the case may be, (ii) such Lien shall not apply to any other property or assets of NAI or any Subsidiary and (iii) such Lien shall secure only those obligations which it secures on the date of such acquisition or the date such Person becomes a Subsidiary, as the case may be, and extensions, renewals and replacements thereof that do not increase the outstanding principal amount

thereof;

(d) Liens on fixed or capital assets (and additions, accessions, parts, improvements and attachments thereto and the proceeds thereof) acquired, constructed or improved by NAI or any Subsidiary; provided that:

(i) such security interests secure Indebtedness not otherwise prohibited under the Operative Documents;

(ii) such security interests and the Indebtedness secured thereby are either (A) incurred prior to or within one hundred twenty (120) days after such acquisition or the completion of such construction or improvement, or (B) granted and incurred to extend, renew or replace any security interest and Indebtedness secured thereby that are permitted by this clause (d) and do not increase the outstanding principal amount thereof by more than 5%;

(iii) the Indebtedness secured thereby does not exceed 105% of the cost of acquiring, constructing or improving such fixed or capital assets; and

(iv) such security interests shall not apply to any other property or assets of NAI or any Subsidiary;

(e) customary bankers' Liens and rights of setoff arising by operation of law or contract and incurred on deposits made in the ordinary course of business;

(f) assignments of the right to receive income effected (i) as a part of the sale of a Subsidiary or a business unit or (ii) for factoring in the ordinary course of business;

(g) Liens on any cash earnest money deposit made by NAI or any Subsidiary in connection with any letter of intent or acquisition agreement that is not prohibited by the Operative Documents;

(h) customary Liens granted in favor a trustee to secure fees and other amounts owing to such trustee under an indenture or other agreement pursuant to Indebtedness not otherwise prohibited under the Operative Documents; and

(i) Liens granted as provided in and securing Indebtedness under NAI's Secured Revolver, provided such Liens do not at any time secure an outstanding principal balance of more than \$500,000,000.

*(3) Fundamental Changes and Asset Sales.*

(a) NAI will not, and will not permit any Subsidiary to, merge into, consolidate with, or otherwise be acquired by, any other Person, or sell, transfer, lease or otherwise dispose (including pursuant to a Sale and Leaseback Transaction) of (in one transaction or in a series of transactions) all or substantially all of its assets, or all or substantially all of the stock of any of its Subsidiaries (in each case, whether now owned or here-after acquired, and for purposes hereof, any capital stock issued by NAI which is held by NAI as treasury stock shall not be deemed to be property or an asset of NAI and shall not be subject to this subparagraph 3(B)(3), or liquidate or dissolve, except that, if at the time thereof and immediately after giving effect thereto no Default shall have occurred and be continuing (i) any Subsidiary may merge into a Material Domestic Subsidiary in a transaction in which the surviving entity is such Material Domestic Subsidiary, (ii) any wholly owned Subsidiary may merge into or consolidate with any wholly owned Subsidiary in a transaction in which the surviving entity is a wholly owned Subsidiary and no Person other than NAI or a wholly owned Subsidiary receives any consideration, provided that if any such merger described in this clause (ii) shall involve a Material Domestic Subsidiary, the surviving entity of such merger shall be a Material Domestic Subsidiary, (iii) any Subsidiary may sell, transfer, lease or otherwise dispose of its assets to a Material Domestic Subsidiary or any wholly owned Subsidiary pursuant to a transaction not otherwise prohibited under the Operative Documents, (iv) any Subsidiary may liquidate or dissolve if NAI determines in good faith that such liquidation or dissolution is in the best interests of NAI, (v) NAI may merge with any other Person so long as NAI is the surviving entity, (vi) any Subsidiary may merge with any other Person so long as the surviving entity is, in the case of a Subsidiary Guarantor, the Subsidiary Guarantor, and in all other cases, a wholly owned Subsidiary and (vii) any Subsidiary other than a Subsidiary Guarantor may merge into, and NAI or any Subsidiary may dispose of assets to, any other Person so long as NAI delivers a certificate to BNPPPLC demonstrating pro forma compliance with subparagraph 3(C) after giving effect to such transaction.

(b) NAI will not, and will not permit any of its Subsidiaries to, engage to any material extent in any business other than businesses of the type conducted by NAI and its Subsidiaries on the date of execution of the Operative Documents and businesses reasonably related thereto.

(c) NAI will not, and will not permit any of its Subsidiaries to, change its fiscal year to end on a day other than as such fiscal year end is currently determined or change NAI's method of determining fiscal quarters.

(4) *Speculative Swap Agreements.* NAI will not, and will not permit any of its Subsidiaries to, enter into any Swap Agreement, except (a) Swap Agreements entered into to hedge or mitigate risks to which NAI or any Subsidiary has actual exposure (other than those in respect of Equity Interests or Subordinated Indebtedness of NAI or any of its Subsidiaries), and (b) Swap Agreements entered into in order to effectively cap, collar or exchange interest rates (from fixed to floating rates, from one floating rate to another floating rate or otherwise) with respect to any interest-bearing liability or investment of NAI or any Subsidiary.

(5) *Transactions with Affiliates.* NAI will not, and will not permit any of its Subsidiaries to, sell, lease or otherwise transfer any property or assets to, or purchase, lease or otherwise acquire any property or assets from, or otherwise engage in any other transactions with, any of its Affiliates, except (a) in the ordinary course of business at prices and on terms and conditions not less favorable to NAI or such Subsidiary than could be obtained on an arm's-length basis from unrelated third parties, (b) transactions between or among NAI and its wholly owned Subsidiaries not involving any other Affiliate, (c) to enter into indemnification arrangements with or to pay customary fees and reimburse out-of-pocket expenses of directors or (d) as set forth on the Disclosure Letter.

(6) *Restrictive Agreements.* NAI will not, and will not permit any of its Subsidiaries to, directly or indirectly, enter into, incur or permit to exist any agreement or other arrangement that prohibits, restricts or imposes any condition upon (a) the ability of NAI or any Subsidiary to create, incur or permit to exist any Lien upon any of its property or assets, or (b) the ability of any Subsidiary to pay dividends or other distributions with respect to any shares of its capital stock or to make or repay loans or advances to NAI or any other Subsidiary or to Guarantee Indebtedness of NAI or any other Subsidiary; provided that (i) the foregoing shall not apply to restrictions and conditions imposed by law, by any Operative Document, by any document relating to NAI's unsecured syndicated revolving credit facility from certain lenders and JPMorgan Chase Bank, National Association as administrative agent, by NAI's Secured Revolver, or by any document relating to NAI's synthetic lease facilities, (ii) the foregoing shall not apply to restrictions and conditions existing on the date hereof identified on Schedule 6.06 to the Disclosure Letter (but shall apply to any extension or renewal of, or any amendment or modification expanding the scope of, any such restriction or condition), (iii) the foregoing shall not apply to customary restrictions and conditions contained in agreements relating to the sale of assets or of a Subsidiary pending such sale, provided such restrictions and conditions apply only to such assets or such Subsidiary that are to be sold and such sale is permitted hereunder, (iv) clause (a) of the foregoing shall not apply to restrictions or conditions imposed by any agreement relating to secured Indebtedness permitted by the Operative Documents if such restrictions or conditions apply only to the property or assets securing such Indebtedness, and (v) clause (a) of the

foregoing shall not apply to customary provisions in leases, licenses, joint venture agreements and other agreements entered into in the ordinary course of business restricting the assignment thereof.

(C) Financial Covenants. Prior to the Designated Sale Date and so long thereafter as any amount shall continue to be due and payable by NAI to BNPPLC pursuant to any of the Operative Documents:

(1) *Maximum Leverage Ratio*. NAI will not permit the Leverage Ratio to be greater than 3.0 to 1.0.

(2) *Minimum Liquidity*. NAI and its Subsidiaries on a consolidated basis shall maintain, at all times, Liquidity of not less than \$300,000,000.

#### 4 Limited Representations and Covenants of BNPPLC

##### (A) Concerning Accounting Matters.

(1) To permit NAI to determine the appropriate accounting for NAI's relationship with BNPPLC under FASB Interpretation No. 46(R), *Consolidation of Variable Interest Entities* ("FIN 46"), BNPPLC represents that to the knowledge of BNPPLC the fair value of the Property and of other properties, if any, leased to NAI by BNPPLC (collectively, whether one or more, the "**Properties Leased to NAI**") are, as of the Effective Date, less than half of the total of the fair values of all assets of BNPPLC, excluding any assets of BNPPLC held within a silo. Further, none of the Properties Leased to NAI are, as of the Effective Date, held within a silo. Consistent with the directions of NAI (based upon the current interpretation of FIN 46 by NAI and its auditors), and for purposes of this representation only:

- "**held within a silo**" means, with respect to any asset or group of assets leased by BNPPLC to a single lessee or group of affiliated lessees, that BNPPLC has obtained funds equal to or in excess of 95% of the fair value of the leased asset or group of assets to acquire or maintain its investment in such asset or group of assets through non-recourse financing or other contractual arrangements (such as targeted equity or bank participations), the effect of which is to leave such asset or group of assets (or proceeds thereof) as the only significant asset or assets of BNPPLC at risk for the repayment of such funds;
- "**fair value**" means, with respect to any asset, the amount for which the asset could be bought or sold in a current transaction



negotiated at arms length between willing parties (that is, other than in a forced or liquidation sale);

- with respect to the Properties Leased to NAI (regardless of how BNPPLC accounts for the leases of the Properties Leased to NAI), and with respect to other assets that are subject to leases accounted for by BNPPLC as operating leases pursuant to Financial Accounting Standards Board Statement 13 (“FAS 13”), fair value is determined without regard to residual value guarantees, remarketing agreements, non-recourse financings, purchase options or other contractual arrangements, whether made by BNPPLC with NAI or with other parties, that might otherwise impact the fair value of such assets;
- with respect to assets, other than Properties Leased to NAI, that are subject to leases accounted for by BNPPLC as leveraged leases pursuant to FAS 13, fair value is determined on a gross basis prior to the application of leveraged lease accounting, recognizing that equity investments made by BNPPLC in its assets subject to leveraged lease accounting should be grossed up in applying this test (however, equity investments made by BNPPLC through another legal entity should not be so grossed up in applying this test);
- with respect to assets, other than Properties Leased to NAI, that are subject to leases accounted for by BNPPLC as direct financing leases pursuant to FAS 13, fair value is determined as the sum of the fair values (considering current interest rates at which similar loans would be made to borrowers with similar credit ratings and for the same remaining maturities) of the corresponding finance lease receivables and related unguaranteed residual values.

(2) BNPPLC also represents that BNPPLC’s Parent is, as of the Effective Date, including BNPPLC as a consolidated subsidiary in the audited financial statements issued by BNPPLC’s Parent.

(3) BNPPLC covenants that, as reasonably requested by NAI from time to time with respect to any accounting period during which the Lease is or was in effect, BNPPLC will provide to NAI confirmation of facts concerning BNPPLC and its assets as necessary to permit NAI to determine the proper accounting for the Lease (including updates of the facts set forth in clauses (1) and (2) above); except that BNPPLC will not be required by this provision to (w) provide any information that is not in the possession

or control of BNPPPLC or its Affiliates, (x) disclose the specific terms and conditions of its leases or other transactions with other parties or the names of such parties, (y) make disclosures prohibited by any law applicable to BNPPPLC or BNPPPLC's Parent, or (z) disclose any other information that is protected from disclosure by confidentiality provisions in favor of such other parties or would be protected if their agreements with BNPPPLC contained confidentiality provisions similar in scope and substance to any confidentiality provisions set forth in the Operative Documents for the benefit of NAI or its Affiliates. BNPPPLC will represent that information provided by it pursuant to this clause is true and complete in all material respects, but only to the knowledge of BNPPPLC as of the date it is provided, utilizing the form of the certificate attached hereto as Exhibit E (signed by an officer of BNPPPLC), which certificate will be provided periodically by BNPPPLC within five business days of reasonable written request therefor by NAI as provided above, or such longer period of time as may be reasonably necessary under the circumstances in order for BNPPPLC to confirm such information.

(4) Although the representations required of BNPPPLC by this subparagraph are intended to cover *facts*, it is understood and agreed (consistent with subparagraph 4(C) of the Lease) that BNPPPLC has not made and will not make any representation or warranty as to the proper accounting by NAI or its Affiliates of the Lease or as to other accounting *conclusions*.

(B) Other Limited Representations. BNPPPLC represents that:

(1) *Entity Status*. BNPPPLC is a corporation duly incorporated, validly existing and in good standing under the laws of Delaware.

(2) *Authority*. The Constituent Documents of BNPPPLC permit the execution, delivery and performance of the Operative Documents by BNPPPLC, and all actions and approvals necessary to bind BNPPPLC under the Operative Documents have been taken and obtained. Without limiting the foregoing, the Operative Documents will be binding upon BNPPPLC when signed on behalf of BNPPPLC by Lloyd G. Cox, Managing Director of BNPPPLC. BNPPPLC has all requisite power and all governmental certificates of authority, licenses, permits and qualifications to carry on its business as now conducted and contemplated to be conducted and to perform the Operative Documents, except that BNPPPLC makes no representation as to whether it has obtained governmental certificates of authority, licenses, permits, qualifications or other documentation required by state or local Applicable Laws. With regard to any such state or local requirements, NAI may require that BNPPPLC obtain a specific governmental certificates of authority, licenses, permits, qualifications or other documentation pursuant to subparagraph 4(C), subject to the conditions set forth in that subparagraph.

(3) *Solvency*. BNPPPLC is not "insolvent" on the Effective Date (that is, the

sum of BNPPLC's absolute and contingent liabilities — including the obligations of BNPPLC under the Operative Documents — does not exceed the fair market value of BNPPLC's assets), and BNPPLC has no outstanding liens, suits, garnishments or court actions which could render BNPPLC insolvent or bankrupt. BNPPLC's capital is adequate for the businesses in which BNPPLC is engaged and intends to be engaged. BNPPLC has not incurred (whether by the Operative Documents or otherwise), nor does BNPPLC intend to incur or believe that it will incur, debts which will be beyond its ability to pay as such debts mature. No petition or answer has been filed by or, to BNPPLC's knowledge, against BNPPLC in bankruptcy or other legal proceedings that seeks an assignment for the benefit of creditors, the appointment of a receiver, trustee, custodian or liquidator with respect to BNPPLC or any significant portion of BNPPLC's property, a reorganization, arrangement, rearrangement, composition, extension, liquidation or dissolution of BNPPLC or similar relief under the federal Bankruptcy Code or any state law. (As used in the Operative Documents, "**BNPPLC's knowledge**" and words of like effect mean the present actual knowledge of Lloyd G. Cox and Barry Mendelsohn, the current officers of BNPPLC having primary responsibility for the negotiation of the Operative Documents.)

(4) *Pending Legal Proceedings.* No judicial or administrative investigations, actions, suits or proceedings are pending or, to the knowledge of BNPPLC, threatened against or affecting BNPPLC by or before any court or other Governmental Authority. BNPPLC is not in default with respect to any order, writ, injunction, decree or demand of any court or other Governmental Authority in a manner that has or could reasonably be expected to have a material adverse effect on BNPPLC or its ability to perform its obligations under the Operative Documents.

(5) *No Default or Violation.* The execution and performance by BNPPLC of the Operative Documents do not and will not contravene or result in a breach of or default under any other agreement to which BNPPLC is a party or by which BNPPLC is bound or which affects any assets of BNPPLC. Such execution and performance by BNPPLC do not contravene any law, order, decree, rule or regulation to which BNPPLC is subject. Further, such execution and performance by BNPPLC will not result in the creation or imposition of (or the obligation to create or impose) any lien, charge or encumbrance on, or security interest in, any property of BNPPLC pursuant to the provisions of any such other agreement.

(6) *Enforceability.* The Operative Documents constitute the legal, valid and binding obligations of BNPPLC enforceable in accordance with their terms, subject to the effect of bankruptcy, insolvency, reorganization, receivership and other similar laws affecting the rights of creditors generally.

(7) *Conduct of Business and Maintenance of Existence.* So long as any of the

Operative Documents remains in force, BNPPPLC will continue to engage in business of the same general type as now conducted by it and will preserve, renew and keep in full force and effect its corporate existence and its rights, privileges and franchises necessary or desirable in the normal conduct of business.

(8) *Not a Foreign Person.* BNPPPLC is not a “foreign person” within the meaning of Sections 1445 and 7701 of the Code (i.e. BNPPPLC is not a non-resident alien, foreign corporation, foreign partnership, foreign trust or foreign estate as those terms are defined in the Code and regulations promulgated thereunder).

Notwithstanding the foregoing, however or any other provision herein or in other Operative Documents to the contrary, it is understood that NAI is not relying upon BNPPPLC for any evaluation of California or local Applicable Laws upon the transactions contemplated in the Operative Documents, and BNPPPLC makes no representation and will not make any representation that conditions imposed by zoning ordinances or other state or local Applicable Laws to the purchase, ownership, lease or operation of the Property have been satisfied.

(C) Further Assurances. During the Term of the Lease BNPPPLC will take any action reasonably requested by NAI to facilitate the use of the Property permitted by the Lease; subject, however, to the following terms and conditions:

(1) This subparagraph 4(C) will not impose upon BNPPPLC the obligation to take any action that can be taken by NAI, NAI’s Affiliates or anyone else other than BNPPPLC in its capacity as the owner of the Property.

(2) BNPPPLC will not be required by this subparagraph 4(C) to incur any expense or to make any payments to another Person unless BNPPPLC has received funds from NAI, in excess of any other amounts due from NAI under any of the Operative Documents, sufficient to cover all such expenses or payments or other Persons.

(3) BNPPPLC will not be required by this subparagraph 4(C) to incur or assume any significant potential liability to another Person.

(4) BNPPPLC will have no obligations whatsoever under this subparagraph 4(C) at any time when a Default has occurred and is continuing.

(5) NAI must request any action to be taken by BNPPPLC pursuant to this subparagraph 4(C), and such request must be specific and in writing, if required by BNPPPLC at the time the request is made.

(6) No action may be required of BNPPPLC pursuant to this subparagraph 4(C) that could constitute a violation of any Applicable Laws or compromise or constitute a

waiver of BNPPPLC's rights under other provisions of this Certificate or any of the other Operative Documents or that for any other reason is reasonably objectionable to BNPPPLC.

The actions BNPPPLC will take pursuant to this subparagraph 4(C) if reasonably requested by NAI will include, subject to the conditions listed in the proviso above, executing or consenting to, or exercising or assisting NAI to exercise rights under any: (I) grant of easements, licenses, rights of way, and other rights in the nature of easements encumbering the Land or the Improvements, (II) release, relocation or termination of easements, licenses, rights of way or other rights in the nature of easements which are for the benefit of the Land or Improvements or any portion thereof, (III) dedication or transfer of portions of the Land not improved with a building, for road, highway or other public purposes, (IV) agreements (other than with NAI or its Affiliates) for the use and maintenance of common areas, for reciprocal rights of parking, ingress and egress and amendments to any covenants and restrictions affecting the Land or any portion thereof, (V) documents required to create or administer a governmental special benefit district or assessment district for public improvements and collection of special assessments, (VI) instruments necessary or desirable for the exercise or enforcement of rights or performance of obligations under any Permitted Encumbrance or any contract, permit, license, franchise or other right included within the term "Property", (VII) modifications of Permitted Encumbrances, (VIII) permit applications or other documents required to accommodate any construction permitted by the Lease, (IX) confirmations of NAI's rights under any particular provisions of the Operative Documents which NAI may wish to provide to a third party, or (X) tract or parcel map subdividing the Land into lots or parcels. However, the determination of whether any such action is reasonably requested or reasonably objectionable to BNPPPLC may depend in whole or in part upon the extent to which the requested action may result in a lien to secure payment or performance obligations against BNPPPLC's interest in the Property, may cause the value of the Property to be less than the Lease Balance after any Qualified Prepayments that may result from such action are taken into account, or may impose upon BNPPPLC any present or future obligations greater than the obligations BNPPPLC is willing to accept, taking into consideration the indemnifications provided by NAI under the Lease. In addition, with respect to any request made by NAI to facilitate a relocation of any easements, the following will be relevant to the determination of whether the request is reasonable:

(i) whether material encroachments will result from the relocation, and whether title to the land over or under which any such easement is to be relocated is encumbered by Liens other than those which are Fully Subordinated or Removable or which otherwise constitute Permitted Encumbrances;

(ii) whether the relocation will result in any interruption of access or services provided to the Property which is likely to extend beyond the Designated Sale Date (it being understood, however, that any such interruption which is not likely to extend beyond the Designated Sale Date will not be a reason for BNPPPLC to decline the

request); and

(iii) whether the relocation is to be accomplished in a manner that will not, when the relocation is complete, result in a material adverse change in the access to or services provided to the Improvements or the Land.

Any and all Losses incurred by BNPPLC because of any action taken pursuant to this subparagraph 4(C) will be covered by the indemnification set forth in subparagraph 5(C) of the Lease. Further, for purposes of such indemnification, any such action taken by BNPPLC will be deemed to have been made at the request of NAI if made pursuant to any request of counsel to or any officer of NAI (or with their knowledge, and without their objection) in connection with the execution or administration of the Lease or the other Operative Documents.

(D) Actions Permitted by NAI Without BNPPLC's Consent. No refusal by BNPPLC to execute or join in the execution of any agreement, application or other document requested by NAI pursuant to the preceding subparagraph 4(C) will prevent NAI from itself executing such agreement, application or other document, so long as NAI is not purporting to act for BNPPLC and does not thereby create or expand any obligations or restrictions that encumber BNPPLC's title to the Property. Further, subject to the other terms and conditions of the Lease and other Operative Documents, NAI may do any of the following in NAI's own name and to the exclusion of BNPPLC during the Term of the Lease, so long as no Default has occurred and is continuing, and provided NAI is not purporting to act for BNPPLC and does not thereby create or expand any obligations or restrictions that encumber BNPPLC's title to the Property:

(1) perform obligations arising under and exercise and enforce the rights of NAI or the owner of the Property under the Permitted Encumbrances;

(2) perform obligations arising under and exercise and enforce the rights of NAI or the owner of the Property with respect to any other contracts or documents (such as building permits) included within the Personal Property; and

(3) recover and retain any monetary damages or other benefit inuring to NAI or the owner of the Property through the enforcement of any rights, contracts or other documents included within the Personal Property (including the Permitted Encumbrances); provided, that to the extent any such monetary damages may become payable as compensation for an adverse impact on value of the Property, the rights of BNPPLC and NAI under the other Operative Documents with respect to the collection and application of such monetary damages will be the same as for condemnation proceeds payable because of a taking of all or any part of the Property.

(E) Waiver of Landlord's Liens. BNPPLC waives any security interest, statutory landlord's lien or other interest BNPPLC may have in or against computer equipment and other

tangible personal property placed on the Land from time to time that NAI or its Affiliates own or lease from other lessors; however, BNPPLC does not waive its interest in or rights with respect to equipment or other property included within the "Property" as described in Paragraph 7 of the Lease. Although computer equipment or other tangible personal property may be "bolted down" or otherwise firmly affixed to Improvements, it will not by reason thereof become part of the Improvements if it can be removed without causing structural or other material damage to the Improvements and without rendering HVAC or other major building systems inoperative and if it does not otherwise constitute "Property" as provided in Paragraph 7 of the Lease.

Without limiting the foregoing, BNPPLC acknowledges that NAI may obtain financing from other parties for inventory, furnishings, equipment, machinery and other personal property that is located in or about the Improvements, but that is not included in or integral to the Property, and to secure such financing NAI may grant a security interest under the California Uniform Commercial Code in such inventory, furnishings, equipment, machinery and other personal property. Further, BNPPLC acknowledges that the lenders providing such financing may require confirmation from BNPPLC of its agreements concerning landlord's liens and other matters set forth in this subparagraph 4(E), and NAI may obtain such confirmation in any statement required of BNPPLC by the next subparagraph.

(F) Estoppel Letters. Upon thirty days written request by NAI at any time and from time to time prior to the Designated Sale Date, BNPPLC must provide a statement in writing certifying that the Operative Documents are unmodified and in full effect (or, if there have been modifications, that the Operative Documents are in full effect as modified, and setting forth such modifications), certifying the dates to which the Base Rent payable by NAI under the Lease has been paid, stating whether BNPPLC is aware of any Default by NAI that may exist under the Operative Documents and confirming BNPPLC's agreements concerning landlord's liens and other matters set forth in subparagraph 4(E). Any such statement by BNPPLC may be relied upon by anyone with whom NAI may intend to enter into an agreement for construction of the Improvements or other significant agreements concerning the Property.

(G) No Implied Representations or Promises by BNPPLC. **NAI acknowledges and agrees that neither BNPPLC nor its representatives or agents have made any representations or promises with respect to the Property or the transactions contemplated in the Operative Documents except as expressly set forth in the Operative Documents, and no rights, easements or licenses are being acquired by NAI from BNPPLC by implication or otherwise, except as expressly set forth in the other Operative Documents.**

**5 Usury Savings Provision.** Notwithstanding anything to the contrary in any of the Operative Documents, BNPPLC does not intend to contract for, charge or collect any amount of money from NAI that constitutes interest in excess of the maximum nonusurious rate of interest, if any, allowed by applicable usury laws (the "**Maximum Rate**"). BNPPLC and NAI agree that

it is their intent in the execution of the Lease, the Purchase Agreement and other Operative Documents to contract in strict compliance with applicable usury laws, if any. In furtherance thereof, BNPPLC and NAI stipulate and agree that none of the provisions of the Lease, the Purchase Agreement or the other Operative Documents shall ever be construed to create a contract requiring compensation for the use, forbearance or detention of money at a rate in excess of the Maximum Rate, and the provisions of this paragraph shall control over all other provisions of this Certificate or other Operative Documents which may be in apparent conflict herewith. All interest paid or agreed to be paid by NAI to BNPPLC shall, to the extent permitted by applicable usury laws, be amortized, prorated, allocated, and spread throughout the period that any principal upon which such interest accrues is expected to be outstanding (including without limitation any renewal or extension of the term of the Lease) so that the amount of interest included in such payments does not exceed the maximum nonusurious amount permitted by applicable usury laws. If the Designated Sale Date is accelerated and as a result thereof amounts paid by NAI to BNPPLC as interest are determined to exceed the interest that would have accrued at the Maximum Rate for the period prior to the Designated Sale Date, then BNPPLC shall, at its option, either refund to NAI the amount of such excess or credit such excess as a Qualified Prepayment (and thus reduce the Lease Balance and other amounts, the determination of which depend upon Qualified Prepayments credited to NAI) and thereby shall render inapplicable any and all penalties of any kind provided by applicable usury laws as a result of such excess interest. If BNPPLC receives money (or anything else) that is determined to constitute interest and that would, but for this provision, increase the effective interest rate received by BNPPLC under or in connection with the Operative Documents to a rate in excess of the Maximum Rate, then the amount determined to constitute interest in excess of the maximum nonusurious interest shall, immediately following such determination, be returned to NAI or be credited as a Qualified Prepayment, in which event any and all penalties of any kind under applicable usury law shall be inapplicable. If BNPPLC does not actually receive, but shall contract for, request or demand, a payment of money (or anything else) which is determined to constitute interest and to increase the effective interest rate contracted for or charged to a rate in excess of the Maximum Rate, BNPPLC shall be entitled, following such determination, to waive or rescind the contractual claim, request or demand for the amount determined to exceed the Maximum Rate, in which event any and all penalties of any kind under applicable usury law shall be inapplicable. If at any time NAI should have reason to believe that the transactions evidenced by the Operative Documents are in fact usurious, NAI shall promptly give BNPPLC notice of such condition, after which BNPPLC shall have ninety days in which to make appropriate refund or other adjustment in order to correct such condition if it in fact exists.

**6 Obligations of NAI Under Other Operative Documents Not Limited by this Certificate.** Except as provided above in Paragraph 5, nothing contained in this Certificate will limit, modify or otherwise affect any of NAI's obligations under the other Operative Documents. Subject to Paragraph 5, those obligations are intended to be separate, independent and in addition to, and not in lieu of, those established by this Certificate.



**7 Obligations of NAI Hereunder Not Limited by Other Operative Documents.** Recognizing that but for this Certificate (including the representations of NAI set forth in Paragraph 1) BNPPPLC would not acquire the Property or enter into the other Operative Documents, NAI agrees that BNPPPLC's rights for any breach of this Certificate (including a breach of such representations) will not be limited by any provision of the other Operative Documents that would limit NAI's liability thereunder.

**8 Waiver of Jury Trial.** Each of the parties hereto hereby waives its right to a jury trial of any claim or cause of action based upon or arising out of this Agreement, the other Operative Documents or any of the transactions contemplated hereby or thereby, including contract claims, tort claims, breach of duty claims, and all other common law or statutory claims (collectively, the "**Claims**"). If and to the extent that the foregoing waiver of the right to a jury trial is unenforceable for any reason in such forum, each of the parties hereto hereby consents to the adjudication of all Claims pursuant to judicial reference as provided in California Code of Civil Procedure Section 638, and the judicial referee shall be empowered to hear and determine all issues in such reference, whether fact or law. Each of the parties hereto represents that each has reviewed this waiver and consent and each knowingly and voluntarily waives its jury trial rights and consents to judicial reference following consultation with legal counsel on such matters. In the event of litigation, a copy of this Agreement may be filed as a written consent to a trial by the court or to judicial reference under California Code of Civil Procedure Section 638 as provided herein.

[The signature pages follow.]

IN WITNESS WHEREOF, this Closing Certificate and Agreement (Moffett Business Center) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION,**  
a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

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**Closing Certificate and Agreement (Moffett Business Center) — Signature Page**

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[Continuation of signature pages for Closing Certificate and Agreement (Moffett Business Center) dated as of November 29, 2007.]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

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**Closing Certificate and Agreement (Moffett Business Center) — Signature Page**

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**Exhibit A**

**Legal Description**

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:**

**PARCEL ONE:**

All of Parcel 1 as shown upon that certain Map entitled, "Parcel Map being a resubdivision of Parcel 6 as shown on Map recorded in Book 214 of Maps, at Page 23, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on March 1, 1978 in Book 413, at Page 53.

**PARCEL TWO:**

All of Parcel A, as shown upon that certain Map entitled, "Parcel Map being a resubdivision of Parcels 2 and 3, as shown on that certain Map recorded March 1, 1978 in Book 413 of Maps, at Page 53, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on August 21, 1979 in Book 448 of Maps, at Pages 18 and 19.

APN: 110-36-014, 110-36-015

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**Exhibit B**

**Permitted Encumbrances**

**1. Property taxes**, which are a lien not yet due and payable, including any assessments collected with taxes to be levied for the fiscal year 2007-2008.

**2. The lien of supplemental taxes**, if any, assessed pursuant to the provisions of Chapter 3.5 (Commencing with Section 75) of the Revenue and Taxation code of the State of California. (None currently assessed.)

**3. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: City of Sunnyvale, A Municipal Corporation  
Purpose: Slope easement  
Recorded: October 9, 1964, Book 6695, Page 389, of Official Records  
Affects: as described therein

**4. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: City of Sunnyvale, A Municipal Corporation  
Purpose: Slope easement  
Recorded: October 9, 1964, Book 6695, Page 409, of Official Records  
Affects: A portion of Parcel One

**5. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: City of Sunnyvale, A Municipal Corporation  
Purpose: Public Utilities  
Recorded: October 9, 1964, Book 6695, Page 457, of Official Records  
Affects: A portion of Parcel One

**6. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: City of Sunnyvale, A Municipal Corporation  
Purpose: Public Utilities  
Recorded: September 24, 1965, Book 7116, Page 489, of Official Records  
Affects: As described therein

**7. Easement(s)** for the purpose(s) shown below and rights incidental thereto as delineated or as offered for dedication, on the Map Recorded in Book 413 of Maps, Page 53:

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Purpose: Public Utility Easement  
Affects: The Southwesterly 10 feet and the Northwesterly 9 feet of Parcel One; and the Southwesterly 15 feet of the Northeasterly 31 feet of the Northwesterly 492.14 feet and a portion of a strip 10 feet wide across a Southerly portion of Parcel Two  
Purpose: Ingress and Egress  
Affects: the Southeasterly 15 feet of Parcel One and the Northwesterly 15 feet of Parcel Two

**8. Covenants, conditions and restrictions** in the declaration of restrictions:

Recorded: March 8, 1978, Instrument No. 5947371, Book D511, Page 396, of Official Records

Modifications of said covenants, conditions and restrictions:

Recorded: August 19, 1980, Instrument No. 6808622, Book F514, Page 328, of Official Records  
Affects: Parcel One and other property

**9. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: The Prudential Insurance Company of America, a New Jersey Corporation  
Purpose: Ingress and Egress  
Recorded: August 24, 1978, Book D908, Page 20, of Official Records  
Affects: A portion of Parcel Two

**10. Covenants, conditions and restrictions** in the declaration of restrictions:

Recorded: November 17, 1978, Book E102, Page 686, of Official Records

Said covenants, conditions and restrictions provide that a violation thereof shall not defeat the lien of any mortgage or deed of trust made in good faith and for value.

The provisions of said covenants, conditions and restrictions were extended to include the herein described land by an instrument:

Recorded: August 22, 1979, Instrument No. 6477044, of Official Records  
Affects: Parcel Two and other property

**11. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: Pacific Gas and Electric Company, a California corporation  
Purpose: One or more underground pipes with suitable service pipes and connections for the conveyance of gas by Pacific Gas and Electric Company  
Recorded: April 20, 1979, Book E434, Page 278, of Official Records

The exact location and extent of said easement is not disclosed of record.

**12. Covenants, conditions and restrictions** in the declaration of restrictions:

Recorded: August 22, 1979, Book E740, Page 437, of Official Records

Said covenants, conditions and restrictions provide that a violation thereof shall not defeat the lien of any mortgage or deed of trust made in good faith and for value.

The provisions of said covenants, conditions and restrictions were extended to include the herein described land by an instrument:

Recorded: May 5, 1980, Book F309, Page 39, of Official Records

**13. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: Harmonic Lightwaves, Inc.  
Recorded: December 18, 1996, Instrument No. 13555124, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555124, of Official Records

**14. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: Volex Group, P.L.C.  
Recorded: December 18, 1996, Instrument No. 13555120, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555120, of Official Records

**15. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: TRW Inc.  
Recorded: December 18, 1996, Instrument No. 13555122, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555122, of Official Records

**16. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: TRW Inc.  
Recorded: December 18, 1996, Instrument No. 13555123, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555123, of Official Records

**17. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation



Lessee: Digital Equipment Corporation  
Recorded: December 18, 1996, Instrument No. 13555121, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555121, of Official Records

**18. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Notice of Non-Responsibility  
Lessor: AMB Property, L.P., a Delaware limited partnership  
Lessee: Harmonics, Incorporated  
Recorded: July 19, 2006, Instrument No. 19026667, of Official Records

**Exhibit C**  
**Quarterly Certificate**

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director

Gentlemen:

This Certificate is furnished pursuant to subparagraph 2(D)(3) of the Closing Certificate and Agreement (Moffett Business Center) dated as of November 29, 2007 between Network Appliance, Inc. and BNP Paribas Leasing Corporation (as amended, the "**Closing Certificate**"). Terms defined in the Closing Certificate and used but not otherwise defined in this Certificate are intended to have the respective meanings ascribed to them in the Closing Certificate.

The undersigned, being a Responsible Financial Officer of Network Appliance, Inc., represents and certifies the following to BNP Paribas Leasing Corporation:

(a) No Event of Default or material Default by NAI has occurred except as follows:

**[If an Event of Default or material Default by NAI has occurred, insert a description of the nature thereof and the action which NAI has taken or proposes to take to rectify it; otherwise, insert the word "none".]**

(b) The representations and warranties by NAI in the Closing Certificate are true and complete in all material respects on and as of the date of this Certificate as though made on and as of such date.

(c) the calculations set forth in the attachment to this Certificate, which show whether NAI is complying with financial covenants set forth in subparagraph 3(C) of the Closing Certificate based upon the most recent information available, are true and complete.

Executed this \_\_\_ day of \_\_\_\_\_, 20\_\_\_.

**[INSERT SIGNATURE BLOCK FOR A  
RESPONSIBLE FINANCIAL OFFICER]**

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**Exhibit D**

**Form of Disclosure Letter**

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**NETWORK APPLIANCE, INC.**

**DISCLOSURE LETTER**

To: JPMorgan Chase Bank, National Association, as Administrative Agent ("Agent"), under that certain Credit Agreement dated as of November \_\_\_\_, 2007 (as such agreement may be amended, restated or otherwise modified in writing from time to time, the "Credit Agreement") among Network Appliance, Inc. (the "Borrower"), the lenders from time to time party thereto, BNP Paribas, as syndication agent, and Agent.

This Disclosure Letter is delivered to you pursuant to the Credit Agreement. The items set forth in the attached Schedules represent exceptions, qualifications, permitted items and disclosures that are listed herein pursuant to the terms of the Credit Agreement. Capitalized terms used herein (or in the attached schedules) and defined in the Credit Agreement shall have the meanings ascribed in the Credit Agreement, unless the context otherwise requires.

IN WITNESS WHEREOF, the undersigned has executed this Disclosure Letter as of November \_\_\_\_, 2007.

NETWORK APPLIANCE, INC.

By: \_\_\_\_\_

Name: Ingemar Lanevi

Title: Treasurer

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**Schedule 3.01  
Subsidiaries**

<u>Subsidiary</u>	<u>Material Domestic Subsidiary (Y/N)</u>	<u>Jurisdiction</u>	<u>Shareholder</u>	<u>Percentage Interest</u>
Network Appliance Global Ltd.	N	Bermuda	Network Appliance Inc.	100%
Network Appliance Holdings Ltd.	N	Cyprus	Network Appliance Global Ltd.	100%
Network Appliance Holding & Manufacturing BV	N	Netherlands	Network Appliance Holdings Ltd.	100%
Network Appliance BV	N	Netherlands	Network Appliance Holding & Mfg BV	100%
Network Appliance ApS	N	Denmark	Network Appliance Holdings Ltd.	100%
Network Appliance Ltd	N	UK	Network Appliance BV	100%
Network Appliance SAS	N	France	Network Appliance BV	100%
Network Appliance GmbH	N	Germany	Network Appliance BV	100%
Network Appliance Srl.	N	Italy	Network Appliance BV	100%
Network Appliance GmbH	N	Switzerland	Network Appliance BV	100%

<u>Subsidiary</u>	<u>Material Domestic Subsidiary (Y/N)</u>	<u>Jurisdiction</u>	<u>Shareholder</u>	<u>Percentage Interest</u>
Network Appliance (Sales) Limited	N	Ireland	Network Appliance BV	100%
Network Appliance GesmbH	N	Austria	Network Appliance BV	100%
Network Appliance SL	N	Spain	Network Appliance BV	100%
Network Appliance BVBA	N	Belgium	Network Appliance BV	100%
Network Appliance Israel Ltd.	N	Israel	Network Appliance BV	100%
Network Appliance Israel R&D, Ltd.	N	Israel	Network Appliance Inc.	100%
Network Appliance Poland Sp. z.o.o.	N	Poland	Network Appliance BV	100%
Network Appliance Sweden AB	N	Sweden	Network Appliance BV	100%
Network Appliance South Africa (Pty) Ltd.	N	South Africa	Network Appliance BV	100%
Network Appliance Finland Oy	N	Finland	Network Appliance BV	100%
Network Appliance Norway AS	N	Norway	Network Appliance BV	100%
Network Appliance BV (Representative Office)	N	UAE	Network Appliance BV	100%

<u>Subsidiary</u>	<u>Material Domestic Subsidiary (Y/N)</u>	<u>Jurisdiction</u>	<u>Shareholder</u>	<u>Percentage Interest</u>
Network Appliance BV (Representative Office)	N	Turkey	Network Appliance BV	100%
Network Appliance BV (Representative Office)	N	Russia	Network Appliance BV	100%
Network Appliance Luxembourg S.a.r.l.	N	Luxembourg	Network Appliance BV	100%
Network Appliance BV (Representative Office)	N	Indonesia	Network Appliance BV	100%
Network Appliance BV (Representative Office)	N	Philippines	Network Appliance BV	100%
Network Appliance KK	N	Japan	Network Appliance Inc.	100%
Network Appliance Pty. Ltd.	N	Australia	Network Appliance Global Ltd.	100%
Network Appliance Mexico S. de R.L. de C.V.	N	Mexico	Network Appliance Inc.	100%
Network Appliance Singapore Private Ltd.	N	Singapore	Network Appliance Inc.	100%
Network Appliance Sdn Bhd	N	Malaysia	Network Appliance Inc.	100%
Network Appliance Systems Private Ltd.	N	India	Network Appliance Inc.	100%
Network Appliance Argentina Srl	N	Argentina	Network Appliance Inc.	100%

<u>Subsidiary</u>	<u>Material Domestic Subsidiary (Y/N)</u>	<u>Jurisdiction</u>	<u>Shareholder</u>	<u>Percentage Interest</u>
Network Appliance Ltd.	N	Brazil	Network Appliance Inc.	100%
Network Appliance Canada Ltd.	N	Canada	Network Appliance Inc.	100%
Network Appliance (Shanghai) Commercial Co., Ltd.	N	China	Network Appliance BV	100%
Network Appliance (Hong Kong) Limited	N	Hong Kong	Network Appliance BV	100%
Network Appliance, Inc. (Representative Office)	N	China, Beijing	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	China, Shanghai	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	China, Guangzhou	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	Korea	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	Taiwan	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	Hong Kong	Network Appliance Inc.	100%
Network Appliance Federal Systems, Inc.	N	California	Network Appliance Inc.	100%
Network Appliance Financial Solutions, Inc.	N	Delaware	Network Appliance Inc.	100%

<u>Subsidiary</u>	<u>Material Domestic Subsidiary (Y/N)</u>	<u>Jurisdiction</u>	<u>Shareholder</u>	<u>Percentage Interest</u>
Spinnaker Networks, Inc.	N	Delaware	Network Appliance Inc.	100%
Spinnaker Networks, LLC	N	Delaware	Network Appliance Inc.	100%
Alacritus, Inc.	N	Delaware	Network Appliance Inc.	100%
Decru, Inc.	N	Delaware	Network Appliance Inc.	100%
Decru BV	N	Netherlands	Network Appliance Holding & Mfg BV	100%
Network Appliance Limited	N	Thailand	Network Appliance Inc.	100%
Network Appliance Saudi Arabia LLFC	N	Saudi Arabia	Network Appliance BV	100%
Decru Ltd.	N	U.K.	Decru Inc.	100%
Topio, Inc.	N	Delaware	Network Appliance Inc.	100%

Commitments or Obligations of Borrower or any Subsidiary to issue capital or other equity interests:

None.

Options, warrants or other rights to acquire capital or other equity interests of Borrower or any Subsidiary:

None.



**Schedule 3.06  
Disclosed Matters**

None.

**Schedule 6.01  
Existing Indebtedness**

Secured Credit Agreement, dated as of October 5, 2007, by and among Network Appliance, Inc., the lenders party thereto and JPMorgan Chase Bank, National Association, as administrative agent.

Loan Agreement, dated as of March 31, 2006, by and among Network Appliance Global, Ltd., as the borrower, the lenders party thereto and JPMorgan Chase Bank, N.A., as administrative agent.

See attached schedule of existing letters of credit and bank guarantees.

Lease Agreements, dated as of December 15, 2005, December 16, 2006, and July 17, 2007, by and between BNP Paribas Leasing Corporation and Network Appliance, Inc., and those certain Closing Certificates executed in connection with such Lease Agreements, dated as of December 15, 2005, December 16, 2006, and July 17, 2007, by and between BNP Paribas Leasing Corporation and Network Appliance, Inc.

**Schedule 6.02  
Existing Liens**

Liens in connection with items disclosed on Schedule 6.01.

**Schedule 6.05**  
**Existing Affiliate Transactions**

Transaction arising in connection with commissionaire agreements between Network Appliance B. V. and each of its subsidiaries and related arrangements with respect to payment of value added taxes.

Transactions arising in connection that certain Technology License Agreement, effective as of May 1, 2000, by and between Network Appliance Global Ltd. and Network Appliance B.V.

Transactions arising in connection that certain Technology License Agreement, effective as of May 1, 2000, by and between Network Appliance Global Ltd. and Network Appliance Inc.

Transactions arising in connection with that certain Technology License Agreement, entered into as of April 27, 2002, by and between Network Appliance, Inc. and Network Appliance Global Ltd.

Transactions arising in connection with that certain Technology License Agreement, entered into as of May 1, 2004, by and between Network Appliance Global Ltd. and Spinnaker Networks Inc.

Transactions arising in connection with that certain Technology License Agreement, entered into as of May 3, 2005, by and between Network Appliance Inc. and Alacritus Inc.

Transactions arising in connection with that certain Technology License Agreement, entered into as of April 29, 2006, by and between Network Appliance Global Ltd. and Decru Inc.

**Schedule 6.06**  
**Existing Restrictive Agreements**

Secured Credit Agreement, dated as of October 5, 2007, by and among Network Appliance, Inc., the lenders party thereto and JPMorgan Chase Bank, National Association, as administrative agent.

Loan Agreement dated as of March 31, 2006, by and among Network Appliance Global, Ltd., as the borrower, the lenders party thereto and JPMorgan Chase Bank, N.A., as administrative agent

Lease Agreements, dated as of December 15, 2005, December 16, 2006, and June 17, 2007, by and between BNP Paribas Leasing Corporation and Network Appliance, Inc., and those certain

Closing Certificates executed in connection with such Lease Agreements, dated as of December 15, 2005, December 16, 2006, and June 17, 2007, by and between BNP Paribas Leasing Corporation and Network Appliance, Inc.

Letter Agreement between Wells Fargo Bank, National Association, and Borrower, dated as of December 1, 2006, providing Borrower with a revolving line of credit for the issuance of letters of credit in an aggregate principal amount not to exceed \$5,000,000.

Exhibit E

Certificate of BNPPPLC Re: Accounting

Network Appliance, Inc.  
7301 Kit Creek Road  
Research Triangle Park, NC 27709  
Attention: Ingemar Lanevi

Gentlemen:

This certificate is furnished pursuant to subparagraph 4(A) of the Closing Certificate and Agreement (Moffett Business Center) dated as of November 29, 2007 between BNP Paribas Leasing Corporation and Network Appliance, Inc. (as amended, the "**Closing Certificate**"). Terms defined in the Closing Certificate and used but not otherwise defined in this certificate are intended to have the respective meanings ascribed to them in the Closing Certificate.

BNP Paribas Leasing Corporation ("**BNPPPLC**") certifies that the following are true and complete in all material respects, but only to the knowledge of BNPPPLC as of the date hereof:

(A) The facts disclosed in any financial statements or other documents listed in the Annex attached to this certificate were (as of their respective dates) true and complete in all material respects. Copies of such statements or other documents were provided by or behalf of BNPPPLC to NAI prior to the date hereof to permit NAI to determine the appropriate accounting for NAI's relationship with BNPPPLC under FASB Interpretation No. 46(R), *Consolidation of Variable Interest Entities* ("**FIN 46**").

(B) The fair value of the Property and of other properties, if any, leased to NAI by BNPPPLC (collectively, whether one or more, the "**Properties Leased to NAI**") are, as of the date hereof, less than half of the total of the fair values of all assets of BNPPPLC, excluding any assets of BNPPPLC which are held within a silo. Further, none of the Properties Leased to NAI are, as of the date hereof, held within a silo.

Although the representations required of BNPPPLC by this certificate are intended to cover *facts*, it is understood and agreed (consistent with subparagraph 4(C) of the Lease) that BNPPPLC has not made and will not make any representation or warranty as to the proper accounting by NAI or its Affiliates of the Lease or other Operative Documents or as to other accounting *conclusions*.

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Executed this \_\_\_ day of \_\_\_\_\_, 20 \_\_\_.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**LEASE AGREEMENT  
(MOFFETT BUSINESS CENTER)**

**BETWEEN**

**NETWORK APPLIANCE, INC.  
("NAI")**

**AND**

**BNP PARIBAS LEASING CORPORATION  
("BNPPLC")**

**November 29, 2007**

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**LEASE AGREEMENT  
(MOFFETT BUSINESS CENTER)**

This LEASE AGREEMENT (MOFFETT BUSINESS CENTER) (this "**Lease**"), dated as of November 29, 2007 (the "**Effective Date**"), is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and NETWORK APPLIANCE, INC. ("**NAI**"), a Delaware corporation.

**RECITALS**

Contemporaneously with the execution of this Lease, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement (Moffett Business Center) dated as of the Effective Date (the "**Common Definitions and Provisions Agreement**"), which by this reference is incorporated into and made a part of this Lease for all purposes. *As used in this Lease, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Lease are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

At the request of NAI and to facilitate the transactions contemplated in the other Operative Documents, BNPPLC is acquiring the Land described in Exhibit A and improvements on the Land from AMB Property, L.P., a Delaware limited partnership, (the "**Prior Owner**") contemporaneously with the execution of this Lease.

In anticipation of BNPPLC's acquisition of the Land and other property described below, BNPPLC and NAI have reached agreement as to the terms and conditions upon which BNPPLC is willing to lease to NAI the Land and the Improvements, and by this Lease BNPPLC and NAI desire to evidence such agreement.

**GRANTING CLAUSES**

BNPPLC does hereby LEASE, DEMISE and LET unto NAI for the Term (as hereinafter defined) all right, title and interest of BNPPLC, now owned or hereafter acquired, in and to:

- (1) the Land, including all interests in the Land acquired by BNPPLC from the Prior Owner;
  - (2) any and all Improvements;
  - (3) all easements and other rights appurtenant to the Land or to the Improvements; and
  - (4) (A) any land lying within the right-of-way of any street, open or proposed, adjoining the Land, (B) any sidewalks and alleys adjacent to the Land, and (C) any strips
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and gores between the Land and abutting land.

BNPPLC's interest in all property described in clauses (1) through (4) above is hereinafter referred to collectively as the "**Real Property**".

To the extent, but only to the extent, that assignable rights or interests in, to or under the following have been or will be acquired by BNPPLC from the Prior Owner or as described in Paragraph 7 below, BNPPLC also hereby grants and assigns to NAI for the term of this Lease the right to use and enjoy (and, in the case of contract rights, to enforce) such rights or interests of BNPPLC:

(a) any goods, equipment, furnishings, furniture and other tangible personal property of whatever nature that are located on the Real Property and all renewals or replacements of or substitutions for any of the foregoing (collectively, the "**Tangible Personal Property**");

(b) the benefits, if any, conferred upon the owner of the Real Property by the Permitted Encumbrances; and

(c) any permits, licenses, franchises, certificates, and other rights and privileges against third parties related to the Real Property or Tangible Personal Property, including warranties, if any, given by vendors from whom any Tangible Personal Property was or may be acquired.

Such rights and interests of BNPPLC, whether now existing or hereafter arising, are hereinafter collectively called the "**Personal Property**". The Real Property and the Personal Property are hereinafter sometimes collectively called the "**Property**."

However, the leasehold estate conveyed by this Lease and NAI's rights hereunder are expressly made subject and subordinate to the terms and conditions of this Lease, to the matters listed in Exhibit B to the Closing Certificate (including the Existing Space Leases) and all other Permitted Encumbrances, and to any other claims or encumbrances not constituting Liens Removable by BNPPLC.

Without limiting the foregoing, it is understood that so long as NAI continues to be entitled to possession of the Property pursuant to this Lease, NAI's possession will extend to and include (to the exclusion of BNPPLC) not only the Improvements, but also the Land (subject only to BNPPLC's limited right of entry on and subject to the terms and conditions set forth in this Lease), and NAI will be entitled to any benefits conferred upon the owner of the Property by Permitted Encumbrances, including the right to receive and retain rents as they become due under Existing Space Leases and to otherwise enforce Existing Space Leases during the term of this Lease. Accordingly, it is the intent of the parties that BNPPLC will not assume or retain

responsibility for the condition of the Land or the Improvements or for any obligations undertaken by NAI under the Existing Space Leases or under other Permitted Encumbrances.

#### **GENERAL TERMS AND CONDITIONS**

The Property is leased by BNPPLC to NAI and is accepted and is to be used and possessed by NAI upon and subject to the following terms and conditions:

##### **1 Term.**

(A) Scheduled Term. The term of this Lease (the "**Term**") will commence on the Effective Date and will end on the first Business Day of December, 2012, unless extended as provided in subparagraph 1(B) or sooner terminated as expressly provided in other provisions of this Lease.

(B) Extension of the Term. The Term may be extended at the option of NAI for up to two successive periods of five years each; provided, however, that prior to each such extension the following conditions must have been satisfied: (A) NAI must have delivered a notice of its election to exercise the option at least one hundred eighty days prior to the end of the Term, and prior to the commencement of any such extension BNPPLC and NAI must have agreed in writing upon, and received the written consent and approval of BNPPLC's Parent and all Participants (other than Participants being replaced at the request of NAI as provided in Paragraph 6) to, (1) a corresponding extension of the date specified in clause (1) of the definition of Designated Sale Date in the Common Definitions and Provisions Agreement, and (2) an adjustment to the Rent that NAI will be required to pay during the extension, it being expected that the Rent for the extension may be different than the Rent required for the original Term or any prior extension, and it being understood that the Rent for any extension must in all events be satisfactory to both BNPPLC and NAI, each in its sole and absolute discretion; (B) at the time of NAI's exercise of its option to extend, no Event of Default has occurred and is continuing and no Event of Default will result from the extension; (C) immediately prior to any such extension, this Lease must then remain in effect; and (D) if this Lease has been assigned by NAI, then NAI must have executed a guaranty (or confirmed an existing guaranty, if applicable), guaranteeing NAI's assignee's obligations under the Operative Documents throughout such extended Term. With respect to the condition that BNPPLC and NAI must have agreed upon the Rent required for any extension of the Term, neither NAI nor BNPPLC is willing to submit itself to a risk of liability or loss of rights hereunder for being judged unreasonable. Similarly, neither BNPPLC's Parent nor any Participant is expected to submit itself to a risk of liability or loss of rights for being judged to have unreasonably withheld consent or approval to any extension of the Term. Accordingly, NAI, BNPPLC, BNPPLC's Parent and Participants will each have sole and absolute discretion in making its determination, and both NAI and BNPPLC hereby disclaim any obligation express or implied to be reasonable in negotiating the Rent for any such extension. Subject to the changes to the Rent and satisfaction of the other conditions listed in this

subparagraph, if NAI exercises its option to extend the Term as provided in this subparagraph, this Lease will continue in full force and effect, and the leasehold estate hereby granted to NAI will continue without interruption and without any loss of priority over other interests in or claims against the Property that may be created or arise after the Effective Date and before the extension.

## 2 Use and Condition of the Property.

(A) Use. Subject to the Permitted Encumbrances, NAI may use and occupy the Property during the Term, but only for the following purposes and other lawful purposes incidental thereto:

- (1) administrative and office space;
- (2) activities related to NAI's research and development or production of products that are of substantially the same type and character as those regularly sold by NAI in the ordinary course of its business as of the Effective Date;
- (3) cafeteria and other support facilities that NAI may provide to its employees; and
- (4) other lawful purposes (including NAI's research and development or production of products that are not of substantially the same type and character as those regularly sold by NAI in the ordinary course of its business as of the Effective Date) approved in advance and in writing by BNPPPLC, which approval will not be unreasonably withheld (but NAI acknowledges that BNPPPLC's withholding of such approval shall be reasonable if BNPPPLC determines in good faith that (1) giving the approval may materially increase BNPPPLC's risk of liability for any existing or future environmental problem, or (2) giving the approval is likely to substantially increase BNPPPLC's administrative burden of complying with or monitoring NAI's compliance with the requirements of this Lease or other Operative Documents).

The foregoing provisions of this subparagraph will not prevent a tenant under an Existing Space Lease executed prior to the Effective Date from using the space covered thereby for purposes expressly authorized by the terms and conditions of such Existing Space Lease.

(B) Condition of the Property. NAI acknowledges that it has carefully and fully inspected the Property and accepts the Property in its present state, AS IS, and without any representation or warranty, express or implied, as to the condition of such property or as to the use which may be made thereof. NAI also accepts the Property without any covenant, representation or warranty,



**express or implied, by BNPPLC or other Interested Parties regarding the title thereto or the rights of any parties in possession of any part thereof, except as expressly set forth in Paragraph 17. BNPPLC will not be responsible for any latent or other defect or change of condition in the Land, Improvements or other Property or for any violations with respect thereto of Applicable Laws. Further, BNPPLC will not be required to furnish to NAI any facilities or services of any kind, including water, phone, sewer, steam, heat, gas, air conditioning, electricity, light or power.**

(C) Consideration for and Scope of Waiver. The provisions of subparagraph 2(B) have been negotiated by BNPPLC and NAI as being consistent with the Rent payable under this Lease, and such provisions are intended to be a complete exclusion and negation of any representations or warranties of BNPPLC or other Interested Parties, express or implied, with respect to the Property that may arise pursuant to any law now or hereafter in effect or otherwise, except as expressly set forth herein.

However, such exclusion of representations and warranties by BNPPLC is not intended to impair any representations or warranties made by other parties, including the Prior Owner, the benefit of which may pass to NAI during the Term because of the definition of Personal Property and Property above.

### **3 Rent.**

(A) Base Rent Generally. On each Base Rent Date through the end of the Term, NAI must pay BNPPLC rent (“**Base Rent**”), calculated as provided below. Each payment of Base Rent must be received by BNPPLC no later than 1:00 p.m. (Eastern time) on the date it becomes due; if received after 1:00 p.m. (Eastern time) it will be considered for purposes of this Lease as received on the next following Business Day. At least five days prior to any Base Rent Date upon which an installment of Base Rent becomes due, BNPPLC will notify NAI in writing of the amount of each installment, calculated as provided below. Any failure by BNPPLC to so notify NAI, however, will not constitute a waiver of BNPPLC’s right to payment, but absent such notice NAI will not be in default hereunder for any underpayment resulting therefrom if NAI, in good faith, reasonably estimates the payment required, makes a timely payment of the amount so estimated and corrects any underpayment within three Business Days after being notified by BNPPLC of the underpayment.

(B) Calculation of and Due Dates for Base Rent. Payments of Base Rent will be calculated and become due as follows:

(1) Determination of Payment Due Dates Generally. For Base Rent Periods subject to a LIBOR Period Election of six months, Base Rent will be payable in two

installments, with the first installment becoming due on the Base Rent Date that occurs on the first Business Day of the third calendar month following the commencement of such Base Rent Period, and with the second installment becoming due on the Base Rent Date upon which the Base Rent Period ends. For all other Base Rent Periods, Base Rent will be due in one installment on the Base Rent Date upon which the Base Rent Period ends.

(2) Special Adjustments to Base Rent Payment Dates and Periods. Notwithstanding the foregoing, if NAI or any Applicable Purchaser purchases BNPPLC's interest in the Property pursuant to the Purchase Agreement, any accrued unpaid Base Rent and all outstanding Additional Rent will be due on the date of purchase in addition to the purchase price and other sums due to BNPPLC under the Purchase Agreement.

(3) Base Rent Formula. Each installment of Base Rent payable for any Base Rent Period will equal:

- the Lease Balance on the first day of such Base Rent Period, *times*
- the sum of the Effective Rate and the Spread, *times*
- the number of days in the period from and including the preceding Base Rent Date to but not including the Base Rent Date upon which the installment is due, *divided by*
- three hundred sixty.

Only for the purpose of illustration, assume the following for a hypothetical Base Rent Period: that prior to the first day of such Base Rent Period Qualified Prepayments have been received by BNPPLC, leaving a Lease Balance of \$30,000,000; that the Effective Rate for the Base Rent Period is 6%; that the Spread is one hundred fifty basis points (150/100 of 1%); and that such Base Rent Period contains exactly thirty days. Under such assumptions, Base Rent for the hypothetical Base Rent Period will equal:

$$\$30,000,000 \times [6\% + 1.50\%] \times 30/360 = \$187,500.$$

(4) Fixed Rate Lock. At any time during the Term, NAI may deliver a notice in the form attached to the Common Definitions and Provisions Agreement as Annex 2 (a "**Fixed Rate Lock Notice**"), requesting that BNPPLC establish a fixed rate for use in the calculation of the Effective Rate hereunder (a "**Fixed Rate Lock**") for all Base Rent Periods commencing on or after a date specified in such notice, which date must be the first Business Day of a calendar month (the "**Fixed Rate Lock Date**"). Promptly after receiving a Fixed Rate Lock Notice, BNPPLC will enter into an Interest Rate Swap with

BNP Paribas (the “**Fixed Rate Swap**”); except that BNPPLC may decline to enter into the Fixed Rate Swap and to establish a Fixed Rate Lock if:

- (a) NAI does not deliver the Fixed Rate Lock Notice to BNPPLC at least ten Business days prior to the Fixed Rate Lock Date specified therein;
- (b) NAI specifies a Fixed Rate Lock Date in the Fixed Rate Lock Notice that is prior to the end of any Base Rent Period which commenced before BNPPLC receives the Fixed Rate Lock Notice;
- (c) any notice has been given to accelerate the Designated Sale Date as provided in the definition thereof in the Common Definitions and Provisions Agreement;
- (d) the estimate of the Fixed Rate (hereinafter defined) specified by NAI in the Fixed Rate Lock Notice is for any reason less than the fixed rate available to BNPPLC under any Interest Rate Swap proposed by BNP Paribas;
- (e) at the time the Fixed Rate Lock Notice is given, the Interest Rate Swap requested thereby is contrary to any Applicable Laws or any interpretation thereof by any governmental authority, central bank or comparable agency charged with the interpretation or administration thereof, or any request or directive (whether or not having the force of law) of any such authority, central bank or comparable agency (including, without limitation, any such requirement imposed by the Board of Governors of the United States Federal Reserve System); or
- (f) any event has occurred or circumstance exists that constitutes a Default.

The notional principal amount of the Fixed Rate Swap will equal the Lease Balance on the date such notice is given. The fixed rate used to calculate payments required of BNPPLC under the Fixed Rate Swap, as the counterparty designated the fixed rate payor, will constitute the “**Fixed Rate**” for purposes of this Lease.

(C) Early Termination of Fixed Rate Lock. After a Fixed Rate Lock is established, BNPPLC may cause or suffer a termination in whole or in part of the Fixed Rate Swap in the event that (i) NAI fails to make any payment of Base Rent required hereunder on the Base Rent Date when it first becomes due, (ii) the Designated Sale Date occurs before the date specified in clause (1) of the definition thereof in the Common Definitions and Provisions Agreement, (iii) for any reason a Qualified Prepayment is applied to reduce the Lease Balance, (iv) the Lease Balance on the Fixed Rate Lock Date is less than the notional amount of the Fixed Rate Swap for

any reason. NAI must reimburse to BNPPLC any Fixed Rate Settlement Amount charged to BNPPLC in connection with such a termination, and if the termination is a complete, rather than a partial, termination of the Fixed Rate Swap then in effect, it will for purposes of this Lease constitute a termination of the Fixed Rate Lock itself. Further, if BNPPLC is charged penalties or interest because of its failure to make a timely payment required under the Fixed Rate Swap, and if BNPPLC's failure to make the timely payment was caused by NAI's failure to make a timely payment of Base Rent or other amounts due hereunder or under other Operative Documents, then such penalties or interest will constitute Losses against which BNPPLC is entitled to be indemnified pursuant to subparagraph 5(C). If a Fixed Rate Lock is terminated as provided in this subparagraph, NAI shall have no right to require BNPPLC to enter into another Interest Rate Swap in order to establish a new fixed rate.

(D) Additional Rent. All amounts which NAI is required to pay to or on behalf of BNPPLC pursuant to this Lease, together with every charge, premium, interest and cost set forth herein which may be added for nonpayment or late payment thereof, will constitute rent (all such amounts, other than Base Rent, are herein called "**Additional Rent**"; and, collectively, Base Rent and Additional Rent are herein sometimes called "**Rent**").

(E) Arrangement Fee and Upfront Fees. In addition to other amounts payable by NAI hereunder, contemporaneously with the execution of this Lease NAI must pay BNPPLC an arrangement fee (the "**Arrangement Fee**") and upfront fees (the "**Upfront Fees**") as provided in the Closing Letter. The Arrangement Fee and the Upfront Fees will represent Additional Rent for the first Base Rent Period.

(F) Administrative Fees. In addition to other amounts payable by NAI hereunder, on or before each anniversary of the Effective Date and prior to the Designated Sale Date, NAI must pay BNPPLC an annual administrative agency fee (an "**Administrative Fee**") as provided in the Closing Letter. Each payment of an Administrative Fee will represent Additional Rent for the first Base Rent Period during which it first becomes due.

(G) No Demand or Setoff. Except as expressly provided herein, NAI must pay all Rent without notice or demand and without counterclaim, deduction, setoff or defense.

(H) Default Interest and Order of Application. All Rent will bear interest, if not paid when first due, at the Default Rate in effect from time to time from the date due until paid; provided, that nothing herein contained will be construed as permitting the charging or collection of interest at a rate exceeding the maximum rate permitted under Applicable Laws. BNPPLC may apply any amounts paid by or on behalf of NAI against any Rent then past due in the order the same became due or in such other order as BNPPLC elects.

(I) Calculations by BNPPLC Are Conclusive. All calculations by BNPPLC of Base Rent, Additional Rent or any amount needed to calculate Base Rent (including the Effective Rate

for any Base Rent Period and the Lease Balance) or Additional Rent will, in the absence of clear and demonstrable error, be conclusive and binding upon NAI.

#### **4 Nature of this Agreement.**

(A) “Net” Lease Generally. Subject only to the exceptions listed in subparagraph 5(D) below, it is the intention of BNPPLC and NAI that Base Rent and other payments herein specified will be absolutely net to BNPPLC and that NAI must pay all costs, expenses and obligations of every kind relating to the Property or this Lease which may arise or become due. Further, it is understood that all amounts payable by NAI to BNPPLC under this Lease and the other Operative Documents are expressed as minimum payments to be made net of any deduction or withholding required under any Applicable Laws.

(B) No Termination. Except as expressly provided in this Lease itself, this Lease will not terminate, nor will NAI have any right to terminate this Lease, nor will NAI be entitled to any abatement of or setoff against the Rent, nor will the obligations of NAI under this Lease be excused, for any reason whatsoever, including any of the following: (i) any damage to or the destruction of all or any part of the Property from whatever cause, (ii) the taking of the Property or any portion thereof by eminent domain or otherwise for any reason, (iii) the prohibition, limitation or restriction of NAI’s use or development of all or any portion of the Property or any interference with such use by governmental action or otherwise, (iv) any eviction of NAI or of anyone claiming through or under NAI, (v) any default on the part of BNPPLC under this Lease or any of the other Operative Documents or any other agreement to which BNPPLC and NAI are parties, (vi) the inadequacy in any way whatsoever of the design, construction, assembly or installation of any improvements, fixtures or Tangible Personal Property included in the Property (it being understood that BNPPLC has not made, does not make and will not make any representation express or implied as to the adequacy thereof), (vii) any latent or other defect in the Property or any change in the condition thereof or the existence with respect to the Property of any violations of Applicable Laws, (viii) NAI’s ownership of any interest in the Property, (ix) any breach of an Existing Space Lease by the tenant thereunder, or (x) any other cause, whether similar or dissimilar to the foregoing, any existing or future law to the contrary notwithstanding. It is the intention of the parties hereto that the obligations of NAI hereunder be separate and independent of the covenants and agreements of BNPPLC, that Base Rent and all other sums payable by NAI hereunder continue to be payable in all events and that the obligations of NAI hereunder continue unaffected, unless the requirement to pay or perform the same have been terminated or limited pursuant to an express provision of this Lease. Without limiting the foregoing, NAI waives to the extent permitted by Applicable Laws, except as otherwise expressly provided herein, all rights to which NAI may now or hereafter be entitled by law (including any such rights arising because of any “warranty of suitability” or other warranties implied as a matter of law) (i) to quit, terminate or surrender this Lease or the Property or any part thereof or (ii) to any abatement, suspension, deferment or reduction of the Rent.

However, nothing in this subparagraph 4(B) will be construed as a waiver by NAI of any right NAI may have at law or in equity to the following remedies, whether because of BNPPLC's failure to remove a Lien Removable by BNPPLC or because of any other default by BNPPLC under this Lease: (i) the recovery of monetary damages in the case of any default that continues beyond the period for cure provided in Paragraph 16, (ii) injunctive relief in case of the violation, or attempted or threatened violation, by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Lease which are binding upon BNPPLC (including the confidentiality provisions set forth in subparagraph 22(B) below), or (iii) a decree compelling performance by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Lease which are binding upon BNPPLC.

(C) Characterization of this Lease.

(1) Both NAI and BNPPLC intend that (A) for the purposes of determining the proper accounting for this Lease by NAI, BNPPLC will be treated as the owner and landlord of the Property and NAI will be treated as the tenant of the Property, and (B) for income tax purposes and commercial law (including real estate and bankruptcy law) and regulatory purposes, (1) this Lease and the other Operative Documents will be treated as a financing arrangement, (2) BNPPLC will be deemed a lender making loans to NAI in the principal amount equal to the Lease Balance, which loans are secured by the Property, and (3) NAI will be treated as the owner of the Property and will be entitled to all tax benefits available to the owner of the Property. ***Consistent with such intent, by the provisions set forth in Exhibit B, NAI is granting to BNPPLC a lien upon and mortgaging and warranting title to the Land and the Improvements and all rights, titles and interests of NAI in and to other Property, WITH POWER OF SALE, to secure all obligations (monetary or otherwise) of NAI arising under or in connection with any of the Operative Documents.*** Without limiting the generality of the foregoing, NAI and BNPPLC desire that their intent as set forth in this subparagraph be given effect both in the context of any bankruptcy, insolvency or receivership proceedings concerning NAI or BNPPLC and in other contexts. Accordingly, NAI and BNPPLC expect that in the event of any bankruptcy, insolvency or receivership proceedings affecting NAI or BNPPLC or any enforcement or collection actions arising out of such proceedings, the transactions evidenced by this Lease and the other Operative Documents will be characterized and treated as loans made to NAI by BNPPLC, as an unrelated third party lender to NAI, secured by the Property.

(2) Notwithstanding the foregoing, NAI acknowledges and agrees that none of BNPPLC or the other Interested Parties has made, or will be deemed to have made, in the Operative Documents or otherwise, any representations or warranties concerning how this Lease and the other Operative Documents will be characterized or treated under applicable accounting rules, income tax, regulatory, commercial or real estate law, bankruptcy, insolvency or receivership law or any other rules or requirements concerning

the tax, accounting or legal characteristics of the Operative Documents. NAI further acknowledges and agrees that it is sophisticated and knowledgeable regarding all such matters and that it has, as it deemed appropriate, obtained from and relied upon its own professional accountants, counsel and other advisors for such tax, accounting and legal advice concerning the Operative Documents.

(3) In any event, NAI will be required by subparagraph 5(C) below to indemnify and hold harmless BNPPLC from and against all additional taxes that may arise or become due because of any refusal of taxing authorities to recognize and give effect to the intention of the parties as set forth in subparagraph 4(C)(1) (“**Unexpected Recharacterization Taxes**”), including any additional income or capital gain tax that may become due because of payments to BNPPLC of the purchase price upon any sale under the Purchase Agreement resulting from any insistence of such taxing authorities that BNPPLC be treated as the “true owner” of the Property for tax purposes (a “**Forced Recharacterization**”); provided, however, NAI will not be required to pay or reimburse Unexpected Recharacterization Taxes to the extent that they are, in any given tax year, eliminated or offset by actual savings to BNPPLC because of additional depreciation deductions or other tax benefits available to BNPPLC in the same year only by reason of the Forced Recharacterization (“**Unexpected Tax Savings**”). To the extent Unexpected Recharacterization Taxes are eliminated or offset by Unexpected Tax Savings in a given tax year, including the tax year in which any sale under the Purchase Agreement occurs (the “**Year of Sale**”), such Unexpected Recharacterization Taxes will constitute Excluded Taxes as provided in clause (D) of the definition thereof in the Common Definitions and Provisions Agreement. Also, for purposes of this provision, it is understood that any depreciation deductions first available to BNPPLC in tax years prior to the Year of Sale and resulting from a Forced Recharacterization (“**Prior Year Depreciation Deductions**”) will be considered “available to BNPPLC” in the Year of Sale (and thus will eliminate or offset any Unexpected Recharacterization Taxes resulting from the recapture of such Prior Year Depreciation Deductions upon a sale under the Purchase Agreement) to the extent that (A) such Prior Year Depreciation Deductions are not otherwise used to generate Unexpected Tax Savings or Unexpected Net Tax Benefits (as defined below), and (B) the tax laws and regulations applicable in the Year of Sale effectively permit BNPPLC to carry over the Prior Year Depreciation Deductions to the Year of Sale by allowing BNPPLC to carry over net operating losses from the years in which the Prior Year Depreciation Deductions were first available to BNPPLC to the Year of Sale.

(4) After any Forced Recharacterization, BNPPLC will make a reasonable effort to determine whether Unexpected Tax Savings *exceed* Unexpected Recharacterization Taxes in any given tax year (any such excess being hereinafter called an “**Unexpected Net Tax Benefit**”); and if BNPPLC does determine that an Unexpected Net Tax Benefit has been realized and the amount thereof, BNPPLC will notify NAI of

the same and either credit the amount thereof against payments otherwise then due or to become due from NAI under this Lease or the other Operative Documents or pay the amount of such Unexpected Net Tax Benefit to NAI. It is understood, however, that the tax position of BNPPLC (and the consolidated tax group of which it is a part) may, in any given tax year, be such that no Unexpected Net Tax Benefit exists or can be determined with a reasonable effort on the part of BNPPLC. Therefore, BNPPLC makes no representation that NAI will receive any credits or payments pursuant to this provision after any Forced Recharacterization. Also, the determination by BNPPLC of the amount of any Unexpected Net Tax Benefit will be conclusive absent clear and manifest error, as will any determination by BNPPLC that the amount of any Unexpected Net Tax Benefit in a given tax year cannot be calculated with a reasonable effort. If NAI is dissatisfied with any such determination by BNPPLC prior to the Designated Sale Date, NAI will be entitled to accelerate the Designated Sale Date (as provided in clause (2) of the definition thereof), after which NAI may purchase or cause an Applicable Purchaser to purchase the Property on the accelerated Designated Sale Date pursuant to the Purchase Agreement.

**5 Payment of Executory Costs and Losses Related to the Property.**

(A) Local Impositions. Subject only to the exceptions listed in subparagraph 5(D) below, NAI must pay or cause to be paid prior to delinquency all Local Impositions. If requested by BNPPLC from time to time, NAI must furnish BNPPLC with receipts or other appropriate evidence showing payment of all Local Impositions at least ten days prior to the applicable delinquency date therefor.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity, applicability or amount of any asserted Local Imposition, and pending such contest NAI will not be deemed in default under any of the provisions of this Lease because of the Local Imposition if (1) NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPLC, and (2) NAI promptly causes to be paid any amount adjudged by a court of competent jurisdiction to be due, with all costs, penalties and interest thereon, promptly after such judgment becomes final; provided, however, in any event each such contest must be concluded and the contested Local Impositions must be paid by NAI prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPLC or its directors, officers or employees because of the nonpayment thereof or (ii) the date any writ or order is issued under which any property owned or leased by BNPPLC (including the Property) may be seized or sold or any other action is taken or overtly threatened against BNPPLC or against any property owned or leased by BNPPLC because of the nonpayment thereof, or (iii) any Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPLC's interest in the Property pursuant to the Purchase Agreement for a price (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.



(B) Increased Costs: Capital Adequacy Charges. Subject only to the exceptions listed in subparagraph 5(D) below:

(1) If there is any increase in the cost to BNPPLC's Parent or any Participant of agreeing to make or making, funding or maintaining advances to BNPPLC in connection with the Property because of any Banking Rules Change, then NAI must from time to time (after receipt of a request from BNPPLC's Parent or such Participant as provided below) pay to BNPPLC for the account of BNPPLC's Parent or such Participant, as the case may be, additional amounts sufficient to compensate BNPPLC's Parent or the Participant for such increased cost. A certificate as to the amount of such increased cost, submitted to BNPPLC and NAI by BNPPLC's Parent or the Participant, will be conclusive and binding upon NAI, absent clear and demonstrable error.

(2) BNPPLC's Parent or any Participant may demand additional payments ("**Capital Adequacy Charges**") if BNPPLC's Parent or the Participant determines that any Banking Rules Change affects the amount of capital to be maintained by it and that the amount of such capital is increased by or based upon the existence of advances made or to be made to or for BNPPLC to permit BNPPLC to maintain BNPPLC's investment in the Property. To the extent that BNPPLC's Parent or any Participant demands Capital Adequacy Charges as compensation for the additional capital requirements reasonably allocable to such investment or advances, NAI must pay to BNPPLC for the account of BNPPLC's Parent or the Participant, as the case may be, the amount so demanded.

(3) Notwithstanding the foregoing provisions of this subparagraph 5(B), NAI will not be obligated to pay any claim for compensation pursuant to this subparagraph 5(B) that arises or accrues (a) in the case of BNPPLC's Parent, as a result of any change in the rating assigned to BNPPLC by rating agencies or bank regulators in regard to BNPPLC's creditworthiness, record keeping or failure to comply with Applicable Laws (including U.S. banking regulations applicable to subsidiaries of a bank holding company), or (b) in the case of BNPPLC's Parent or any Participant, more than nine months prior to the date NAI is notified of the intent of BNPPLC's Parent or such Participant to make a claim for such charges; provided, that if the Banking Rules Change which results in a claim for compensation is retroactive, then the nine month period will be extended to include the period of the retroactive effect of such Banking Rules Change. Further, BNPPLC will cause BNPPLC's Parent and any Participant that is an Affiliate of BNPPLC to use commercially reasonable efforts to reduce or eliminate any claim for compensation pursuant to this subparagraph 5(B), including a change in the office of BNPPLC's Parent or such Participant through which it provides and maintains Funding Advances if such change will avoid the need for, or reduce the amount of, such compensation and will not, in the reasonable judgment of BNPPLC's Parent or such Participant, be otherwise disadvantageous to it. It is understood that NAI may also

request similar commercial reasonable efforts on the part of any Participant that is not an Affiliate of BNPPPLC, but if a claim for additional compensation by any such Participant is not eliminated or waived, then NAI may request that BNPPPLC replace such Participant as provided in Paragraph 6. Nothing in this subparagraph will be construed to require BNPPPLC's Parent or any Participant to create any new office through which to make or maintain Funding Advances.

(4) Any amount required to be paid by NAI under this subparagraph 5(B) will be due ten days after a notice requesting such payment is received by NAI from BNPPPLC's Parent or the applicable Participant.

(C) NAI's Payment of Other Losses: General Indemnification. Subject only to the exceptions listed in subparagraph 5(D) below:

(1) *Agreement to Indemnify.* As directed by BNPPPLC, NAI must pay, reimburse, indemnify, defend, protect and hold harmless BNPPPLC and all other Interested Parties from and against all Losses (including Environmental Losses) asserted against or incurred or suffered by any of them at any time and from time to time by reason of, in connection with, arising out of, or in any way related to the following:

- the ownership or alleged ownership of any interest in the Property or the Rents;
- the purchase, design, construction, preparation, installation, inspection, delivery, non-delivery, acceptance, rejection, possession, use, operation, maintenance, management, rental, lease, sublease, repossession, condition (including defects, whether or not discoverable), destruction, repair, alteration, modification, restoration, addition or substitution, storage, transfer of title, redelivery, return, sale or other disposition of all or any part of or interest in the Property;
- the imposition of any Lien (or incurring of any liability to refund or pay over any amount as a result of any Lien) against all or any part of or interest in the Property;
- any failure of the Property or NAI itself to comply with Applicable Laws;
- Existing Space Leases or other Permitted Encumbrances or any violation thereof;

- Hazardous Substance Activities, including those occurring prior to the Term;
- the negotiation, administration or enforcement of the Operative Documents or the Participation Agreement;
- the making or maintenance of Funding Advances;
- any Interest Rate Swap that BNPPLC enters into as described in subparagraph 3(B)(4) of this Lease;
- the breach by NAI of this Lease, any other Operative Document or any other document executed by NAI pursuant to or in connection with any Operative Document;
- any obligations of BNPPLC under the Closing Certificate; or
- any bodily or personal injury or death or property damage occurring in or upon or in the vicinity of the Property through any cause whatsoever.

NAI's obligations under this indemnity will apply whether or not any Interested Party is also indemnified as to the applicable Loss by another Interested Party and whether or not the Loss arises or accrues because of any condition of the Property or other circumstance concerning the Property prior to the Effective Date.

Further, in the event, for income tax purposes, an Interested Party must include in its taxable income any payment or reimbursement from NAI which is required by this indemnity (in this provision, the "**Original Indemnity Payment**"), and yet the Interested Party is not entitled during the same taxable year to a corresponding and equal deduction from its taxable income for the Loss paid or reimbursed by such Original Indemnity Payment (in this provision, the "**Corresponding Loss**"), then NAI must also pay to such Interested Party on demand the additional amount (in this provision, the "**Additional Indemnity Payment**") needed to gross up the Original Indemnity Payment for any and all resulting additional income taxes. That is, NAI must pay an Additional Indemnity Payment as is needed so that the Corresponding Loss (computed net of the reduction, if any, of the Interested Party's income taxes because of credits or deductions that are attributable to the Interested Party's payment or deemed payment of the Corresponding Loss and that are recognized for tax purposes in the same taxable year during which the Interested Party must recognize the Original Indemnity Payment as income) will not exceed the difference computed by subtracting (i) all income taxes (determined for this purpose based on the highest marginal income tax rates charged to corporations by

federal, state and local tax authorities, as applicable, for the relevant period or periods) imposed because of the receipt or constructive receipt of the Original Indemnity Payment and the Additional Indemnity Payment, from (ii) the sum of the Original Indemnity Payment and the Additional Indemnity Payment. (With regard to any payment or reimbursement of an Original Indemnity Payment, “**After Tax Basis**” means that such payment or reimbursement is or will be made together with the additional amount needed to gross up such Original Indemnity Payment as described in this provision.)

(2) *Scope of Indemnities and Releases.* **Every indemnity and release provided in this Lease and the other Operative Documents for the benefit of BNPPPLC or other Interested Parties, including the indemnity set forth in subparagraph 5(C)(1), will apply even if and when the subject matter of the indemnity or release arises out of or results from the negligence or strict liability of BNPPPLC or any other Interested Party.** Further, all such indemnities and releases will apply even if insurance obtained by NAI or required of NAI by this Lease or the other Operative Documents is not adequate to cover Losses against or for which the indemnities and releases are provided. (However, NAI’s liability for any failure to obtain insurance required by this Lease or the other Operative Documents will not be limited to Losses against which indemnities are provided, it being understood that the parties have agreed upon insurance requirements for reasons that extend beyond providing a source of payment for Losses against which BNPPPLC and other Interested Parties may be indemnified by NAI.)

(3) *Nonexclusive List of Costs Covered by Indemnity.* Costs and expenses for which NAI is responsible on an After Tax Basis pursuant to this subparagraph 5(C) will include all of the following, except to the extent that the following are included in the Initial Advance or in the calculation of any Break Even Price or Make Whole Amount paid to BNPPPLC pursuant to the Purchase Agreement:

- appraisal fees;
- Uniform Commercial Code search fees;
- filing and recording fees;
- inspection fees and expenses;
- brokerage fees and commissions;

- survey fees;
- title policy premiums and escrow fees;
- any Breakage Costs or Fixed Rate Settlement Amount;
- Attorneys' Fees incurred by BNPPLC with respect to the drafting, negotiation, administration or enforcement of this Lease or the other Operative Documents; and
- all taxes (except Excluded Taxes) related to the Property or to the transactions contemplated in the Operative Documents.

(4) *Defense and Settlement of Indemnified Claims.*

(a) By notice to NAI BNPPLC may direct NAI to assume on behalf of BNPPLC or any other Interested Party and to conduct with due diligence and in good faith the defense of and the response to any claim, proceeding or investigation included in or concerning any Loss for which NAI is responsible pursuant to subparagraph 5(C)(1). NAI must promptly comply with any such direction using counsel selected by NAI and reasonably satisfactory to BNPPLC or the other Interested Party, as applicable, to represent BNPPLC or the other Interested Party, as applicable. In the event NAI fails to promptly comply with any such direction from BNPPLC, BNPPLC or any other affected Interested Party may contest or settle the claim, proceeding or investigation using counsel of its own selection at NAI's expense, subject to subparagraph 5(D)(3) if that subparagraph is applicable.

(b) Also, although subparagraphs 5(D)(3) and 5(D)(4) will apply to tort claims asserted against any Interested Party related to the Property, the right of an Interested Party to be indemnified pursuant to this subparagraph 5(C) for taxes or other payments made to satisfy governmental requirements ("**Government Mandated Payments**") will not be conditioned in any way upon NAI having consented to or approved of, or having been provided with an opportunity to defend against or contest, such Government Mandated Payments. In all cases, however, including those which may involve Government Mandated Payments, the rights of each Interested Party to be indemnified will be subject to subparagraph 5(D)(5).

(5) *Payments Due.* Any amount to be paid by NAI under this subparagraph 5(C) will be due ten days after a notice requesting such payment is given to NAI, subject to any applicable contest rights expressly granted to NAI by other

provisions of this Lease.

(6) *Survival*. NAI's obligations under this subparagraph 5(C) will survive the termination or expiration of this Lease with respect to Losses suffered by any Interested Party on or prior to, or by reason of any actual or alleged occurrence or circumstances on or prior to, the later of the dates upon which (a) this Lease terminates or expires, or (b) NAI surrenders possession and control of the Property.

(D) Exceptions and Qualifications to Indemnities.

(1) *Exceptions*. BNPPPLC acknowledges and agrees that nothing in Paragraph 4 or the preceding subparagraphs of this Paragraph 5 will be construed to require NAI to pay or reimburse:

- Excluded Taxes; or
- Losses incurred or suffered by any Interested Party to the extent proximately caused by (and attributed by any applicable principles of comparative fault to) the Established Misconduct of that Interested Party; or
- Losses that result from any Liens Removable by BNPPPLC; or
- transaction expenses (including Attorneys' Fees) incurred by any of the Participants in connection with the drafting, negotiation or execution of the Participation Agreement (or supplements making them parties thereto) or in connection with any due diligence Participants may undertake before entering into the Participation Agreement; or
- Local Impositions or other Losses contested, if and so long as they are contested, by NAI in accordance with any of the provisions of this Lease or other Operative Documents which expressly authorize such contests; or
- transaction expenses or other Losses caused by or necessary to accomplish any conveyance by BNPPPLC to BNPPPLC's Parent or a Qualified Affiliate which constitutes a Permitted Transfer only by reason of clause (3) of the definition of Permitted Transfer in the Common Definitions and Provisions Agreement; or
- any amount which may from time to time be payable by BNPPPLC to any Participant representing the excess of "Base Rent" as defined in the Participation Agreement over Base Rent as defined in and calculated pursuant to this Lease and the Common Definitions and Provisions Agreement; or

- any decline in the value of the Property solely by reason of decline in general market conditions and not because of any breach of this Lease or other Operative Documents by NAI.

Further, without limiting BNPPLC's rights (as provided in other provisions of this Lease and other Operative Documents) to include the following in the calculation of the Lease Balance, the Break Even Price and the Make Whole Amount (as applicable) or to collect Base Rent, a Supplemental Payment and other amounts, the calculation of which depends upon the Lease Balance, BNPPLC acknowledges and agrees that nothing in Paragraph 4 or the preceding subparagraphs of this Paragraph 5 will be construed to require NAI to pay or reimburse an Interested Party for costs paid by BNPPLC with the proceeds of the Initial Advance as part of the Transaction Expenses.

(2) *Notice of Claims.* If an Interested Party receives a written notice of a claim for taxes or a claim alleging a tort or other unlawful conduct that the Interested Party believes is covered by the indemnity in subparagraph 5(C)(1), then such Interested Party will be expected to promptly furnish a copy of such notice to NAI. The failure to so provide a copy of the notice will not excuse NAI from its obligations under subparagraph 5(C)(1); except that if such failure continues for more than fifteen days after the notice is received by such Interested Party and NAI is unaware of the matters described in the notice, with the result that NAI is unable to assert defenses or to take other actions which could minimize its obligations, then NAI will be excused from its obligation to indemnify such Interested Party (and any Affiliate of such Interested Party) against Losses, if any, which would not have been incurred or suffered but for such failure. For example, if BNPPLC fails to provide NAI with a copy of a notice of an overdue tax obligation covered by the indemnity set out in subparagraph 5(C)(1) and NAI is not otherwise already aware of such obligation, and if as a result of such failure BNPPLC becomes liable for penalties and interest covered by the indemnity in excess of the penalties and interest that would have accrued if NAI had been promptly provided with a copy of the notice, then NAI will be excused from any obligation to BNPPLC (or any Affiliate of BNPPLC) to pay the excess.

(3) *Withholding of Consent to Settlements Proposed by NAI.* With regard to any tort claim against an Interested Party for which NAI undertakes to defend the Interested Party as provided in subparagraph 5(C)(4)(a), if the Interested Party unreasonably refuses to consent to a settlement of the claim which is proposed by NAI and which will meet the conditions listed in the next sentence, NAI's liability for the cost of continuing the defense and for any other amounts payable in respect of the claim will be limited to the total cost for which the settlement proposed by NAI would have been accomplished but for the unreasonable refusal to consent. Any such settlement proposed by NAI must meet the following conditions: (A) at the time of the settlement by NAI, NAI must pay all amounts required to release the Interested Party and its property

interests from any further obligation for or liens securing the applicable claim and from any interest, penalties and other related liabilities, and (B) the settlement or compromise must not involve an admission of fraud or criminal wrongdoing or result in some other material adverse consequence to the Interested Party.

*(4) Settlements Without the Prior Consent of NAI.*

(a) Except as otherwise provided in subparagraph 5(D)(4)(b), if any Interested Party settles any tort claim for which it is entitled to be indemnified by NAI without NAI's consent, then NAI may, by notice given to the Interested Party no later than ten days after NAI is notified of the settlement, elect to pay Reasonable Settlement Costs to the Interested Party in lieu of a payment or reimbursement of actual settlement costs. (With respect to any tort claim asserted against an Interested Party, "**Reasonable Settlement Costs**" means the maximum amount that a prudent Person in the position of the Interested Party, but able to pay any amount, might reasonably agree to pay to settle the tort claim, taking into account the nature and amount of the claim, the relevant facts and circumstances known to such Interested Party at the time of settlement and the additional Attorneys Fees' and other costs of defending the claim which could be anticipated but for the settlement.) After making an election to pay Reasonable Settlement Costs with regard to a particular tort claim and a particular Interested Party, NAI will have no right to rescind or revoke the election, despite any subsequent determination that Reasonable Settlement Costs exceed actual settlement costs. It is understood that Reasonable Settlement Costs may be more or less than actual settlement costs and that a final determination of Reasonable Settlement Costs may not be possible until after NAI must decide between paying Reasonable Settlement Costs or paying actual settlement costs.

(b) Notwithstanding the foregoing, NAI will have no right to elect to pay Reasonable Settlement Costs in lieu of actual settlement costs if an Interested Party settles claims without NAI's consent at any time when an Event of Default has occurred and is continuing or after a failure by NAI to conduct with due diligence and in good faith the defense of and the response to any claim, proceeding or investigation as provided in subparagraph 5(C)(4)(a).

(c) Except as provided in this subparagraph 5(D)(4), no settlement by any Interested Party of any claim made against it will excuse NAI from any obligation to indemnify the Interested Party against the settlement costs or other Losses suffered by reason of, in connection with, arising out of, or in any way related to such claim.

*(5) No Authority to Admit Wrongdoing by NAI or to Bind NAI to any*



*Settlement.* No Interested Party will under any circumstances have any authority to bind NAI to an admission of wrongdoing or responsibility to any third party claimant with regard to matters for which such Interested Party claims a right to indemnification from NAI under this Lease.

Further, nothing herein contained, including the foregoing provisions concerning settlements by Interested Parties of indemnified Losses, will be construed as authorizing any Interested Party to bind NAI to do or refrain from doing anything to satisfy a third party claimant. If, for example, a claim is made by a Governmental Authority that NAI must refrain from some particular conduct on or about the Land in order to comply with Applicable Laws, BNPPLC cannot bind NAI (and will not purport to bind NAI) to any agreement to refrain from such conduct or otherwise prevent NAI from continuing to contest the claim by reason of any provision set forth herein.

Moreover, so long as this Lease continues, no Interested Party may settle any claim involving the Property by executing any agreement (including any consent decree proposed by any Governmental Authority) which purports to prohibit, limit or impose conditions upon any use of the Property by NAI without the prior written consent of NAI. In the case of any proposed settlement of a claim asserted by a Governmental Authority against BNPPLC, NAI will not unreasonably withhold such consent. However, for purposes of determining whether it is reasonable for NAI to withhold such consent, any diligent ongoing undertaking by NAI to contest such the claim on behalf of BNPPLC will be relevant.

Subject to the foregoing provisions in this subparagraph 5(D)(5), any Interested Party may agree for itself (and only for itself) to act or refrain from doing anything as demanded or requested by a third party claimant; provided, however, in no event will such an agreement impede NAI from continuing to exercise its rights to operate its business on the Property or elsewhere in any lawful manner deemed appropriate by NAI, nor will any such agreement limit or impede NAI's right to contest claims raised by any third party claimants (including Governmental Authorities) that NAI is not complying or has not complied with Applicable Laws.

(6) *Defense of Tax Claims.* This Lease does not grant to NAI any right to control the defense of or contest any tax claim for which an Interested Party may have a right to indemnity under subparagraph 5(C), other than the right to contest Local Impositions as provided in subparagraph 5(A), nor does this Lease grant to NAI the right to inspect the income tax returns, books or records of any Interested Party. Nevertheless, if a tax claim is asserted against BNPPLC for which it is entitled to be indemnified pursuant to subparagraph 5(C), BNPPLC will consider in good faith any defenses and strategies proposed by NAI with regard to such claim. Further, if any such tax claim is asserted against BNPPLC which involves assertions that apply not only to the

transactions contemplated by this Lease, but also to other similar transactions in which BNPPLC has participated, then BNPPLC will not settle the claim on a basis that results in a disproportionately greater tax burden with respect to the transactions contemplated herein than with respect to such other similar transactions. For example, if taxing authorities assert that both this Lease and other comparable lease agreements made by BNPPLC are not financing arrangements as intended by the parties thereto, and on the basis of such assertions the taxing authorities claim that BNPPLC owes income taxes which are not Excluded Taxes, then BNPPLC will not settle the claim in a manner that would cause NAI's liability under subparagraph 5(C) to be disproportionately greater than the indemnity obligation of another similarly situated tenant of BNPPLC under another lease agreement with an indemnity provision comparable to subparagraph 5(C). Also, BNPPLC will not grant to another tenant the right to dictate to BNPPLC the tax position BNPPLC must take in regard to the Property or the Operative Documents, except that BNPPLC may include provisions comparable to the foregoing in other leases to assure other tenants against a disproportionately greater burden than NAI will bear in regard to any settlement of a tax claim by BNPPLC.

(7) *Indemnified Parties Other than Landlord.* As a condition to making any indemnity payment for Losses directly to any Interested Party other than BNPPLC itself, NAI may require the Interested Party to confirm and agree in writing that it will be obligated to make the payments to NAI as provided in subparagraph 5(E)(2) in the event the Interested Party subsequently receives a refund of the Losses covered by such indemnity payment.

(E) Refunds and Credits Related to Losses Paid by NAI.

(1) If BNPPLC receives a refund of any Losses paid, reimbursed or advanced by NAI pursuant to this Paragraph 5 that has not already been accounted for in the After Tax Basis calculation described in subparagraph 5(C)(1), BNPPLC will promptly pay to NAI the amount of such refund, plus or minus any net tax benefits or detriments realized by BNPPLC as a result of the refund and such payment to NAI; provided, that the amount payable to NAI will not exceed the amount of the indemnity payment in respect of such refunded Losses that was made by NAI. If it is subsequently determined that BNPPLC was not entitled to the refund, the portion of the refund that is repaid or recaptured will be treated as a Loss for which NAI must indemnify BNPPLC pursuant to this Paragraph 5 without regard to subparagraph 5(D). If, in connection with any such refund, BNPPLC also receives an amount representing interest on such refund, BNPPLC will promptly pay to NAI the amount of such interest, plus or minus any net tax benefits or detriments realized by BNPPLC as a result of the receipt or accrual of the interest and as a result of such payment to NAI; provided, that BNPPLC will not be required to make any such payment in respect of the interest (if any) that is fairly attributable to a period for which NAI had not yet paid, reimbursed or advanced the Losses refunded to

BNPPLC.

(2) If any Interested Party (other than BNPPLC itself) receives a refund of any Loss paid, reimbursed or advanced by NAI pursuant to this Paragraph 5 that has not already been accounted for in the After Tax Basis calculation described in subparagraph 5(C)(1), NAI may demand (and enforce the demand pursuant to any agreement previously delivered by the Interested Party as provided in subparagraph 5(D)(7)) that such Interested Party promptly pay to NAI the amount of such refund, plus or minus any net tax benefits or detriments realized by such Interested Party as a result of the refund and such payment to NAI; provided, that the amount payable to NAI will not exceed the amount of the indemnity payment in respect of such refunded Losses that was made by NAI. If it is subsequently determined that such Interested Party was not entitled to the refund, the portion of the refund that is repaid or recaptured will be treated as a Loss for which NAI must indemnify such Interested Party pursuant to this Paragraph 5 without regard to subparagraph 5(D). If, in connection with any such refund, such Interested Party also receives an amount representing interest on such refund, NAI may demand that such Interested Party promptly pay to NAI the amount of such interest, plus or minus any net tax benefits or detriments realized by such Interested Party as a result of the receipt or accrual of the interest and as a result of such payment to NAI; provided, that such Interested Party will not be required to make any such payment in respect of the interest (if any) which is fairly attributable to a period before NAI paid, reimbursed or advanced the Losses refunded to such Interested Party.

(3) With respect to Losses incurred or suffered by an Interested Party and paid or reimbursed by NAI on an After Tax Basis, if taxes of such Interested Party which are not subject to indemnification by NAI are reduced because of such Losses (whether by reason of a deduction, credit or otherwise) and such reduction was not taken into account in the calculation of the required reimbursement or payment by NAI, then for purposes of this subparagraph 5(E) such reduction will be considered a "refund".

(4) Notwithstanding the foregoing, in no event will BNPPLC or any other Interested Party be required to make any payment to NAI pursuant to this subparagraph 5(E) when an Event of Default has occurred and is continuing.

(F) Reimbursement of Excluded Taxes Paid by NAI. If NAI is ever required (by laws imposing withholding tax obligations or otherwise) to pay Excluded Taxes that any Interested Party should have paid, but failed to pay when due, in connection with this Lease, such Interested Party must reimburse NAI for such Excluded Taxes (together with any additional amount required to preserve for NAI the full amount of such reimbursement after related taxes are considered, calculated in the same manner that an Additional Indemnity Payment would be calculated under subparagraph 5(C)(1) in the case of a reimbursement owed by NAI to an Interested Party) within 30 days after such Interested Party's receipt of a written demand for such

reimbursement by NAI.

(G) Collection on Behalf of Participants. BNPPLC may, on behalf of any Participant or its Affiliates, collect any amount that becomes due from NAI to such Participant or its Affiliates pursuant to subparagraph 5(B) or 5(C), in which case BNPPLC will be obligated to such Participant in respect of the collected amount as provided in the Participation Agreement. Alternatively, as provided in the Participation Agreement, BNPPLC may assign the right to collect any such amount to such Participant, in which case the Participant will be entitled to collect the same directly from NAI.

#### **6 Replacement of Participants.**

(A) NAI's Right to Substitute Participants. During the Term, so long as no Event of Default exists and subject to the terms and conditions set forth in subparagraph 6(B), if any Participant which is not an Affiliate of BNPPLC (in this Paragraph, the “**Unrelated Participant**”) (1) declines to approve the Rent for an extension of this Lease under subparagraph 1(B), or (2) makes a demand for compensation under subparagraph 5(B), NAI may request that BNPPLC execute Participation Agreement Supplements (as defined in the Participation Agreement) as needed to transfer the rights of the Unrelated Participant thereunder to one or more new Participants (in this subparagraph, whether one or more, the “**New Participants**”) designated by NAI who are willing and able to accept such interests and to make Funding Advances as necessary to terminate the Unrelated Participant's right to payments in respect of Base Rent and the Lease Balance under the Operative Documents. BNPPLC will execute such Participation Agreement Supplements within ten Business Days of the later to occur of such request by NAI and satisfaction of all conditions set forth in subparagraph 6(B).

(B) Conditions to Replacement of Participants. NAI and BNPPLC, working together, will endeavor in good faith to identify New Participants that are willing to replace any Unrelated Participant described in the preceding subparagraph and that are acceptable to both NAI and BNPPLC. (The term New Participants may include new parties to the Participation Agreement and it may include existing Participants that increase their Funding Advances as needed to replace the Unrelated Participant.) However, nothing contained herein will be construed to require BNPPLC itself to increase its Percentage (as defined in the Participation Agreement) to replace an Unrelated Participant, and nothing herein contained will be construed to require BNPPLC itself to provide or to obtain from its Affiliates Funding Advances to replace the Funding Advances that an Unrelated Participant has provided or agreed to provide. Also, New Participants will be subject to the approval of BNPPLC; provided, that BNPPLC must not unreasonably withhold its approval for the substitution of any New Participant proposed by NAI for any Unrelated Participant so long as (i) no Event of Default has occurred and is continuing, (ii) BNPPLC determines it can give such approval without violating Applicable Laws, without breaching its obligations under the Participation Agreement, and without waiving rights or remedies it has under this Lease or the other Operative Documents, (iii) BNPPLC or BNPPLC's

Parent is not involved in any material litigation adverse to the New Participant in any pending lawsuit or other legal proceeding, and (iv) all of the conditions listed in the next sentence are satisfied. Any substitution of New Participants for an Unrelated Participant as provided in this Paragraph will be subject to the following conditions:

(1) the proposed substitution does not include a waiver of rights by BNPPLC against any Unrelated Participant or require BNPPLC to pay any amounts out-of-pocket that are not reimbursed concurrently by NAI or the New Participants;

(2) the New Participants must become parties to the Participation Agreement (by executing supplements to that agreement as provided therein) and must provide all funds due to the Unrelated Participant being replaced because of the termination of the Unrelated Participant's rights to receive payments in respect of Net Cash Flow and Net Sales Proceeds (both as defined in the Participation Agreement); and

(3) the obligations of BNPPLC to the New Participants must not exceed the obligations that BNPPLC would have had to the Unrelated Participant if there had been no substitution, other than those for which NAI is liable.

Upon consummation of any such substitution NAI must pay to the replaced Participant Breakage Costs, if any, incurred by the replaced Participant because of the substitution.

**7 Items Included in the Property.** The Land and all Improvements on the Land from time to time will constitute "Property" covered by this Lease. Further, to the extent heretofore or hereafter acquired by NAI (in whole or in part) with any portion of the Initial Advance or with other funds for which NAI receives reimbursement from the Initial Advance, all furnishings, furniture, chattels, permits, licenses, franchises, certificates and other personal property of whatever nature will be deemed to have been acquired on behalf of BNPPLC by NAI and will constitute "Property" covered by this Lease, as will all renewals or replacements of or substitutions for any such Property. Upon request of BNPPLC, but not more often than once in any period of twelve consecutive months, NAI will deliver to BNPPLC an inventory describing all significant items of Personal Property (and, in the case of Tangible Personal Property, showing the make, model, serial number and location thereof), with a certification by NAI that such inventory is true and complete and that all items specified in the inventory are covered by this Lease free and clear of any Lien other than the Permitted Encumbrances or Liens Removable by BNPPLC.

## 8 Environmental.

### (A) Environmental Covenants by NAI.

(1) NAI will not conduct or permit others to conduct Hazardous Substance Activities on the Property, except Permitted Hazardous Substance Use and Remedial Work.

(2) NAI will not discharge or permit the discharge of anything (including Permitted Hazardous Substances) on or from the Property that would require any permit under applicable Environmental Laws, other than (i) storm water runoff, (ii) waste water discharges through a publicly owned treatment works, (iii) discharges that are a necessary part of any Remedial Work, and (iv) other similar discharges consistent with the definition herein of Permitted Hazardous Substance Use which do not significantly increase the risk of Environmental Losses to BNPPPLC, in each case in strict compliance with Environmental Laws.

(3) Following any discovery that Remedial Work is required by Environmental Laws or is otherwise reasonably believed by BNPPPLC to be required, and to the extent not inconsistent with the other provisions of this Lease, NAI must promptly perform and diligently and continuously pursue such Remedial Work.

(4) If requested by BNPPPLC in connection with any Remedial Work required by this subparagraph, NAI must retain environmental consultants reasonably acceptable to BNPPPLC to evaluate any significant new information generated during NAI's implementation of the Remedial Work and to discuss with NAI whether such new information indicates the need for any additional measures that NAI should take to protect the health and safety of persons (including employees, contractors and subcontractors and their employees) or to protect the environment. NAI must implement any such additional measures to the extent required with respect to the Property by Environmental Laws or otherwise reasonably believed by BNPPPLC to be required.

(B) Right of BNPPPLC to do Remedial Work Not Performed by NAI. If NAI's failure to perform any Remedial Work required as provided in subparagraph 8(A) continues beyond the Environmental Cure Period (as defined below), BNPPPLC may, in addition to any other remedies available to it, conduct all or any part of the Remedial Work. To the extent that Remedial Work is done by BNPPPLC pursuant to the preceding sentence (including any removal of Hazardous Substances), the cost thereof will be a demand obligation owing by NAI to BNPPPLC. As used in this subparagraph, "**Environmental Cure Period**" means the period ending on the earliest of: (1) ninety days after NAI is notified of the breach which must be cured within such period or, if during such ninety days NAI initiates the Remedial Work and diligently and continuously pursues it in accordance with a timetable accepted and approved by applicable Governmental

Authorities (which may include delays waiting for permits or other authorizations), the date by which such Remedial Work is to be completed according to such timetable, (2) the date that any writ or order is issued for the levy or sale of any property owned by BNPPPLC (including the Property) because of such breach, (3) the date that any criminal action is instituted or overtly threatened against BNPPPLC or any of its directors, officers or employees because of such breach, or (4) any Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPPLC's interest in the Property pursuant to the Purchase Agreement for a net price to BNPPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(C) Environmental Inspections and Reviews. BNPPPLC reserves the right to retain environmental consultants to review any report prepared by NAI or to conduct BNPPPLC's own investigation to confirm whether NAI is complying with the requirements of this Paragraph 8. NAI grants to BNPPPLC and to BNPPPLC's agents, employees, consultants and contractors the right to enter upon the Property during reasonable hours and after reasonable notice to inspect the Property and to perform such tests as BNPPPLC deems reasonably necessary or appropriate to review or investigate Hazardous Substances in, on, under or about the Property or any discharge or reasonably suspected discharge of Hazardous Substances into groundwater or surface water from the Property. NAI must promptly reimburse BNPPPLC for the fees of its environmental consultants and the costs of any such inspections and tests; provided, however, BNPPPLC's right to reimbursement for the fees of any consultant engaged as provided in this subparagraph or for the costs of any inspections or test undertaken as provided in this subparagraph will be limited to the following circumstances: (1) an Event of Default has occurred and is continuing at the time of such engagement, tests or inspections; (2) NAI has not exercised the Purchase Option and BNPPPLC has retained the consultant to establish the condition of the Property prior to any conveyance thereof pursuant to the Purchase Agreement or to the expiration of this Lease; (3) BNPPPLC has retained the consultant to satisfy any regulatory requirements applicable to BNPPPLC or its Affiliates; (4) BNPPPLC has retained the consultant because it has reason to believe, and does in good faith believe, that a significant violation of Environmental Laws concerning the Property has occurred; or (5) BNPPPLC has retained the consultant because BNPPPLC has been notified of a possible violation of Environmental Laws concerning the Property by any Governmental Authority having jurisdiction.

(D) Communications Regarding Environmental Matters.

(1) NAI must promptly advise BNPPPLC and Participants of (i) any discovery known to NAI of any event or circumstance which would render any of the representations of NAI herein or in any of the other Operative Documents concerning environmental matters materially inaccurate or misleading if made at the time of such discovery and assuming that NAI was aware of all relevant facts, (ii) any Remedial Work (or change in Remedial Work) required or undertaken by NAI or its Affiliates in response

to any (A) discovery of any Hazardous Substances on, under or about the Property other than Permitted Hazardous Substances or (B) any claim for damages resulting from Hazardous Substance Activities, (iii) any discovery known to NAI of any occurrence or condition on any real property adjoining or in the vicinity of the Property which would or could reasonably be expected to cause the Property or any part thereof to be subject to any ownership, occupancy, transferability or use restrictions under Environmental Laws, or (iv) any investigation or inquiry known to NAI of any failure or alleged failure by NAI to comply with Environmental Laws affecting the Property by any Governmental Authority responsible for enforcing Environmental Laws. In such event, NAI will deliver to BNPPPLC within thirty days after BNPPPLC's request, a preliminary written environmental plan setting forth a general description of the action that NAI proposes to take with respect thereto, if any, to bring the Property into compliance with Environmental Laws or to correct any breach by NAI of this Paragraph 8, including any proposed Remedial Work, the estimated cost and time of completion, the name of the contractor and a copy of the construction contract, if any, and such additional data, instruments, documents, agreements or other materials or information as BNPPPLC may reasonably request.

(2) NAI will provide BNPPPLC and Participants with copies of all material written communications with Governmental Authorities relating to the matters listed in the preceding clause (1). NAI will also provide BNPPPLC and Participants with copies of any correspondence from third Persons which threaten litigation over any significant failure or alleged significant failure of NAI to maintain or operate the Property in accordance with Environmental Laws.

(3) Prior to NAI's submission of a communication to any regulatory agency or third party which causes, or potentially could cause (whether by implementation of or response to said communication), a material change in the scope, duration, or nature of any Remedial Work, NAI must, to the extent practicable, deliver to BNPPPLC and Participants a draft of the proposed submission (together with the proposed date of submission), and in good faith assess and consider any comments of BNPPPLC regarding the same. Promptly after BNPPPLC's request, NAI will meet with BNPPPLC to discuss the submission, will provide any additional information reasonably requested by BNPPPLC and will provide a written explanation to BNPPPLC addressing the issues raised by comments (if any) of BNPPPLC regarding the submission.

#### **9 Insurance Required and Condemnation.**

(A) Liability Insurance. Throughout the Term NAI must maintain commercial general liability insurance against claims for bodily and personal injury, death and property damage occurring in or upon or resulting from any occurrence in or upon the Property under one or more insurance policies, all in such amounts, with such insurance companies and upon such terms and



conditions (including self-insurance, whether by deductible, retention, or otherwise) as are consistent with NAI's normal insurance practices in the country where the Land is located. In any event, policies under which NAI maintains such insurance will provide, by endorsement or otherwise, that BNPPPLC and the other Interested Parties are also insured thereunder against such claims with coverage that is not limited by any negligence or allegation of negligence on their part and with coverage that is primary, not merely excess over or contributory with the other commercial general liability coverage they may themselves maintain. NAI must deliver and maintain with BNPPPLC for each liability insurance policy required by this Lease written confirmation of the policy and the scope of the coverage provided thereby issued by the applicable insurer or its authorized agent.

**(B) Property Insurance.**

(1) Throughout the Term NAI must keep all Improvements (including all alterations, additions and changes made to the Improvements) insured against fire and other casualty under one or more property insurance policies, all in such amounts, with such insurance companies and upon such terms and conditions (including self-insurance, whether by deductible, retention, or otherwise) as are consistent with NAI's normal insurance practices in the country where the Property is located. In any event, policies under which NAI maintains such insurance will (a) provide coverage for the full replacement cost of the Improvements (exclusive of footings and foundations) and on a basis that eliminates any risk of reduced coverage under co-insurance provisions, (b) show BNPPPLC as an insured as its interest may appear and (c) provide that the protection afforded to BNPPPLC thereunder is primary (such that any policies maintained by BNPPPLC itself will be excess, secondary and noncontributing) and is not to be reduced or impaired by acts or omissions of NAI or any other beneficiary or insured. NAI must deliver and maintain with BNPPPLC for each property insurance policy required by this Lease written confirmation of the policy and the scope of the coverage provided thereby issued by the applicable insurer or its authorized agent.

(2) If any of the Property is destroyed or damaged by fire, explosion, windstorm, hail or by any other casualty against which insurance is required hereunder, (a) BNPPPLC may, but will not be obligated to, make proof of loss if not made promptly by NAI after notice from BNPPPLC, (b) each insurance company concerned is hereby authorized and directed to make payment for such loss directly to BNPPPLC (or, if so instructed by BNPPPLC, to NAI) for application as required by Paragraph 10, and (c) BNPPPLC will be entitled, in its own name or in the name of NAI or in the name of both, to settle, adjust or compromise any and all claims for loss, damage or destruction under any policy or policies of insurance; except that, if any such claim is for less than \$1,000,000 and no Event of Default has occurred and is continuing, NAI alone will have the right to settle, adjust or compromise the claim as NAI deems appropriate; and, except that, during the Term, so long as no Event of Default has occurred and is continuing,

BNPPLC must provide NAI with at least forty-five days notice of BNPPLC's intention to settle any such claim before settling it unless NAI has already approved of the settlement by BNPPLC.

(3) BNPPLC will not in any event or circumstances be liable or responsible for failure to collect, or to exercise diligence in the collection of, any insurance proceeds.

(4) If any casualty results in damage to or loss or destruction of the Property, NAI must give prompt notice thereof to BNPPLC and Paragraph 10 will apply.

(C) Failure to Obtain Insurance. If NAI fails to obtain any insurance or to provide confirmation of any such insurance as required by this Lease, BNPPLC will be entitled (but not required) to obtain the insurance that NAI has failed to obtain or for which NAI has not provided the required confirmation and, without limiting BNPPLC's other remedies under the circumstances, BNPPLC may require NAI to reimburse BNPPLC for the cost of such insurance and to pay interest thereon computed at the Default Rate from the date such cost was paid by BNPPLC until the date of reimbursement by NAI.

(D) Condemnation. Immediately upon obtaining knowledge of the institution of any proceedings for the condemnation of the Property or any portion thereof, or any other similar governmental or quasi-governmental proceedings arising out of injury or damage to the Property or any portion thereof, each party will promptly notify the other (provided, however, BNPPLC will have no liability for its failure to provide such notice) of the pendency of such proceedings. NAI must, at its expense, diligently prosecute any such proceedings and must consult with BNPPLC, its attorneys and experts and cooperate with them as reasonably requested in the carrying on or defense of any such proceedings. BNPPLC is hereby authorized, in its own name or in the name of NAI or in the name of both, at any time when an Event of Default has occurred and is continuing, but not otherwise without NAI's prior consent, to execute and deliver valid acquittances for, and to appeal from, any such judgment, decree or award concerning condemnation of any of the Property. BNPPLC will not in any event or circumstances be liable or responsible for failure to collect, or to exercise diligence in the collection of, any such proceeds, judgments, decrees or awards.

Notwithstanding the foregoing provisions of this subparagraph, if condemnation proceeds totaling not more than \$1,000,000 are to be recovered as a result of a taking of less than all or substantially all of the Property, NAI may directly receive and hold such proceeds during the Term, so long as no Event of Default has occurred and is continuing and NAI applies such proceeds as required herein.

(E) Waiver of Subrogation. NAI, for itself and for any Person claiming through it (including any insurance company claiming by way of subrogation), waives any and every claim which arises or may arise in its favor against BNPPLC or any other Interested Party to recover

Losses for which NAI is compensated by insurance or would be compensated by the insurance contemplated in this Lease, but for any deductible or self-insured retention maintained under such insurance or but for a failure of NAI to maintain the insurance as required by this Lease. NAI agrees to have such insurance policies properly endorsed so as to make them valid notwithstanding this waiver, if such endorsement is required to prevent a loss of insurance.

#### 10 Application of Insurance and Condemnation Proceeds.

(A) Collection and Application of Insurance and Condemnation Proceeds Generally. This Paragraph 10 will govern the application of proceeds received by BNPPPLC or NAI during the Term from any third party (1) under any property insurance policy as a result of damage to the Property (including proceeds payable under any insurance policy covering the Property which is maintained by NAI), (2) as compensation for any restriction placed upon the use or development of the Property or for the condemnation of the Property or any portion thereof, or (3) because of any judgment, decree or award for injury or damage to the Property (e.g., damage resulting from a third party's release of Hazardous Materials onto the Property); excluding, however, any funds paid to BNPPPLC by BNPPPLC's Parent, by an Affiliate of BNPPPLC or by any Participant that is made to compensate BNPPPLC for any Losses BNPPPLC may suffer or incur in connection with this Lease or the Property. Except as provided in subparagraph 10(D), NAI must promptly pay over to BNPPPLC any insurance, condemnation or other proceeds covered by this Paragraph 10 which NAI may receive from any insurer, condemning authority or other third party. All proceeds covered by this Paragraph 10, including those received by BNPPPLC from NAI or third parties, will be applied as follows:

(1) First, proceeds covered by this Paragraph 10 will be used to reimburse BNPPPLC for any reasonable costs and expenses, including Attorneys' Fees, that BNPPPLC incurred to collect the proceeds.

(2) Second, the proceeds remaining after such reimbursement to BNPPPLC (hereinafter, the "**Remaining Proceeds**") will be applied, as hereinafter more particularly provided, either as a Qualified Prepayment or to reimburse NAI or BNPPPLC for the actual out-of-pocket costs of repairing or restoring the Property. Until, however, any Remaining Proceeds received by BNPPPLC are applied by BNPPPLC as a Qualified Prepayment or applied by BNPPPLC to reimburse costs of repairs to or restoration of the Property pursuant to this Paragraph 10, BNPPPLC will hold and maintain such Remaining Proceeds as Escrowed Proceeds in an interest bearing account, and all interest earned on such account will be added to and made a part of such Escrowed Proceeds.

(B) Advances of Escrowed Proceeds to NAI. Except as otherwise provided below in this Paragraph 10, BNPPPLC will advance all Remaining Proceeds held by it as Escrowed Proceeds to reimburse NAI for the actual out-of-pocket cost to NAI of repairing or restoring the Property in accordance with the requirements of this Lease and the other Operative Documents

as the applicable repair or restoration, progresses and upon compliance by NAI with such terms, conditions and requirements as may be reasonably imposed by BNPPLC to assure the completion of such repair or restoration with available funds. So long as any Lease Balance remains outstanding, however, BNPPLC will not be required to pay Escrowed Proceeds to NAI in excess of the actual out-of-pocket cost to NAI of the applicable repair or restoration, as evidenced by invoices or other documentation reasonably satisfactory to BNPPLC, it being understood that BNPPLC may retain and, after NAI has completed the applicable repair or restoration and been reimbursed for the out-of-pocket cost thereof, apply any such excess (or so much thereof as is needed to reduce the Lease Balance to zero) as a Qualified Prepayment.

(C) Application of Escrowed Proceeds as a Qualified Prepayment. Provided no Event of Default has occurred and is continuing, BNPPLC will apply any Remaining Proceeds paid to it (or other amounts available for application as a Qualified Prepayment) as a Qualified Prepayment on any date that BNPPLC is directed to do so by a notice from NAI; however, if such a notice from NAI specifies an effective date for a Qualified Prepayment that is less than five Business Days after BNPPLC's actual receipt of the notice, BNPPLC may postpone the date of the Qualified Prepayment to any date not later than five Business Days after BNPPLC's receipt of the notice. In any event, BNPPLC may deduct Breakage Costs or any Fixed Rate Settlement Amount incurred in connection with any Qualified Prepayment from the Remaining Proceeds or other amounts available for application as the Qualified Prepayment, and NAI must reimburse BNPPLC upon request for any such Breakage Costs or Fixed Rate Settlement Amount that BNPPLC incurs but does not deduct.

(D) Right of NAI to Receive and Apply Remaining Proceeds Below a Certain Level. If any condemnation of any portion of the Property or any casualty resulting in the diminution, destruction, demolition or damage to any portion of the Property will (in the good faith judgment of BNPPLC) reduce the then current "AS IS" market value by less than \$1,000,000 and (in the good faith estimation of BNPPLC) be unlikely to result in Remaining Proceeds of more than \$1,000,000, and if no Event of Default has occurred and is continuing, then BNPPLC will, upon NAI's request, instruct the condemning authority or insurer, as applicable, to pay the Remaining Proceeds resulting therefrom directly to NAI. NAI must apply any such Remaining Proceeds to the repair or restoration of the Property to a safe and secure condition and to a value of no less than the value before taking or casualty.

(E) Special Provisions Applicable After an Event of Default. Notwithstanding the foregoing, when any Event of Default has occurred and is continuing, BNPPLC will be entitled to receive and collect all insurance, condemnation or other proceeds governed by this Paragraph 10 and to apply all Remaining Proceeds, when and to the extent deemed appropriate by BNPPLC in its sole discretion, either (A) to the reimbursement of NAI or BNPPLC for the out-of-pocket cost of repairing or restoring the Property, or (B) as Qualified Prepayments. Further, when any Event of Default has occurred and is continuing, if the Remaining Proceeds paid to BNPPLC with respect to any damage or destruction of the Property are reduced by

reason of any insurance deductible or self-insured retention, NAI must pay to BNPPLC upon demand an additional amount equal to the full amount of such deductible or self-insured retention, whereupon the additional amount paid will be added to the Remaining Proceeds and applied as such by BNPPLC in accordance with the provisions of this Lease.

(F) NAI's Obligation to Restore. Regardless of the adequacy of any Remaining Proceeds available to NAI hereunder, if the Property is damaged by fire or other casualty or less than all or substantially all of the Property is taken by condemnation, NAI must either (1) promptly restore or improve the Property or the remainder thereof to a value no less than the Lease Balance and to a reasonably safe and sightly condition, or (2) promptly restore the Property or remainder thereof to a reasonably safe and sightly condition and pay to BNPPLC for application as a Qualified Prepayment the amount (if any), as determined by BNPPLC, needed to reduce the Lease Balance to no more than the then current "AS IS" market value of the Property or remainder thereof.

(G) Takings of All or Substantially All of the Property. In the event of any taking of all or substantially all of the Property, BNPPLC will be entitled to apply all Remaining Proceeds (or so much thereof as is required to reduce the Lease Balance to zero) as a Qualified Prepayment. Any taking of so much of the Property as, in BNPPLC's good faith judgment, makes it impracticable to restore or improve the remainder thereof as required by part (1) of the preceding subparagraph will be considered a taking of substantially all the Property for purposes of this Paragraph 10.

(H) If Remaining Proceeds Exceed the Lease Balance. Notwithstanding the various provisions of this Paragraph 10 authorizing BNPPLC to apply Remaining Proceeds received by it during the Term as a Qualified Prepayment, in the event any such Remaining Proceeds exceed the sum of (i) all payments thereof made to NAI to reimburse it for the costs of repairs and restoration to the Property, (ii) any application thereof to cover costs incurred by BNPPLC for the repair or restoration the Property and (iii) the Lease Balance, such excess will not be applied as a Qualified Prepayment, but rather will constitute Escrowed Proceeds which must, if NAI exercises the Purchase Option pursuant to the Purchase Agreement, be delivered to the purchaser of the Property (be it NAI or an Applicable Purchaser) as provided therein.

**11 Additional Representations, Warranties and Covenants of NAI Concerning the Property.** NAI represents, warrants and covenants as follows:

(A) Operation and Maintenance. NAI must operate and maintain the Property in a good and workmanlike manner and in compliance with Applicable Laws in all material respects and pay or cause to be paid all fees or charges of any kind due in connection therewith. (If NAI does not promptly correct any failure of the Property to comply with Applicable Laws that is the subject of a written complaint or demand for corrective action given by any Governmental Authority to NAI, or to BNPPLC and forwarded by it to NAI, then for purposes of the preceding

sentence, NAI will be considered not to have maintained the Property “in compliance with all Applicable Laws in all material respects” whether or not the noncompliance would be material in the absence of the complaint or demand.) NAI will not use or occupy, or allow the use or occupancy of, the Property in any manner which violates any Applicable Laws or which constitutes a public or private nuisance or which makes void, voidable or cancelable any insurance then in force with respect to the Property. To the extent that any of the following would, individually or in the aggregate, materially and adversely affect the value of the Property or the use of the Property for purposes permitted by this Lease, NAI will not, without BNPPPLC’s prior consent: (i) initiate or permit any zoning reclassification of the Property; (ii) seek any variance under existing zoning ordinances applicable to the Property; (iii) use or permit the use of the Property in a manner that would result in such use becoming a nonconforming use under applicable zoning ordinances or similar laws, rules or regulations; (iv) execute or file any subdivision plat affecting the Property; or (v) consent to the annexation of the Property to any municipality. NAI will not cause or permit any drilling or exploration for, or extraction, removal or production of, minerals from the surface or subsurface of the Property, and NAI will not do anything that could reasonably be expected to significantly reduce the market value of the Property. If NAI receives a notice or claim from any Governmental Authority that the Property is not in compliance with any Applicable Law, or that any action may be taken against BNPPPLC because the Property does not comply with any Applicable Law, NAI must promptly furnish a copy of such notice or claim to BNPPPLC.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity and applicability of any Applicable Law with respect to the Property, and pending such contest NAI will not be deemed in default hereunder because of the violation of such Applicable Law, if NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPPLC, and if NAI promptly causes the Property to comply with any such Applicable Law upon a final determination by a court of competent jurisdiction that the same is valid and applicable to the Property; provided, however, in any event such contest must be concluded and the violation of such Applicable Law must be corrected by NAI and any claims asserted against BNPPPLC or the Property because of such violation must be paid by NAI, all prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPPLC or any of its directors, officers or employees because of such violation, (ii) the date that any action is taken or overtly threatened by any Governmental Authority against BNPPPLC or any property owned by BNPPPLC (including the Property) because of such violation, or (iii) a Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPPLC’s interest in the Property pursuant to the Purchase Agreement for a price to BNPPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(B) Debts for Construction, Maintenance, Operation or Development. NAI must cause all debts and liabilities incurred in the construction, maintenance, operation or

development of the Property, including invoices for labor, material and equipment and all debts and charges for utilities servicing the Property, to be promptly paid.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity, applicability or amount of any asserted statutory liens in the nature of contractors', mechanics' or materialmens' liens, and pending such contest NAI will not be deemed in default under this subparagraph because of the contested lien if (1) within thirty days after being asked to do so by BNPPLC, NAI bonds over to BNPPLC's reasonable satisfaction all such contested liens against the Property alleged to secure an amount in excess of \$1,000,000 (individually or in the aggregate), (2) NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPLC, and (3) NAI promptly causes to be paid any amount adjudged by a court of competent jurisdiction to be due, with all costs and interest thereon, promptly after such judgment becomes final; provided, however, that in any event each such contest must be concluded and the lien, interest and costs must be paid by NAI prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPLC or its directors, officers or employees because of the nonpayment thereof, (ii) the date that any writ or order is issued under which the Property or any other property in which BNPPLC has an interest may be seized or sold or any other action is taken or overtly threatened against BNPPLC or any property in which BNPPLC has an interest because of the nonpayment thereof, or (iii) a Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPLC's interest in the Property pursuant to the Purchase Agreement for a price to BNPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(C) Repair, Maintenance, Alterations and Additions. NAI must keep the Property in good order, operating condition and appearance and must cause all necessary repairs, renewals and replacements to be promptly made. NAI will not allow any of the Property to be materially misused, abused or wasted, and NAI will promptly replace any worn-out fixtures and Tangible Personal Property with fixtures and personal property comparable to the replaced items when new. NAI will not, without the prior consent of BNPPLC, (i) remove from the Property any fixture or Personal Property having significant value except such as are replaced by NAI by fixtures or Personal Property of equal suitability and value, free and clear of any lien or security interest (and for purposes of this clause "significant value" will mean any fixture or Personal Property that has a value of more than \$100,000 or that, when considered together with all other fixtures and Personal Property removed and not replaced by NAI by items of equal suitability and value, has an aggregate value of \$500,000 or more) or (ii) make material new Improvements or alter Improvements in any material respect.

However, during the Term, so long as no Event of Default has occurred and is continuing, BNPPLC will not unreasonably withhold a consent requested by NAI pursuant to the preceding sentence for the construction or alteration of Improvements. NAI acknowledges,

however, that BNPPLC's refusal or failure to give such consent will be deemed reasonable if BNPPLC believes in good faith that the construction or alteration for which NAI is requesting consent could have a material adverse impact upon the value of the Property (taken as whole), or if NAI has not provided BNPPLC with adequate information to allow BNPPLC to properly evaluate such impact on value.

Without limiting the foregoing, NAI must notify BNPPLC before making any significant alterations to the Improvements, regardless of the impact on the value of the Property expected to result from such alterations.

(D) Permitted Encumbrances. NAI must comply with and will cause to be performed all of the covenants, agreements and obligations imposed upon the owner of any interest in the Property by the Permitted Encumbrances. Without limiting the foregoing, NAI must cause all amounts to be paid when due, the payment of which is secured by any Lien against the Property created by the Permitted Encumbrances. Without the prior consent of BNPPLC, NAI will not create any new Permitted Encumbrance or enter into, initiate, approve or consent to any modification of any Permitted Encumbrance that would create or expand or purport to create or expand obligations or restrictions which would encumber BNPPLC's interest in the Property or be binding upon BNPPLC itself. (Whether BNPPLC must give any such consent requested by NAI during the Term of this Lease will be governed by subparagraph 4(C) of the Closing Certificate.)

(E) Books and Records Concerning the Property. NAI must keep books and records that are accurate and complete in all material respects for the Property and, subject to Paragraph 22, must permit all such books and records (including all contracts, statements, invoices, bills and claims for labor, materials and services supplied for the construction and operation of any Improvements) to be inspected and copied by BNPPLC during normal business hours. (BNPPLC will not over the objection of NAI inspect or copy such materials more than once in any twelve month period unless BNPPLC believes in good faith that more frequent inspection and copying is required to determine whether a Default or an Event of Default has occurred and is continuing or to assess the effect thereof or to properly exercise remedies with respect thereto.) This subparagraph will not be construed as requiring NAI to regularly maintain separate books and records relating exclusively to the Property, but NAI will as reasonably requested from time to time by BNPPLC construct or abstract from its regularly maintained books and records information required by this subparagraph relating to the Property.

#### **12 Assignment and Subletting by NAI.**

(A) BNPPLC's Consent Required. Without the prior consent of BNPPLC, NAI will not assign, transfer, mortgage, pledge or hypothecate this Lease or any interest of NAI hereunder and will not sublet all or any part of the Property, by operation of law or otherwise, except as follows:



(1) During the Term, so long as no Event of Default has occurred and is continuing, NAI may sublet (a) to Affiliates of NAI, or (b) any or all useable space in then existing and completed building Improvements to Persons who are not NAI's Affiliates, subject to the conditions that (i) any such sublease by NAI must be made expressly subject and subordinate to the terms hereof, (ii) the sublease must have a term equal to or less than the remainder of the then effective Term of this Lease, and (iii) the use permitted by the sublease must be expressly limited to uses consistent with subparagraph 2(A) or other uses approved in advance by BNPPPLC as uses that will not present any extraordinary risk of uninsured environmental or other liability.

(2) During the Term, so long as no Event of Default has occurred and is continuing, NAI may assign all of its rights under this Lease and the other Operative Documents to an Affiliate of NAI, subject to the conditions that (a) the assignment must be in writing and must unconditionally provide that the Affiliate assumes all of NAI's obligations hereunder and thereunder, and (b) NAI must execute an unconditional guaranty of the obligations assumed by the Affiliate in form satisfactory to BNPPPLC, confirming (x) that notwithstanding the assignment NAI will remain primarily liable for all of the obligations undertaken by NAI under the Operative Documents, (y) that such guaranty is a guaranty of payment and performance and not merely of collection, and (z) that NAI waives to the extent permitted by Applicable Law all defenses otherwise available to guarantors or sureties.

(B) Standard for BNPPPLC's Consent to Assignments and Certain Other Matters. Consents and approvals of BNPPPLC which are required by this Paragraph 12 will not be unreasonably withheld, but NAI acknowledges that BNPPPLC's withholding of such consent or approval will be reasonable if BNPPPLC determines in good faith that (1) giving the approval may increase BNPPPLC's risk of liability for any existing or future environmental problem, (2) giving the approval is likely to substantially increase BNPPPLC's administrative burden of complying with or monitoring NAI's compliance with the requirements of this Lease, or (3) any transaction for which NAI has requested the consent or approval would negate NAI's representations in the Operative Documents regarding ERISA or cause any of the Operative Documents (or any exercise of BNPPPLC's rights thereunder) to constitute a violation of any provision of ERISA. Further, NAI acknowledges that BNPPPLC may reasonably require, as a condition to giving its consent to any assignment by NAI, that NAI execute an unconditional guaranty providing that NAI will remain primarily liable for all of the tenant's obligations hereunder and under other Operative Documents. Any such guaranty must be a guaranty of payment and not merely of collection, must provide that NAI waives to the extent permitted by Applicable Law all defenses otherwise available to guarantors or sureties, and must otherwise be in a form satisfactory to BNPPPLC.

(C) Consent Not a Waiver. No consent by BNPPPLC to a sale, assignment, transfer, mortgage, pledge or hypothecation of this Lease or NAI's interest hereunder, and no assignment

or subletting of the Property or any part thereof in accordance with this Lease or otherwise with BNPPLC's consent, will release NAI from liability hereunder; and any such consent will apply only to the specific transaction thereby authorized and will not relieve NAI from any requirement of obtaining the prior consent of BNPPLC to any further sale, assignment, transfer, mortgage, pledge or hypothecation of this Lease or any interest of NAI hereunder.

**13 Assignment by BNPPLC.**

(A) Restrictions on Transfers. Except by a Permitted Transfer, BNPPLC will not assign, transfer, mortgage, pledge, encumber or hypothecate this Lease or the other Operative Documents or any interest of BNPPLC in and to the Property during the Term without the prior consent of NAI, which consent NAI may withhold in its sole discretion. Further, notwithstanding anything to the contrary herein contained, if withholding taxes are imposed on the Rents payable to BNPPLC hereunder because of BNPPLC's assignment of this Lease to any citizen of, or any corporation or other entity formed under the laws of, a country other than the United States, NAI will not be required to compensate BNPPLC or any such assignee for the withholding tax.

(B) Effect of Permitted Transfer or other Assignment by BNPPLC. If by a Permitted Transfer BNPPLC sells or otherwise transfers the Property and assigns to the transferee all of BNPPLC's rights under this Lease and under the other Operative Documents, and if the transferee expressly assumes all of BNPPLC's obligations under this Lease and under the other Operative Documents, then BNPPLC will thereby be released from any obligations arising after such assumption under this Lease or under the other Operative Documents, and NAI must look solely to each successor in interest of BNPPLC for performance of such obligations.

**14 BNPPLC's Right to Enter and to Perform for NAI .**

(A) Right to Enter. BNPPLC and BNPPLC's representatives may, subject to subparagraph 14(C), enter the Property for the purpose of making inspections or performing any work BNPPLC is authorized to undertake by the next subparagraph or for the purpose of confirming whether NAI has complied with the requirements of this Lease or the other Operative Documents. During the Term, so long as no Event of Default has occurred and is continuing and no apparent emergency exists which would justify immediate entry, BNPPLC will give NAI at least two Business Days notice before making any such entry over the objection of NAI and will limit any such entry to normal business hours.

(B) Performance for NAI. If NAI fails to perform any act or to take any action required of it by this Lease or the Closing Certificate, or to pay any money which NAI is required by this Lease or the Closing Certificate to pay, and if such failure or action constitutes an Event of Default or renders BNPPLC or any director, officer, employee or Affiliate of BNPPLC at risk of criminal prosecution or renders BNPPLC's interest in the Property or any part

thereof at risk of forfeiture by forced sale or otherwise, then in addition to any other remedies specified herein or otherwise available, BNPPLC may, perform or cause to be performed such act or take such action or pay such money. Any expenses so incurred by BNPPLC, and any money so paid by BNPPLC, will be a demand obligation owing by NAI to BNPPLC. Further, upon making such payment, BNPPLC will be subrogated to all of the rights of the person, corporation or body politic receiving such payment. But nothing herein will imply any duty upon the part of BNPPLC to do any work which under any provision of this Lease NAI may be required to perform, and the performance thereof by BNPPLC will not constitute a waiver of NAI's default. BNPPLC may during the progress of any such work by BNPPLC keep and store upon the Property all necessary materials, tools, and equipment. BNPPLC will not in any event be liable for inconvenience, annoyance, disturbance, loss of business, or other damage to NAI or the subtenants or invitees of NAI by reason of the performance of any such work, or on account of bringing materials, supplies and equipment into or through the Property during the course of such work, and the obligations of NAI under this Lease will not thereby be excused in any manner.

(C) Building Security. So long as NAI remains in possession of the Property, BNPPLC or BNPPLC's representative will, before making any inspection or performing any work on the Property authorized by this Lease, do the following

(1) BNPPLC will give NAI at least 24 hours notice, unless BNPPLC believes in good faith that an emergency may exist or a Default has occurred and is continuing, because of which significant damage to the Property or other significant Losses may be sustained if BNPPLC delays entry to the Property; and

(2) if then requested to do so by NAI in order to maintain NAI's security, BNPPLC or its representative will: (i) sign in at NAI's security or information desk if NAI has such a desk on the premises, (ii) wear a visitor's badge or other reasonable identification, (iii) permit an employee of NAI to observe such inspection or work, and (iv) comply with other similar reasonable nondiscriminatory security requirements of NAI that do not, individually or in the aggregate, significantly interfere with inspections or work of BNPPLC authorized by this Lease.

In addition, such inspections shall be subject to the rights of tenants under Existing Space Leases.

#### **15 Remedies.**

(A) Traditional Lease Remedies. At any time after an Event of Default and after BNPPLC has given any notice required by subparagraph 15(C), BNPPLC will be entitled at BNPPLC's option (and without limiting BNPPLC in the exercise of any other right or remedy BNPPLC may have, and without any further demand or notice except as expressly described in

this subparagraph 15(A)), to exercise any one or more of the following remedies:

(1) By notice to NAI, BNPPPLC may terminate NAI's right to possession of the Property. However, only a notice clearly and unequivocally confirming that BNPPPLC has elected to terminate NAI's right of possession will be effective for purposes of this provision.

(2) Upon termination of NAI's right to possession as provided in the immediately preceding subsection (1) and without further demand or notice, BNPPPLC may re-enter the Property in any manner not prohibited by Applicable Laws and take possession of all improvements, additions, alterations, equipment and fixtures thereon and remove any persons in possession thereof. Any personal property on the Land may be removed and stored in a warehouse or elsewhere, and in such event the cost of any such removal and storage will be at the expense and risk of and for the account of NAI.

(3) Upon termination of NAI's right to possession as provided in the immediately preceding subsection (1), this Lease will terminate and BNPPPLC may recover from NAI damages which include the following:

- (a) the worth at the time of award of the unpaid Rent which had been earned at the time of termination;
- (b) costs and expenses actually incurred by BNPPPLC to repair damage to the Property that NAI was obligated to (but failed to) repair prior to the termination;
- (c) the sum of the following ("**Lease Termination Damages**"):
  - 1) the worth at the time of award of the amount by which the unpaid Rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that NAI proves could have been reasonably avoided;
  - 2) the worth at the time of award of the amount by which the unpaid Rent for the balance of the scheduled Term after the time of award exceeds the amount of such rental loss that NAI proves could be reasonably avoided;
  - 3) any other amount necessary to compensate BNPPPLC for all the detriment proximately caused by NAI's failure to perform NAI's obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including the costs and expenses of

preparing and altering the Property for reletting and all other costs and expenses of reletting (including Attorneys' Fees, advertising costs and brokers' commissions), and

(d) such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable California law.

The "**worth at the time of award**" of the amounts referred to in subparagraph 15(A)(3)(a) and subparagraph 15(A)(3)(c)1) will be computed by allowing interest at the Default Rate. The "**worth at the time of award**" of the amount referred to in subparagraph 15(A)(3)(c)2) will be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%).

Notwithstanding the foregoing, the total Lease Termination Damages which BNPPLC may recover from NAI will be limited in amount to the extent required, if any, to prevent the sum of recoverable Lease Termination Damages, plus any Supplemental Payment that BNPPLC has received or remains entitled to recover pursuant to the Purchase Agreement, from being more than the Maximum Remarketing Obligation; *provided, however*, if a Supplemental Payment is owed to BNPPLC according to the Purchase Agreement, but NAI fails to pay it, this limitation upon BNPPLC's right to recover Lease Termination Damages will be of no effect. For purposes of this provision, "Maximum Remarketing Obligation" is intended to have the meaning assigned to it in the Purchase Agreement and is intended to be computed as of the date any award of Lease Termination Damages to BNPPLC as if such date was the Designated Sale Date.

(4) Even after a breach of this Lease or abandonment of the Property by NAI, BNPPLC may continue this Lease in force and recover Rent as it becomes due. Accordingly, despite any breach or abandonment by NAI, this Lease will continue in effect for so long as BNPPLC does not terminate NAI's right to possession, and BNPPLC may enforce all of BNPPLC's rights and remedies under this Lease, including the right to recover the Rent as it becomes due under this Lease. NAI's right to possession will not be deemed to have been terminated by BNPPLC except pursuant to subparagraph 15(A)(1) hereof. The following, in and of themselves, will not constitute a termination of NAI's right to possession:

- (a) Acts of maintenance or preservation or efforts to relet the Property;
- (b) The appointment of a receiver upon the initiative of BNPPLC to protect BNPPLC's interest under this Lease; or
- (c) Reasonable withholding of consent to an assignment or subletting,

or terminating a subletting or assignment by NAI.

(B) Foreclosure Remedies. At any time when an Event of Default has occurred and is continuing, BNPPLC may notify NAI of BNPPLC's intent to pursue remedies described in Exhibit B, and at any time thereafter, regardless of whether the Event of Default is continuing, if NAI has not already purchased the Property or caused an Applicable Purchaser to purchase the Property pursuant to the Purchase Agreement, (i) BNPPLC will have the power and authority, to the extent provided by law, after proper notice and lapse of such time as may be required by law, to sell or arrange for a sale to foreclose its lien and security interest granted in Exhibit B, and (ii) BNPPLC, in lieu of or in addition to exercising any power of sale granted in Exhibit B, may proceed by a suit or suits in equity or at law, whether for a foreclosure or sale of the Property, or against NAI for the Lease Balance, or for the specific performance of any covenant or agreement herein contained or in aid of the execution of any power herein granted, or for the appointment of a receiver pending any foreclosure or sale of the Property, or for the enforcement of any other appropriate legal or equitable remedy.

(C) Notice Required So Long As the Purchase Option Continues Under the Purchase Agreement. During the Term, so long as NAI remains in possession of the Property, BNPPLC's right to exercise remedies provided in subparagraph 15(A) or to complete any foreclosure sale as provided in subparagraph 15(B) will be subject to the condition precedent that BNPPLC has notified NAI, at a time when an Event of Default has occurred and is continuing and no less than thirty days prior to exercising such remedies or completing such a sale, of BNPPLC's intent to do so. The condition precedent is intended to provide NAI with an opportunity to exercise the Purchase Option before losing possession of the Property because of the remedies enumerated in subparagraph 15(A) or because of a sale authorized by subparagraph 15(B). The condition precedent is not, however, intended to extend any period for curing an Event of Default. Accordingly, if an Event of Default has occurred, and regardless of whether any Event of Default is then continuing, BNPPLC may proceed immediately to exercise remedies provided in subparagraph 15(A) or complete a sale authorized by subparagraph 15(B) at any time after the earliest of (i) thirty days after BNPPLC has given such a notice to NAI, (ii) any date upon which NAI relinquishes possession of the Property, or (iii) any termination of the Purchase Option.

(D) Enforceability. This Paragraph 15 will be enforceable to the maximum extent not prohibited by Applicable Laws, and the unenforceability of any provision in this Paragraph will not render any other provision unenforceable.

(E) Remedies Cumulative. No right or remedy herein conferred upon or reserved to BNPPLC is intended to be exclusive of any other right or remedy, and each and every such right and remedy will be cumulative and in addition to any other right or remedy given to BNPPLC under this Lease or other Operative Documents or now or hereafter existing in favor of BNPPLC under Applicable Laws, except as otherwise expressly provided in the last provision of subparagraph 15(A)(3) above. In addition to other remedies provided in this Lease, BNPPLC

will be entitled, to the extent permitted by Applicable Law or in equity, to injunctive relief in case of the violation, or attempted or threatened violation, of any of the covenants, agreements, conditions or provisions of this Lease, or to a decree compelling performance of any of the other covenants, agreements, conditions or provisions of this Lease to be performed by NAI, or to any other remedy allowed to BNPPLC at law or in equity. Nothing contained in this Lease will limit or prejudice the right of BNPPLC to prove for and obtain in proceedings for bankruptcy or insolvency of NAI by reason of the termination of this Lease, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, the damages are to be proved, whether or not the amount be greater, equal to, or less than the amount of the loss or damages referred to above. Without limiting the generality of the foregoing, nothing contained herein will modify, limit or impair any of the rights and remedies of BNPPLC under the Purchase Agreement, and BNPPLC will not be required to give the thirty day notice described in subparagraph 15(C) as a condition precedent to any acceleration of the Designated Sale Date or to taking any action to enforce the Purchase Agreement. However, to prevent a double recovery, BNPPLC acknowledges that BNPPLC's right to recover Lease Termination Damages may be limited by the last provision of subparagraph 15(A)(3) above in the event BNPPLC collects or remains entitled to collect a Supplemental Payment as provided in the Purchase Agreement.

**16 Default by BNPPLC.** If BNPPLC should default in the performance of any of its obligations under this Lease, BNPPLC will have the time reasonably required, but in no event less than thirty days, to cure such default after receipt of notice from NAI specifying such default and specifying what action NAI believes is necessary to cure the default.

**17 Quiet Enjoyment.** Provided NAI pays the Base Rent and all Additional Rent payable hereunder as and when due and payable and keeps and fulfills all of the terms, covenants, agreements and conditions to be performed by NAI hereunder, BNPPLC will not during the Term disturb NAI's peaceable and quiet enjoyment of the Property; however, such enjoyment will be subject to the terms and conditions of this Lease, to the Existing Space Leases and other Permitted Encumbrances and to any other claims not constituting Liens Removable by BNPPLC. If any Lien Removable by BNPPLC is established against the Property, BNPPLC will remove the Lien Removable by BNPPLC promptly. Any breach by BNPPLC of this Paragraph will render BNPPLC liable to NAI for any monetary damages proximately caused thereby, but as more specifically provided in subparagraph 4(B) above, no such breach will entitle NAI to terminate this Lease or excuse NAI from its obligation to pay Rent.

**18 Surrender Upon Termination.** Unless NAI or an Applicable Purchaser is purchasing or has purchased BNPPLC's entire interest in the Property pursuant to the terms of the Purchase Agreement, NAI must, upon the termination of NAI's right to occupancy, surrender to BNPPLC the Property, including Improvements constructed by NAI and fixtures and furnishings included in the Property, free of all Hazardous Substances (including Permitted Hazardous Substances) and tenancies and with all Improvements in substantially the same condition as of the date the

same were initially completed, excepting only (i) ordinary wear and tear that occurs between the maintenance, repairs and replacements required by other provisions of this Lease, and (ii) demolition, alterations and additions which are expressly permitted by the terms of this Lease and which have been completed by NAI in a good and workmanlike manner in accordance with all Applicable Laws. Any movable furniture or movable personal property belonging to NAI or any party claiming under NAI, if not removed at the time of such termination and if BNPPLC so elects, will be deemed abandoned and become the property of BNPPLC without any payment or offset therefor. If BNPPLC does not so elect, BNPPLC may remove such property from the Property and store it at NAI's risk and expense. NAI must bear the expense of repairing any damage to the Property caused by such removal by BNPPLC or NAI.

19 **Holding Over by NAI.** Should NAI not purchase BNPPLC's right, title and interest in the Property as provided in the Purchase Agreement, but nonetheless continue to hold the Property after the termination of this Lease without objection by BNPPLC, whether such termination occurs by lapse of time or otherwise, such holding over will constitute and be construed as a tenancy from day to day only on and subject to all of the terms, provisions, covenants and agreements on the part of NAI hereunder; except that the Base Rent required for each day the holding over continues will be due and payable by NAI to BNPPLC upon demand and will equal the difference computed by subtracting (a) any interest accruing on such day under the Purchase Agreement on any past due Supplemental Payment, from (b) an amount equal to (i) the difference computed by subtracting any Supplemental Payment previously made by NAI to BNPPLC from the Lease Balance, times (ii) the per annum Default Rate computed as of such day, divided by (iii) three hundred sixty. No payments of money by NAI to BNPPLC after the termination of this Lease will reinstate, continue or extend the Term of this Lease and no extension of this Lease after the termination thereof will be valid unless and until the same is reduced to writing and signed by both BNPPLC and NAI.

20 **Recording Memorandum.** Contemporaneously with the execution of this Lease, the parties will execute and record a memorandum of this Lease for purposes of effecting constructive notice to all Persons of NAI's rights hereunder.

21 **Independent Obligations Evidenced by Other Operative Documents.** NAI acknowledges and agrees that nothing contained in this Lease will limit, modify or otherwise affect any of NAI's obligations under the other Operative Documents, which obligations are intended to be separate, independent and in addition to, and not in lieu of, the obligations set forth herein. Further, in the event of any inconsistency between the express terms and provisions of the Purchase Agreement and the express terms and provisions of this Lease, the express terms and provisions of the Purchase Agreement will control.

22 **Proprietary Information and Confidentiality.**

(A) Proprietary Information. NAI will have no obligation to provide proprietary



information (as defined in the next sentence) to BNPPPLC, except and to the extent (1) expressly required by other terms and conditions of the Operative Documents, or (2) requested by BNPPPLC in connection with any inspection of the Property pursuant to the various provisions hereof and, in BNPPPLC's reasonably determination, required to allow BNPPPLC to accomplish the purposes of such inspection. (Before NAI delivers any such proprietary information in connection with any inspection of the Property, NAI may require that BNPPPLC confirm and ratify the confidentiality agreements covering such proprietary information set forth herein.) For purposes of this Lease and the other Operative Documents, "**proprietary information**" means NAI's intellectual property, trade secrets and other confidential information of value to NAI (including, among other things, information about NAI's manufacturing processes, products, marketing and corporate strategies) that (1) is received by any representative of BNPPPLC at the time of any on-site visit to the Property or (2) otherwise delivered to BNPPPLC by or on behalf of NAI and labeled "proprietary" or "confidential" or by some other similar designation to identify it as information which NAI considers to be proprietary or confidential.

(B) Confidentiality. BNPPPLC will endeavor in good faith to use reasonable precautions to keep confidential any proprietary information that BNPPPLC may receive from NAI or otherwise discover with respect to NAI or NAI's business in connection with the administration of this Lease or any investigation by BNPPPLC hereunder. This provision will not, however, render BNPPPLC liable for any disclosures of proprietary information made by it or its employees or representatives, unless the disclosure is intentional and made for no reason other than to damage NAI's business. Also, this provision will not apply to disclosures: (i) specifically and previously authorized in writing by NAI; (ii) to any assignee of BNPPPLC as to any interest in the Property so long as such assignee has agreed in writing to use its reasonable efforts to keep such information confidential in accordance with the terms of this paragraph; (iii) to legal counsel, accountants, auditors, environmental consultants and other professional advisors to BNPPPLC so long as BNPPPLC informs such persons in writing (if practicable) of the confidential nature of such information and directs them to treat such information confidentially; (iv) to regulatory officials having jurisdiction over BNPPPLC or BNPPPLC's Parent (although the disclosing party will request confidential treatment of the disclosed information, if practicable); (v) as required by legal process (although the disclosing party will request confidential treatment of the disclosed information, if practicable); (vi) of information which has previously become publicly available through the actions or inactions of a person other than BNPPPLC not, to BNPPPLC's knowledge, in breach of an obligation of confidentiality to NAI; (vii) to any Participant so long as the Participant is bound by and has not repudiated a confidentiality provision concerning NAI's proprietary information set forth in the Participation Agreement; or (viii) that are reasonably believed by BNPPPLC to be necessary or helpful to the determination or enforcement of any contractual or other rights which BNPPPLC has or may have against NAI or its Affiliates or which BNPPPLC has or may have concerning the Property (provided, that BNPPPLC must cooperate with NAI as NAI may reasonably request to mitigate any risk that such disclosures will result in subsequent disclosures of proprietary information which are not necessary or helpful to any such determination or enforcement; such cooperation to include, for

example, BNPPPLC's agreement not to oppose a motion by NAI to seal records containing proprietary information in any court proceeding initiated because of a dispute between the parties over the Property or the Operative Documents).

Further, notwithstanding any other contrary provision contained in this Lease or the other Operative Documents, BNPPPLC and NAI (and each of their respective employees, representatives or other agents) may disclose, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Lease and all materials of any kind (including opinions or other tax analyses) that are provided to such party relating to such tax treatment and tax structure, other than any information for which non-disclosure is reasonably necessary in order to comply with applicable securities laws and other than any information the disclosure of which would waive the attorney-client privilege, the tax advisor privilege under Section 7525 of the Internal Revenue Code, or similar privileges.

**[The signature pages follow.]**

IN WITNESS WHEREOF, this Lease Agreement (Moffett Business Center) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

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**Lease Agreement (Moffett Business Center) — Signature Page**

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[Continuation of signature pages for Lease Agreement (Moffett Business Center) dated as of November 29, 2007]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

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**Lease Agreement (Moffett Business Center) — Signature Page**

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**Exhibit A**

**Legal Description**

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:**

**PARCEL ONE:**

All of Parcel 1 as shown upon that certain Map entitled, "Parcel Map being a resubdivision of Parcel 6 as shown on Map recorded in Book 214 of Maps, at Page 23, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on March 1, 1978 in Book 413, at Page 53.

**PARCEL TWO:**

All of Parcel A, as shown upon that certain Map entitled, "Parcel Map being a resubdivision of Parcels 2 and 3, as shown on that certain Map recorded March 1, 1978 in Book 413 of Maps, at Page 53, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on August 21, 1979 in Book 448 of Maps, at Pages 18 and 19.

APN: 110-36-014, 110-36-015

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**Exhibit B**

**California Foreclosure Provisions**

Without limiting any of the provisions set forth in the body of this Lease or other attachments to this Lease, the following provisions are included in and made a part of this Lease for all purposes:

GRANT OF LIEN AND SECURITY INTEREST.

NAI, for and in consideration of the sum of Ten Dollars (\$10.00) to NAI in hand paid by Lloyd G. Cox, Trustee, of Dallas County, Texas (in this Exhibit called the “**Trustee**”), in order to secure the recovery of the Lease Balance by BNPPLC and the payment of all of the other obligations, covenants, agreements and undertakings of NAI under this Lease or other Operative Documents (in this Exhibit called the “**Secured Obligations**”), does hereby irrevocably GRANT, BARGAIN, SELL, CONVEY, TRANSFER, ASSIGN and SET OVER to the Trustee, IN TRUST WITH POWER OF SALE, for the benefit of BNPPLC, the Land, together with (i) all the buildings and other improvements now on or hereafter located thereon; (ii) all materials, equipment, fixtures or other property whatsoever now or hereafter attached or affixed to or installed in said buildings and other improvements, including, but not limited to, all heating, plumbing, lighting, water heating, refrigerating, incinerating, ventilating and air conditioning equipment, utility lines and equipment (whether owned individually or jointly with others), sprinkler systems, fire extinguishing apparatus and equipment, water tanks, engines, machines, elevators, motors, cabinets, shades, blinds, partitions, window screens, screen doors, storm windows, awnings, drapes, and floor coverings, and all fixtures, accessions and appurtenances thereto, and all renewals or replacements of or substitutions for any of the foregoing, all of which are hereby declared to be permanent fixtures and accessions to the freehold and part of the realty conveyed herein as security for the obligations mentioned hereinabove; (iii) all easements and rights of way now and at any time hereafter used in connection with any of the foregoing property or as a means of ingress to or egress from the Land or for utilities to said property; (iv) all interests of NAI in and to any streets, ways, alleys and/or strips of land adjoining said land or any part thereof; (v) all rents, issues, profits, royalties, bonuses, income and other benefits derived from or produced by the Land or Improvements; (vi) all leases or subleases of the Land or Improvements or any part thereof now or hereafter in effect, including all security or other deposits, advance or prepaid rents, and deposits or payments of similar nature; (vii) all options to purchase or lease the Land or Improvements or any part thereof or interest therein, and any greater estate in the Land or Improvements now owned or hereafter acquired by NAI; (viii) all right, title, estate and interest of every kind and nature, at law or in equity, which NAI now has or may hereafter acquire in the Land or Improvements; and (ix) all other claims and demands with respect to the Land or Improvements or the Collateral (as hereinafter defined), including all claims or demands to all proceeds of all insurance now or hereafter in effect with respect to the Land, Improvements or Collateral, all awards made for the taking by condemnation or the power of eminent domain, or by any proceeding or purchase in lieu thereof, of the Land, Improvements or Collateral, or any part thereof, or any damage or injury thereto, all awards resulting from a change of grade of streets, and all awards for severance damages; and (vi) all rights, estates, powers and privileges appurtenant or incident to the foregoing.

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TO HAVE AND TO HOLD the foregoing property (in this Exhibit called the "Mortgaged Property") unto the Trustee, IN TRUST, and his successors or substitutes in this trust and to his or their successors and assigns upon the terms, provisions and conditions herein set forth for the benefit of BNPPPLC.

In order to secure the Secured Obligations, NAI also hereby grants to BNPPPLC a security interest in: all components of the Property which constitute personalty, whether owned by NAI now or hereafter, and all fixtures, accessions and appurtenances thereto, and all renewals or replacements of or substitutions for any of the foregoing (including all building materials and equipment now or hereafter delivered to said premises and intended to be installed or in or incorporated as part of the Improvements); all rents and other amounts from and under leases of all or any part of the Property; all issues, profits and proceeds from all or any part of the Property; all proceeds (including premium refunds) of each policy of insurance relating to the Property; all proceeds from the taking of the Property or any part thereof or any interest therein or right or estate appurtenant thereto by eminent domain or by purchase in lieu thereof; all permits, licenses, franchises, certificates, and other rights and privileges obtained in connection with the Property; all plans, specifications, maps, surveys, reports, architectural, engineering and construction contracts, books of account, insurance policies and other documents, of whatever kind or character, relating to the use, construction upon, occupancy, leasing, sale or operation of the Property; all proceeds and other amounts paid or owing to NAI under or pursuant to any and all contracts and bonds relating to the construction, erection or renovation of the Property; and all oil, gas and other hydrocarbons and other minerals produced from or allocated to the Property and all products processed or obtained therefrom, the proceeds thereof, and all accounts and general intangibles under which such proceeds may arise, together with any sums of money that may now or at any time hereafter become due and payable to NAI by virtue of any and all royalties, overriding royalties, bonuses, delay rentals and any other amount of any kind or character arising under any and all present and future oil, gas and mining leases covering the Property or any part thereof (all of the property described in this section are collectively called the "Collateral" in this Exhibit) and all proceeds of the Collateral. (The Mortgaged Property and the Collateral are in this Exhibit sometimes collectively called the "Security".)

#### FORECLOSURE BY POWER OF SALE

Upon the occurrence of any Event of Default, the Trustee, its successor or substitute, and/or BNPPPLC is authorized and empowered to execute all written notices then required by law to cause the Security to be sold under power of sale to satisfy the Secured Obligations. Trustee will give and record such notices as the law then requires as a condition precedent to a trustee's sale. When the minimum period of time required by law after giving all required notices has elapsed, Trustee, without notice to or demand upon NAI except as otherwise required by law, will sell the Security at the time and place of sale fixed by it in the notice of sale, at one or several sales, either as a whole or in separate parcels and in such manner and order, all as BNPPPLC or Trustee in its sole discretion may determine, at public auction to the highest bidder

for cash, in lawful money of the United States, payable at the time of sale (the obligations hereby secured being the equivalent of cash for purposes of said sale). NAI will have no right to direct the order in which the Security is sold or to require that the Security be sold in separate lots or parcels or items. The sale by the Trustee of less than the whole of the Mortgaged Property will not exhaust the power of sale herein granted, and the Trustee is specifically empowered to make successive sale or sales under such power until the whole of the Mortgaged Property is sold; and, if the proceeds of such sale of less than the whole of the Mortgaged Property is less than the aggregate of the indebtedness secured hereby and the expense of executing this trust as provided herein, the rights and remedies of BNPPLC hereunder and the lien hereof will remain in full force and effect as to the unsold portion of the Mortgaged Property just as though no sale or sales had been made; provided, however, that NAI will never have any right to require the sale of less than the whole of the Mortgaged Property but BNPPLC will have the right, at its sole election, to request the Trustee to sell less than the whole of the Mortgaged Property. Subject to requirements and limits imposed by law, including California Civil Code § 2924g, Trustee may postpone sale of all or any portion of the Security by public announcement at such time and place of sale and from time to time may postpone the sale by public announcement at the time and place fixed by the preceding postponement. Any person or entity, including Trustee, NAI or BNPPLC, may purchase at the sale, and NAI hereby covenants to warrant and defend the title of such purchaser or purchasers. Trustee will deliver to the purchaser at such sale a deed conveying the Security or portion thereof so sold, but without any covenant or warranty, express or implied. At any such sale (i) NAI hereby agrees, in its behalf and in behalf of its heirs, executors, administrators, successors, personal representatives and assigns, that any and all recitals made in any deed of conveyance given by Trustee of any matters or facts stated therein, including without limitation, the identity of BNPPLC, the occurrence or existence of any default, the acceleration of the maturity of any of the Secured Obligations, the request to sell, the notice of sale, the giving of notice to all debtors legally entitled thereto, the time, place, terms, and manner of sale, and receipt, distribution and application of the money realized therefrom, and the due and proper appointment of a substitute Trustee and any other act or thing duly done by BNPPLC or by Trustee hereunder, will be taken by all courts of law and equity as prima facie evidence that the statement or recitals state facts and are without further question to be so accepted as conclusive proof of the truthfulness thereof, and NAI hereby ratifies and confirms every act that Trustee or any substitute Trustee hereunder may lawfully do in the premises by virtue hereof; and (ii) the purchaser may disaffirm any easement granted, or rental, lease or other contract made, in violation of any provision of any of the Operative Documents, and may take immediate possession of the Security free from, and despite the terms, of, such grant of easement and rental or lease contract.

BNPPLC may elect to cause the Security or any part thereof to be sold under the power of sale herein granted in any manner permitted by applicable law. In connection with any sale or sales hereunder, BNPPLC may elect to treat any portion of the Security which consists of a right in action or which is property that can be severed from the Security without causing structural damage thereto as if the same were personal property, and dispose of the same in accordance with applicable law, separate and apart from the sale of the real property. Any sale of any



personal property hereunder will be conducted in any manner permitted by the California Uniform Commercial Code (in this Exhibit called the “Code”). Where any portion of the Security consists of real property and personal property or fixtures, whether or not such personal property is located on or within the real property, BNPPLC may elect in its discretion to exercise its rights and remedies against any or all of the real property, personal property and fixtures, in such order and manner as is now or hereafter permitted by applicable law. Without limiting the generality of the foregoing, BNPPLC may, in its sole and absolute discretion and without regard to the adequacy of its security, elect to proceed against any or all of the real property, personal property and fixtures in any manner permitted by the Code; and if BNPPLC elects to sell both personal property and real property together as permitted by the Code, the power of sale herein granted will be exercisable with respect to all or any of the real property, personal property and fixtures covered hereby, as designated by BNPPLC, and Trustee is hereby authorized and empowered to conduct any such sale of any real property, personal property and fixtures in accordance with the procedures applicable to real property. Where any portion of the Security consists of real property and personal property, any reinstatement of the Secured Obligations, following default and an election by BNPPLC to accelerate the maturity of said obligations, which is made by NAI or any other person or entity permitted to exercise the right of reinstatement under § 2924c of the California Civil Code or any successor statute, will, in accordance with the terms of Code, not prohibit BNPPLC or Trustee from conducting a sale or other disposition of any personal property or fixtures or from otherwise proceeding against or continuing to proceed against any personal property or fixtures in any manner permitted by the Code, nor will any such reinstatement invalidate, rescind or otherwise affect any sale, disposition or other proceeding held, conducted or instituted with respect to any personal property or fixtures prior to such reinstatement or pending at the time of such reinstatement. Any sums paid to BNPPLC in effecting any reinstatement pursuant to § 2924c of the California Civil Code will be applied to the indebtedness secured hereby, and to BNPPLC’s reasonable costs and expenses in the manner required by § 2924c. Should BNPPLC elect to sell any portion of the Security which is real property, or which is personal property or fixtures that BNPPLC has elected to sell together with the real property in accordance with the laws governing a sale of real property, BNPPLC or Trustee will give such notice of default and election to sell as may then be required by law, and without the necessity of any demand on NAI, Trustee, at the time(s) and place(s) specified in the notice of sale, will sell said real property, and all estate, right, title, interest, claim and demand therein, and equity and right of redemption thereof, at such times and places as required or permitted by law, upon such terms as BNPPLC or Trustee may fix and specify in the notice of sale or as may be required by law. If the Security consists of several lots, parcels or items of property, BNPPLC may: (i) designate the order in which such lots, parcels or items will be offered for sale or sold, or (ii) elect to sell such lots, parcels or items through a single sale, or through two or more successive sales, or in any other manner BNPPLC deems in its best interest. Should BNPPLC desire that more than one sale or other disposition of the Mortgaged Property be conducted, BNPPLC may, at its option, cause the same to be conducted simultaneously, or successively, on the same day, or on such different days or times and in such order as BNPPLC may deem to be in its best interests, and no such sale will exhaust the power of sale herein granted or terminate or otherwise affect the lien granted by NAI herein on, or the security

interests of BNPPPLC in, any part of the Security not sold, until all of the indebtedness secured hereby has been fully paid and satisfied. In the event BNPPPLC elects to dispose of the Security through more than one sale, NAI agrees to pay the costs and expenses of each such sale and of any judicial proceedings wherein the same may be made, including reasonable compensation to BNPPPLC and Trustee, their agents and counsel, and to pay all expenses, liabilities and advances made or incurred by BNPPPLC and Trustee (or either of them) in connection with such sale or sale, together with interest on all such advances made by BNPPPLC and Trustee (or either of them) at the Default Rate..

#### JUDICIAL FORECLOSURE

This instrument will be effective as a mortgage as well as a deed of trust and upon the occurrence of an Event of Default may be foreclosed as to any of the Security in any manner permitted by the laws of the State of California or of any other state in which any part of the Security is situated, and any foreclosure suit may be brought by the Trustee or by BNPPPLC. In the event a foreclosure hereunder is commenced by the Trustee, or his substitute or successor, BNPPPLC may at any time before the sale of the Security direct the said Trustee to abandon the sale, and may then institute suit for the collection of the Secured Obligations and for the judicial foreclosure of this instrument. It is agreed that if BNPPPLC should institute a suit for the collection of the Secured Obligations and for the foreclosure of this instrument, BNPPPLC may at any time before the entry of a final judgment in said suit dismiss the same, and require the Trustee, his substitute or successor to exercise the power of sale granted herein to sell the Security in accordance with the provisions of this instrument.

#### BNPPPLC AS PURCHASER

BNPPPLC will have the right to become the purchaser at any sale held by any Trustee or substitute or successor or by any receiver or public officer, and any BNPPPLC purchasing at any such sale will have the right to credit upon the amount of the bid made therefor, to the extent necessary to satisfy such bid, the outstanding Lease Balance and other Secured Obligations owing to such BNPPPLC.

#### UNIFORM COMMERCIAL CODE REMEDIES

Upon the occurrence of an Event of Default, BNPPPLC may exercise its rights of enforcement with respect to the Collateral under the California Uniform Commercial Code, as amended, and in conjunction with, in addition to or in substitution for those rights and remedies:

- (a) BNPPPLC may enter upon the Land to take possession of, assemble and collect the Collateral or to render it unusable; and
- (b) BNPPPLC may require NAI to assemble the Collateral and make it

available at a place BNPPPLC designates which is mutually convenient to allow BNPPPLC to take possession or dispose of the Collateral; and

(c) written notice mailed to NAI as provided herein ten (10) days prior to the date of public sale of the Collateral or prior to the date after which private sale of the Collateral will be made shall constitute reasonable notice; and

(d) any sale made pursuant to the provisions of this section will be deemed to have been a public sale conducted in a commercially reasonable manner if held contemporaneously with the sale of the Mortgaged Property under power of sale as provided herein upon giving the same notice with respect to the sale of the Collateral hereunder as is required for such sale of the Mortgaged Property under power of sale; and

(e) in the event of a foreclosure sale, whether made by the Trustee exercising the power of sale granted herein, or under judgment of a court, the Collateral and the Mortgaged Property may, at the option of BNPPPLC, be sold as a whole; and

(f) it will not be necessary that BNPPPLC take possession of the Collateral or any part thereof prior to the time that any sale pursuant to the provisions of this section is conducted and it will not be necessary that the Collateral or any part thereof be present at the location of such sale; and

(g) prior to application of proceeds of disposition of the Collateral to the Secured Obligations, such proceeds will be applied to the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and the reasonable attorney's fees and legal expenses incurred by BNPPPLC; and

(h) any and all statements of fact or other recitals made in any bill of sale or assignment or other instrument evidencing any foreclosure sale hereunder as to nonpayment of the Secured Obligations or as to the occurrence of any Event of Default, or as to BNPPPLC having declared any of the Secured Obligations to be due and payable, or as to notice of time, place and terms of sale and of the properties to be sold having been duly given, or as to any other act or thing having been duly done by BNPPPLC, will be taken as prima facie evidence of the truth of the facts so stated and recited; and

(i) BNPPPLC may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale held by BNPPPLC, including the sending of notices and the conduct of the sale, but in the name and on behalf of BNPPPLC.

#### APPOINTMENT OF A RECEIVER

In addition to all other remedies herein provided for, if any Event of Default occurs or continues after the Designated Sale Date, BNPPPLC will as a matter of right be entitled to the

appointment of a receiver or receivers for all or any part of the Security, whether such receivership be incident to a proposed sale of such property or otherwise, and without regard to the adequacy of the security or the value of the Security or the solvency of any person or persons liable for the payment of the Secured Obligations, and NAI does hereby irrevocably consent to the appointment of such receiver or receivers, waives any and all defenses to such appointment and agrees not to oppose any application therefor by BNPPLC, but nothing herein is to be construed to deprive BNPPLC of any other right, remedy or privilege it may now have under the law to have a receiver appointed. Any such receiver or receivers will have all of the usual powers and duties of receivers in like or similar cases and will continue as such and exercise all such powers until the date of confirmation of sale of the Security unless such receivership is sooner terminated. Any money advanced by BNPPLC in connection with any such receivership will be a demand obligation owing by NAI to BNPPLC and will bear interest from the date of making such advancement by BNPPLC until paid at the Default Rate and will be a part of the Secured Obligations and will be secured by this lien and by any other instrument securing the Secured Obligations.

#### PROVISIONS CONCERNING THE TRUSTEE

Trustee accepts this trust when a Short Form Lease or memorandum referencing the provisions of this Exhibit, duly executed and acknowledged, is made a public record as provided by law. The trust hereby created will be irrevocable by NAI.

In the event the Trustee takes any action pursuant to the provisions of this Exhibit, NAI must pay to Trustee reasonable compensation for services rendered in the administration of this trust, which will be in addition to any required reimbursement for Attorney's Fees or other expenses.

BNPPLC may appoint a substitute to replace and act as the Trustee hereunder in any manner now or hereafter provided by law, or in lieu thereof, BNPPLC may from time to time, by an instrument in writing, appoint substitutes as successor or successors to any Trustee named herein or acting hereunder, which instrument, executed and acknowledged by BNPPLC and recorded in the Office of the Recorder of the county in which the Property is located, will be conclusive proof of proper substitution of such successor Trustee or Trustees, who will thereupon and without conveyance from the predecessor Trustee, succeed to all its title, estate, rights, powers and duties. Such instrument must contain the name of the original NAI, Trustee and BNPPLC hereunder, the instrument number of this Deed of Trust, and the name and address of the successor Trustee. In the event the Secured Obligations are at any time owned by more than one person or entity, the holder or holders of not less than a majority in the amount of such Secured Obligations will have the right and authority to make the appointment of a successor or substitute trustee provided for in the preceding sentences. Such appointment and designation by BNPPLC or by the holder or holders of not less than a majority of the Secured Obligations will be full evidence of the right and authority to make the same and of all facts therein recited. If

BNPPLC is a corporation and such appointment is executed in its behalf by an officer of such corporation, such appointment will be conclusively presumed to be executed with authority and will be valid and sufficient without proof of any action by the board of directors or any superior officer of the corporation. Upon the making of any such appointment and designation, all of the estate and title of the Trustee in the Security will vest in the named successor or substitute trustee and he will thereupon succeed to and will hold, possess and execute all the rights, powers, privileges, immunities and duties herein conferred upon the Trustee; but nevertheless, upon the written request of BNPPLC or of the successor or substitute Trustee, the Trustee ceasing to act must execute and deliver an instrument transferring to such successor or substitute Trustee all of the estate and title in the Security of the Trustee so ceasing to act, together with all the rights, powers, privileges, immunities and duties herein conferred upon the Trustee, and must duly assign, transfer and deliver any of the properties and moneys held by said Trustee hereunder to said successor or substitute Trustee. All references herein to the Trustee will be deemed to refer to the Trustee (including any successor or substitute appointed and designated as herein provided) from time to time acting hereunder. NAI hereby ratifies and confirms any and all acts which the herein named Trustee or his successor or successors, substitute or substitutes, in this trust, do lawfully by virtue hereof.

THE TRUSTEE WILL NOT BE LIABLE FOR ANY ERROR OF JUDGMENT OR ACT DONE BY THE TRUSTEE IN GOOD FAITH, OR BE OTHERWISE RESPONSIBLE OR ACCOUNTABLE UNDER ANY CIRCUMSTANCES WHATSOEVER (INCLUDING THE TRUSTEE'S NEGLIGENCE), EXCEPT FOR THE TRUSTEE'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT. The Trustee will have the right to rely on any instrument, document or signature authorizing or supporting any action taken or proposed to be taken by him hereunder, believed by him in good faith to be genuine. All moneys received by the Trustee will, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated in any manner from any other moneys (except to the extent required by law), and the Trustee will be under no liability for interest on any moneys received by him hereunder. NAI WILL REIMBURSE THE TRUSTEE FOR, AND INDEMNIFY AND SAVE HIM HARMLESS AGAINST, ANY AND ALL LIABILITY AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES) WHICH MAY BE INCURRED BY HIM IN THE PERFORMANCE OF HER DUTIES HEREUNDER (INCLUDING ANY LIABILITY AND EXPENSES RESULTING FROM THE TRUSTEE'S OWN NEGLIGENCE). The foregoing indemnity will not terminate upon release, foreclosure or other termination of this instrument.

#### MISCELLANEOUS

BNPPLC may resort to any security given by this instrument or to any other security now existing or hereafter given to secure the payment of the Secured Obligations, in whole or in part, and in such portions and in such order as may seem best to BNPPLC in its sole and uncontrolled discretion, and any such action will not in anywise be considered as a waiver of any of the rights, benefits, liens or security interests evidenced by this instrument.

To the full extent NAI may do so, NAI agrees that NAI will not at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter in force pertaining to the rights and remedies of sureties or redemption, and NAI, for NAI and NAI's successors and assigns, and for any and all persons ever claiming any interest in the Security, to the extent permitted by law, hereby waives and releases all rights of redemption, valuation, appraisal, stay of execution, notice of intention to mature or declare due the whole of the Secured Obligations, notice of election to mature or declare due the whole of the Secured Obligations and all rights to a marshaling of the assets of NAI, including the Security, or to a sale in inverse order of alienation in the event of foreclosure of the liens and security interests hereby created. NAI will not have or assert any right under any statute or rule of law pertaining to the marshaling of assets, sale in inverse order of alienation, the exemption of homestead, the administration of estates of decedents or other matters whatever to defeat, reduce or affect the right of BNPPLC under the terms of this instrument to a sale of the Security for the collection of the Secured Obligations without any prior or different resort for collection, or the right of BNPPLC under the terms of this instrument to the payment of the Secured Obligations out of the proceeds of sale of the Security in preference to every other claimant whatever. If any law referred to in this section and now in force, of which NAI or NAI's successors and assigns and such other persons claiming any interest in the Security might take advantage despite this provision, is hereafter repealed or ceases to be in force, such law shall not thereafter be deemed to preclude the application of this provision.

In the event there is a foreclosure sale hereunder and at the time of such sale NAI or NAI's successors or assigns or any other persons claiming any interest in the Security by, through or under NAI are occupying or using the Security, or any part thereof, each and all will immediately become the tenant of the purchaser at such sale. Such tenancy will be a tenancy from day-to-day, terminable at the will of either landlord or tenant, at a reasonable rental per day based upon the value of the property occupied, such rental to be due daily to the purchaser. In the event the tenant fails to surrender possession of said property upon demand, the purchaser will be entitled to institute and maintain an action to obtain possession in any court of competent jurisdiction in California.

NAI agrees to pay BNPPLC for each statement of BNPPLC (as beneficiary) regarding the obligations secured hereby the maximum fee allowed by law or, if there is no maximum fee, such reasonable fee as is then charged by BNPPLC for rendering such statement.

Notwithstanding any contrary provisions regarding the giving of notices in the Common Definitions or Provisions Agreement or other Operative Documents, any service of a notice required by California Civil Code §2924 will be considered complete when the requirements of that statute are met.

All rights of action under this Exhibit be enforced by BNPPLC or Trustee without the possession of any instruments secured hereby and without the production thereof or of this Lease or other Operative Documents at any trial or other proceeding relative thereto.

**COMMON DEFINITIONS  
AND PROVISIONS AGREEMENT  
(MOFFETT BUSINESS CENTER)**

between

BNP PARIBAS LEASING CORPORATION

and

NETWORK APPLIANCE, INC.

Dated as of November 29, 2007

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**Annexes**

Annex 1	ABR Period Election Form
Annex 2	Fixed Rate Lock Notice Form
Annex 3	LIBOR Period Election Form

**COMMON DEFINITIONS  
AND PROVISIONS AGREEMENT  
(MOFFETT BUSINESS CENTER)**

This COMMON DEFINITIONS AND PROVISIONS AGREEMENT (MOFFETT BUSINESS CENTER) (this "**Agreement**"), dated as of November 29, 2007 (the "**Effective Date**"), is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and NETWORK APPLIANCE, INC. ("**NAI**"), a Delaware corporation.

**RECITALS**

Contemporaneously with the execution of this Agreement, NAI and BNPPLC are executing the Closing Certificate (as defined below), the Lease (as defined below) and the Purchase Agreement (as defined below), all of which concern NAI or the Property (as defined below). Each of the Closing Certificate, the Lease and the Purchase Agreement (together with this Agreement, the "**Operative Documents**") are intended to create separate and independent obligations upon the parties thereto. However, NAI and BNPPLC intend that all of the Operative Documents share certain consistent definitions and other miscellaneous provisions. To that end, the parties are executing this Agreement and incorporating it by reference into each of the other Operative Documents.

**AGREEMENTS**

**ARTICLE I — LIST OF DEFINED TERMS**

**Unless a clear contrary intention appears, the following terms will have the respective indicated meanings as used herein and in the other Operative Documents:**

"**ABR**" means, for any day, a fluctuating rate of interest per annum (rounded upwards, if necessary, to the next 1/100th of 1%) equal to the higher of (a) the Prime Rate in effect on such day and (b) the Fed Funds Rate in effect one day prior to such day plus 1/4 of 1% per annum. For any period (including any Base Rent Period), "**ABR**" means the average of the ABR for each day during such period.

"**ABR Period Election**" means an election to have the Effective Rate for any Base Rent Period calculated by reference to the ABR, rather than by reference to LIBOR or a Fixed Rate. NAI may (subject to the limitations and qualifications set forth in this definition) make any Base Rent Period after the first Base Rent Period subject to an ABR Period Election by a notice given to BNPPLC in the form attached as Annex 1 at least five Business Days prior to the commencement of such period. After an ABR Period Election becomes effective, it will remain in effect for all subsequent Base Rent Periods until the Fixed Rate Lock Date for any Fixed Rate Lock or a different election is made in accordance with the provisions of this definition and the

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definition of LIBOR Period Election. In no event will changes in any ABR Period Election or LIBOR Period Election become effective except upon the commencement of a new Base Rent Period. (For purposes of the Operative Documents, an ABR Period Election for any Base Rent Period will also be considered in effect on the Effective Date or Base Rent Date upon which such period begins.)

“**Active Negligence**” of any Person means, and is limited to, the negligent conduct on the Property (and not mere omissions) by such Person or by others acting and authorized to act on such Person’s behalf (other than NAI) in a manner that proximately causes actual bodily injury or property damage for which NAI does not carry (and is not obligated by the Lease to carry) insurance. “**Active Negligence**” will not include (1) any negligent failure of BNPPPLC to act when the duty to act would not have been imposed but for BNPPPLC’s status as owner of any interest in the Land, the Improvements or any other Property or as a party to the transactions described in the Lease or the other Operative Documents, (2) any negligent failure of any other Interested Party to act when the duty to act would not have been imposed but for such party’s contractual or other relationship to BNPPPLC or participation or facilitation in any manner, directly or indirectly, of the transactions described in the Lease or other Operative Documents, or (3) the exercise in a lawful manner by BNPPPLC (or any party lawfully claiming through or under BNPPPLC) of any right or remedy provided in or under the Lease or the other Operative Documents.

“**Additional Rent**” has the meaning indicated in subparagraph 3(F) of the Lease.

“**Administrative Fees**” means the fees identified as such in subparagraph 3(F) of the Lease.

“**Affiliate**” of any Person means any other Person controlling, controlled by or under common control with such Person. For purposes of this definition, the term “control” when used with respect to any Person means the power to direct the management of policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise, and the terms “controlling” and “controlled” have meanings correlative to the foregoing.

“**After Tax Basis**” has the meaning indicated in subparagraph 5(C)(1) of the Lease.

“**Applicable Laws**” means any or all of the following, to the extent applicable to BNPPPLC, NAI, the Property or the Operative Documents, after giving effect to the contractual choice of law provisions in the Operative Documents: restrictive covenants; zoning ordinances and building codes; flood disaster laws; health, safety and environmental laws and regulations; the Americans with Disabilities Act and other laws pertaining to disabled persons; and other laws, statutes, ordinances, rules, permits, regulations, orders, determinations and court decisions.

“**Applicable Purchaser**” means any third party designated to purchase BNPPPLC’s

interest in the Property and in any Escrowed Proceeds as provided in the Purchase Agreement.

“**Arrangement Fee**” has the meaning indicated in subparagraph 3(E) of the Lease.

“**Attorneys’ Fees**” means the expenses and reasonable fees of counsel to the parties incurring the same, including costs or expenses of in-house counsel (whether or not accounted for as general overhead or administrative expenses) and printing, photostating, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals, librarians and others not admitted to the bar but performing services under the supervision of an attorney. Such terms will also include all such expenses and reasonable fees incurred with respect to appeals, arbitrations and bankruptcy proceedings, and whether or not any manner of proceeding is brought with respect to the matter for which such fees and expenses were incurred.

“**Banking Rules Change**” means either: (1) the introduction of or any change after the Effective Date (other than any change by way of imposition or increase of reserve requirements included in the Eurodollar Rate Reserve Percentage) in any law or regulation applicable to BNPPLC, BNPPLC’s Parent or any Participant, or in the generally accepted interpretation by the institutional lending community of any such law or regulation, or in the interpretation of any such law or regulation asserted by any regulator, court or other governmental authority (other than any change by way of imposition or increase of reserve requirements included in the Eurodollar Rate Reserve Percentage) or (2) the compliance by BNPPLC, BNPPLC’s Parent or any Participant with any new guideline or new request issued after the Effective Date from any central bank or other governmental authority (whether or not having the force of law).

“**Base Rent**” means the rent payable by NAI pursuant to subparagraph 3(A) of the Lease.

“**Base Rent Date**” means a date upon which Base Rent must be paid under the Lease, all of which dates will be the first Business Day of a calendar month. The *first* Base Rent Date will be the first Business Day of the *first* calendar month following the Effective Date. Each *successive Base Rent Date after the first Base Rent Date* will be the first Business Day of the first or third calendar month following the calendar month which includes the preceding Base Rent Date, determined as follows:

(1) If an ABR Period Election or a LIBOR Period Election of one month is in effect on a Base Rent Date, or if a Fixed Rate Lock commences or continues on a Base Rent Date, then the first Business Day of the *first* calendar month following such Base Rent Date will be the next following Base Rent Date.

(2) If a LIBOR Period Election of three months or longer is in effect on a Base Rent Date, then the first Business Day of the *third* calendar month following such Base Rent Date will be the next following Base Rent Date.

Thus, for example, if a Base Rent Date falls on the first Business Day of September, 2008 and a

LIBOR Period Election of three months commences on such Base Rent Date, then the first Base Rent Date thereafter will be the first Business Day of December, 2008.

“**Base Rent Period**” means a period for which Base Rent must be paid under the Lease, each of which periods will correspond to the ABR Period Election or LIBOR Period Election for the period (except when a Fixed Rate Lock continues in effect). The first Base Rent Period will begin on and include the Effective Date, and each successive Base Rent Period will begin on and include the Base Rent Date upon which the preceding Base Rent Period ends. Each Base Rent Period, including the first Base Rent Period, will end on but not include the first or second Base Rent Date after the Base Rent Date upon which such period began, determined as follows:

(1) If an ABR Period Election or a LIBOR Period Election of one month or three months is in effect for a Base Rent Period, or if a Fixed Rate Lock commences or continues on the first day of the Base Rent Period, then such Base Rent Period will end on but not include the first Base Rent Date after the Base Rent Date upon which such period began.

(2) If a LIBOR Period Election of six months is in effect for a Base Rent Period, then such Base Rent Period will end on but not include the second Base Rent Date after the Base Rent Date upon which such period began.

The determination of Base Rent Periods can be illustrated by two examples:

1) If NAI makes a LIBOR Period Election of three months for a hypothetical Base Rent Period beginning on the first Business Day in January, 2009, then such Base Rent Period will end on but not include the first Base Rent Date after it begins; that is, such Base Rent Period will end on but not include the first Business Day in April, 2009, the third calendar month after January, 2009.

2) If, however, NAI makes a LIBOR Period Election of six months for the hypothetical Base Rent Period beginning the first Business Day in January, 2009, then such Base Rent Period will end on but not include the second Base Rent Date after it begins; that is, the first Business Day in July, 2009.

“**BNPPLC**” means BNPPLC Leasing Corporation, a Delaware corporation.

“**BNPPLC’s Parent**” means BNP Paribas, a bank organized and existing under the laws of France, and any successors of such bank.

“**Breakage Costs**” means any and all costs, losses or expenses incurred or sustained by BNPPLC’s Parent (as a Participant or otherwise) or any Participant, for which BNPPLC’s Parent or the Participant requests reimbursement from BNPPLC, because of:

(1) the resulting liquidation or redeployment of deposits or other funds that were used to make or maintain Funding Advances upon application of a Qualified Prepayment or upon any sale of the Property pursuant to the Purchase Agreement, if such application or sale occurs on any day other than the last day of a Base Rent Period; or

(2) the resulting liquidation or redeployment of deposits or other funds that were used to make or maintain Funding Advances upon the acceleration of the end of any Base Rent Period because of an acceleration of the Designated Sale Date as described in clauses (2) or (3) of the definition thereof.

Breakage Costs will include, for example, losses on Funding Advances maintained by BNPPPLC's Parent or any Participant which are attributable to any decline in LIBOR as of the effective date of any application described in the clause (1) preceding, as compared to the LIBOR used to determine the Effective Rate then in effect. Each determination of Breakage Costs by BNPPPLC's Parent or by any Participant, as applicable, will be conclusive and binding upon NAI in the absence of clear and demonstrable error.

“**Break Even Price**” has the meaning indicated in the Purchase Agreement.

“**Business Day**” means any day that is (1) not a Saturday, Sunday or day on which commercial banks are generally closed or required to be closed in New York City, New York, and (2) a day on which dealings in deposits of dollars are transacted in the London interbank market; provided, that if such dealings are suspended indefinitely for any reason, “Business Day” will mean any day described in clause (1).

“**Capital Adequacy Charges**” means any additional amounts BNPPPLC's Parent or any Participant requests BNPPPLC to pay as compensation for an increase in required capital as provided in subparagraph 5(B)(2) of the Lease.

“**Closing Certificate**” means the Closing Certificate and Agreement (Moffett Business Center) dated as of the Effective Date executed by NAI and BNPPPLC, as such Closing Certificate and Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Closing Letter**” means the letter agreement dated as of the Effective Date between BNPPPLC and NAI confirming the amount of the Initial Advance and the Transactions Expenses paid from the Initial Advance.

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

“**Common Definitions and Provisions Agreement**” means this Agreement, which is incorporated by reference into each of the other Operative Documents, as this Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in



accordance with its terms.

“**Consolidated Debt for Borrowed Money**” has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

“**Consolidated EBITDA**” has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

“**Constituent Documents**” of any entity means the organizational documents pursuant to which such entity was created and is governed, such as the articles of incorporation and bylaws of a corporation, the articles of organization and regulations of a limited liability company or the partnership agreement of a partnership.

“**Default**” means any event or circumstance which constitutes, or which would with the passage of time or the giving of notice or both (if not cured within any applicable cure period) constitute, an Event of Default.

“**Default Rate**” means, a floating per annum rate equal to two percent (2%) above ABR, except that for purposes of computing interest accruing for any period that commences thirty or more days after the Designated Sale Date on any Base Rent or Supplemental Payment that has become due, but remains to be paid to BNPPPLC by NAI, the Default Rate will mean a floating per annum rate equal to five percent (5%) above ABR. Notwithstanding the foregoing, in no event will the “Default Rate” at any time exceed the maximum interest rate permitted by Applicable Laws.

“**Designated Sale Date**” means the earliest of:

(1) the date upon which the Term is scheduled to expire as provided in Paragraph 1(A) of the Lease (*i.e.*, the first Business Day of December, 2012); or

(2) any Business Day designated as the “Designated Sale Date” for purposes of this Agreement and the other Operative Documents in an irrevocable, unconditional notice given by NAI to BNPPPLC; provided, that if the Business Day so designated by NAI as the Designated Sale Date is not at least twenty days after the date of such notice, the notice will be of no effect for purposes of this definition; and provided, further, that to be effective, any such notice must include an irrevocable exercise by NAI of the Purchase Option under subparagraph 2(A)(1) of the Purchase Agreement and thereby obligate NAI to tender payment of the full Break Even Price to BNPPPLC on the Business Day so designated; or

(3) any Business Day designated as the “Designated Sale Date” for purposes of this Agreement and the other Operative Documents in a notice given by BNPPPLC to NAI:

- when an Event of Default has occurred and is continuing; or
- following any change in the zoning or other Applicable Laws affecting the permitted use or development of the Property that, in BNPPLC's judgment, materially reduces the value of the Property; or
- following any discovery of conditions or circumstances on or about the Property, such as the presence of an endangered species, which are likely to substantially impede the use or development of the Property and thereby, in BNPPLC's judgment, materially reduce the value of the Property;

provided, however, that if the Business Day so designated by BNPPLC as the Designated Sale Date is not at least thirty days after the date of such notice, the notice will be of no effect for purposes of this definition; or

(4) the first Business Day after the commencement of any Event of Default described in clauses (G), (H) or (I) of the definition Event of Default herein that occurs because of any bankruptcy proceeding instituted by or against NAI, as debtor, under Title 11 of the United States Code.

“**Effective Date**” means November 29, 2007.

“**Effective Rate**” means, for each Base Rent Period, a per annum rate determined as follows:

(1) In the case of any Base Rent Period subject to a LIBOR Period Election, the Effective Rate will equal the rate per annum determined by dividing (A) LIBOR for such period, by (B) one hundred percent (100%) minus the Eurodollar Rate Reserve Percentage for such period.

(2) In the case of any Base Rent Period that is not subject to a LIBOR Period Election, the Effective Rate will equal the ABR for such period.

(4) Notwithstanding the foregoing, for any Base Rent Period that begins on or after the Fixed Rate Lock Date applicable to a Fixed Rate Lock and that ends before or on the date such Fixed Rate Lock is terminated as provided in subparagraph 3(C) of the Lease, the Effective Rate will equal the Fixed Rate.

So long as any LIBOR Period Election remains in effect, as LIBOR or the Eurodollar Rate Reserve Percentage changes from Base Rent Period to Base Rent Period, the Effective Rate will be automatically increased or decreased, as the case may be, without prior notice to NAI. Also, during any period when no LIBOR Period Election or Fixed Rate Lock is in effect, as the ABR changes from Base Rent Period to Base Rent Period, the Effective Rate will be automatically

increased or decreased, as the case may be, without prior notice to NAI.

If for any reason BNPPLC determines that it is impossible or unreasonably difficult to determine the Effective Rate with respect to a given Base Rent Period in accordance with the foregoing, then the “**Effective Rate**” for that Base Rent Period will equal any published index or per annum interest rate determined in good faith by BNPPLC to be comparable to LIBOR at the beginning of the first day of that Base Rent Period. A comparable interest rate might be, for example, the then existing yield on short term United States Treasury obligations (as compiled by and published in the then most recently published United States Federal Reserve Statistical Release H.15(519) or its successor publication), plus or minus a fixed adjustment based on BNPPLC’s comparison of past eurodollar market rates to past yields on such Treasury obligations.

“**Eligible Financial Institution**” means (a) a commercial bank organized under the laws of the United States, or any State thereof or the District of Columbia, and having total assets in excess of \$5,000,000,000; (b) a commercial bank organized under the laws of any other country which is a member of the Organization for Economic Cooperation and Development (“OECD”) or has concluded special lending arrangements with the International Monetary Fund associated with its General Arrangements to Borrow, or a political subdivision of any such country, and having total assets in excess of \$5,000,000,000; provided, that such bank is acting through a branch or agency located in the United States; (c) the central bank of any country which is a member of the OECD; and (d) a finance company, insurance company or other financial institution (whether a corporation, partnership or other entity, but excluding any savings and loan association) which is engaged in making, purchasing or otherwise investing in commercial loans in the ordinary course of its business, and having total assets in excess of \$5,000,000,000; provided, however, that in no event will any bank or other Person qualify as an Eligible Financial Institution at any time when it has outstanding obligations with a credit rating less than investment grade from Standard & Poor’s, a division of the McGraw-Hill Companies, or Moody’s Investors Service, Inc. or another nationally recognized rating service.

“**Environmental Cutoff Date**” means the later of the dates upon which (i) the Lease terminates or NAI’s interests in the Property are sold at foreclosure as provided in Exhibit B attached to the Lease, or (ii) NAI surrenders possession and control of the Property and ceases to have interest in the Land or Improvements or rights with respect thereto under any of the Operative Documents.

“**Environmental Laws**” means any and all existing and future Applicable Laws pertaining to safety, health or the environment, or to Hazardous Substances or Hazardous Substance Activities, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, and the Resource Conservation and Recovery Act of 1976, as amended by the Used Oil Recycling Act of 1980, the Solid Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984.

“**Environmental Losses**” means Losses suffered or incurred by BNPPLC or any other Interested Party, directly or indirectly, relating to or arising out of, based on or as a result of any of the following: (i) any Hazardous Substance Activity that occurs or is alleged to have occurred on or prior to the Environmental Cutoff Date; (ii) any violation of any applicable Environmental Laws relating to the Land or the Property or to the ownership, use, occupancy or operation thereof that occurs or is alleged to have occurred in whole or in part on or prior to the Environmental Cutoff Date; (iii) any investigation, inquiry, order, hearing, action, or other proceeding by or before any governmental or quasi-governmental agency or authority in connection with any Hazardous Substance Activity that occurs or is alleged to have occurred in whole or in part on or prior to the Environmental Cutoff Date; or (iv) any claim, demand, cause of action or investigation, or any action or other proceeding, whether meritorious or not, brought or asserted against any Interested Party which directly or indirectly relates to, arises from, is based on, or results from any of the matters described in clauses (i), (ii), or (iii) of this definition or any allegation of any such matters. For purposes of determining whether Losses constitute “Environmental Losses,” as the term is used in the Lease, any actual or alleged Hazardous Substance Activity or violation of Environmental Laws relating to the Land or the Property will be presumed to have occurred prior to the Environmental Cutoff Date unless NAI establishes by clear and convincing evidence to the contrary that the relevant Hazardous Substance Activity or violation of Environmental Laws did not occur or commence prior to the Environmental Cutoff Date.

“**Environmental Report**” means, collectively, the following reports, which were provided by NAI to BNPPLC prior to the Effective Date:

- September 2007 Phase I Environmental Site Assessment by WSP Environmental Strategies, 549 Baltic Way, 603-611 Baltic Way, 641 Baltic Way and 632-634 Caribbean Drive Sunnyvale , CA;
- Clayton Environmental Consultants. Phase I Environmental Site Assessment of the Four Building Complex at 549 and 611 Baltic Way and 632 Caribbean, Sunnyvale, CA. May 6, 1993;
- Clayton Environmental Consultants. Phase I Environmental Site Assessment of the Four Building Complex at 549, 611 and 641 Baltic and 632 and 646 Caribbean Drive, Sunnyvale, CA. March 20, 1996;
- Versar, Inc. Phase I Environmental Site Assessment of Moffett Business Center at 549, 603-611 Baltic Way and 632 and 646 Caribbean Drive, Sunnyvale, CA. November 20, 1996; and
- Versar, Inc. Asbestos Survey of Moffett Business Center at 549, 603-611 Baltic Way and 632 and 646 Caribbean Drive, Sunnyvale, CA. November 1996.

“**Existing Space Leases**” means leases or subleases from NAI of space within the Improvements, if any, which are existing as of the Effective Date and are included in the list of Permitted Encumbrances attached as Exhibit B to the Closing Certificate.

“**ERISA**” means the Employee Retirement Income Security Act of 1974, as amended from time to time, together with all rules and regulations promulgated with respect thereto.

“**ERISA Affiliate**” means any Person who for purposes of Title IV of ERISA is a member of NAI’s controlled group, or under common control with NAI, within the meaning of Section 414 of the Internal Revenue Code, and the regulations promulgated and rulings issued thereunder.

“**ERISA Termination Event**” means (a) the occurrence with respect to any Plan of (1) a reportable event described in Sections 4043(b)(5) or (6) of ERISA or (2) any other reportable event described in Section 4043(b) of ERISA other than a reportable event not subject to the provision for thirty-day notice to the Pension Benefit Guaranty Corporation pursuant to a waiver by such corporation under Section 4043(a) of ERISA, or (b) the withdrawal of NAI or any ERISA Affiliate from a Plan during a plan year in which it was a “substantial employer” as defined in Section 4001(a)(2) of ERISA, or (c) the filing of a notice of intent to terminate any Plan or the treatment of any Plan amendment as a termination under Section 4041 of ERISA, or (d) the institution of proceedings to terminate any Plan by the Pension Benefit Guaranty Corporation under Section 4042 of ERISA, or (e) any other event or condition which might constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Plan.

“**Escrowed Proceeds**” means, subject to the exclusions specified in the next sentence, any money that is received by BNPPPLC from time to time during the Term (and any interest earned thereon) from any party (1) under any property insurance policy as a result of damage to the Property, (2) as compensation for any restriction imposed by any Governmental Authority upon the use or development of the Property or for the condemnation of the Property or any portion thereof, (3) because of any judgment, decree or award for physical damage to the Property or (4) as compensation under any title insurance policy or otherwise as a result of any title defect or claimed title defect with respect to the Property; provided, however, in determining the amount of “Escrowed Proceeds” there will be deducted all expenses and costs of every type, kind and nature (including Attorneys’ Fees) incurred by BNPPPLC to collect such proceeds. Notwithstanding the foregoing, “Escrowed Proceeds” will not include (A) any payment to BNPPPLC by a Participant or an Affiliate of BNPPPLC that is made to compensate BNPPPLC for the Participant’s or Affiliate’s share of any Losses BNPPPLC may incur as a result of any of the events described in the preceding clauses (1) through (4), (B) any money or proceeds that have been applied as a Qualified Prepayment or to pay any Breakage Costs, Fixed Rate Settlement Amount or other costs incurred in connection with a Qualified Prepayment, (C) any money or proceeds that, after no less than ten days notice to NAI, BNPPPLC returns or pays to a third party because of BNPPPLC’s good faith belief that such return or payment is required by law, (D) any

money or proceeds paid by BNPPLC to NAI or offset against any amount owed by NAI, or (E) any money or proceeds used by BNPPLC in accordance with the Lease for repairs or the restoration of the Property or to obtain development rights or the release of restrictions that will inure to the benefit of future owners or occupants of the Property. Until Escrowed Proceeds are paid to NAI pursuant to Paragraph 10 of the Lease, transferred to a purchaser under the Purchase Agreement as therein provided or applied as a Qualified Prepayment or as otherwise described in the preceding sentence, BNPPLC will keep the same deposited in one or more interest bearing accounts, and all interest earned on such account will be added to and made a part of Escrowed Proceeds.

“**Established Misconduct**” of a Person means, and is limited to:

(1) if the Person is bound by the Operative Documents or the Participation Agreement, conduct of such Person that constitutes a breach by it of the express provisions of the Operative Documents or the Participation Agreement, as applicable, and that continues beyond any period for cure provided therein, as determined in or as a necessary element of a final judgment rendered against such Person by a court with jurisdiction to make such determination, and

(2) conduct of such Person or its Affiliates that has been determined to constitute willful misconduct or Active Negligence in or as a necessary element of a final judgment rendered against such Person by a court with jurisdiction to make such determination.

In no event, however, will Established Misconduct include actions of any Person undertaken in good faith to mitigate Losses that such Person may suffer because of a breach or repudiation by NAI of any of the Operative Documents. Further, negligence other than Active Negligence will not in any event constitute Established Misconduct. For purposes of this definition, “conduct of a Person” will consist of (1) the conduct of any employee of that Person to the extent (and only to the extent) that the employee is acting within the scope of his employment by that Person, and (2) the conduct of an agent of that Person (such as an independent environmental consultant engaged by that Person), but only to the extent that the agent is (a) acting within the scope of the authority granted to him by such Person, and (b) neither NAI nor acting with the consent or approval of or at the request of or under the direction of NAI or NAI’s Affiliates, employees or agents. Established Misconduct of one Interested Party will not be attributed to a second Interested Party unless the second Interested Party is an Affiliate of the first, and it is understood that BNPPLC has not been authorized, and nothing in the Participation Agreement will be construed as authorizing BNPPLC, to act as an “agent” for any Participant as the term is used in this definition.

“**Eurocurrency Liabilities**” has the meaning indicated in Regulation D of the Board of Governors of the Federal Reserve System, as in effect from time to time.

“**Eurodollar Rate Reserve Percentage**” means, for purposes of determining the Effective Rate for any Base Rent Period, the reserve percentage applicable two Business Days before the first day of such Base Rent Period under regulations issued from time to time by the Board of Governors of the Federal Reserve System (or any successor) for determining the maximum reserve requirement (including any emergency, supplemental or other marginal reserve requirement) for BNPPPLC’s Parent with respect to liabilities or deposits consisting of or including Eurocurrency Liabilities (or with respect to any other category or liabilities by reference to which LIBOR is determined) having a term comparable to such Base Rent Period.

“**Event of Default**” means any of the following:

(A) NAI fails to pay when due any installment of Base Rent or Administrative Fees required by the Lease, and such failure continues for three Business Days after NAI is notified in writing thereof.

(B) NAI fails to pay the full amount of any Supplemental Payment as provided in the Purchase Agreement on the Designated Sale Date.

(C) NAI fails to pay when first due any amount required by the Operative Documents (other than Base Rent or Administrative Fees required as provided in the Lease or any Supplemental Payment required as provided in the Purchase Agreement) and such failure continues for ten Business Days after NAI is notified thereof.

(D) NAI fails to cause any representation or warranty of NAI contained in any of the Operative Documents that was false or misleading in any material respect when made to be made true and not misleading (other than as described in the other clauses of this definition), or NAI fails to comply with any provision of the Operative Documents (other than as described in the other clauses of this definition), and in either case does not cure such failure prior to the earlier of (A) thirty days after notice thereof is given to NAI or (B) the date any writ or order is issued for the levy or sale of any property owned by BNPPPLC (including the Property) or any criminal prosecution is instituted or overtly threatened against BNPPPLC or any of its directors, officers or employees because of such failure; provided, however, that so long as no such writ or order is issued and no such criminal prosecution is instituted or overtly threatened, the period within which such failure may be cured by NAI will be extended for a further period (not to exceed an additional one hundred twenty days) as is necessary for the curing thereof with diligence, if (but only if) (x) such failure is susceptible of cure but cannot with reasonable diligence be cured within such thirty day period, (y) NAI promptly commences to cure such failure and thereafter continuously prosecutes the curing thereof with reasonable diligence and (z) the extension of the period for cure will not, in any event, cause the period for cure to extend to or beyond the Designated Sale Date.

(E) NAI abandons any material part of the Property.

(F) NAI or any Subsidiary of NAI fails to pay any principal of or premium or interest on any of its Indebtedness which is outstanding in a principal amount of at least \$25,000,000 when the same becomes due and payable (whether by scheduled maturity, required prepayment, acceleration, demand or otherwise), and such failure continues after the applicable grace period, if any, specified in the agreement or instrument relating to such Indebtedness; or any other event occurs or condition exists under any agreement or instrument relating to any such Indebtedness and continues after the applicable grace period, if any, specified in such agreement or instrument, if the effect of such event or condition is to accelerate the maturity of such Indebtedness; or any such Indebtedness is declared by the creditor to be due and payable, or required to be prepaid (other than by a regularly scheduled required prepayment), redeemed, purchased or defeased, or an offer to prepay, redeem, purchase or defease such Indebtedness is required to be made, in each case prior to the stated maturity thereof.

(G) NAI or any Subsidiary of NAI is generally not paying its debts as such debts become due, or admits in writing its inability to pay its debts generally, or makes a general assignment for the benefit of creditors; or any proceeding is instituted by or against NAI or any Subsidiary of NAI seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee, custodian or other similar official for it or for any substantial part of its property and, in the case of any such proceeding instituted against it (but not instituted by it), either such proceeding remains undismissed or unstayed for a period of sixty consecutive days, or any of the actions sought in such proceeding (including the entry of an order for relief against, or the appointment of a receiver, trustee, custodian or other similar official for, it or for any substantial part of its property) occurs; or NAI or any Subsidiary of NAI takes any corporate action to authorize any of the actions set forth above in this clause.

(H) Any order, judgment or decree is entered in any proceedings against NAI or any of NAI's Subsidiaries decreeing its dissolution and such order, judgment or decree remains unstayed and in effect for more than sixty days.

(I) Any order, judgment or decree is entered in any proceedings against NAI or any of NAI's Subsidiaries decreeing a divestiture of any of assets that represent a substantial part, or the divestiture of the stock of any of NAI's Subsidiaries whose assets represent a substantial part, of the total assets of NAI and its Subsidiaries (determined on a consolidated basis in accordance with GAAP) or which requires the divestiture of assets, or stock of any of NAI's Subsidiaries, which have contributed a substantial part of the net income of NAI and its Subsidiaries (determined on a consolidated basis in accordance with GAAP) for any of the three fiscal years then most recently ended, and such order, judgment or decree remains unstayed and in effect for more than sixty days.

(J) A judgment or order for the payment of money in an amount (not covered by



insurance) which exceeds \$25,000,000 is rendered against NAI or any of NAI's Subsidiaries and either (i) enforcement proceedings is commenced by any creditor upon such judgment, or (ii) within thirty days after the entry thereof, such judgment or order is not discharged or execution thereof stayed pending appeal, or within thirty days after the expiration of any such stay, such judgment is not discharged.

(K) Any ERISA Termination Event occurs that BNPPLC determines in good faith would constitute grounds for a termination of any Plan or for the appointment by the appropriate United States district court of a trustee to administer any Plan and such ERISA Termination Event is continuing thirty days after notice to such effect is given to NAI by BNPPLC, or any Plan is terminated, or a trustee is appointed by a United States district court to administer any Plan, or the Pension Benefit Guaranty Corporation institutes proceedings to terminate any Plan or to appoint a trustee to administer any Plan.

(L) NAI enters into any transaction which would cause any of the Operative Documents or any other document executed in connection herewith (or any exercise of BNPPLC's rights hereunder or thereunder) to constitute a non-exempt prohibited transaction under ERISA.

(M) NAI fails to comply with the financial covenants set forth in subparagraph 3(C) of the Closing Certificate.

(N) Any Change in Control (as defined in subparagraph 3(A) of the Closing Certificate) shall occur.

**"Excluded Taxes"** means:

(A) taxes upon or measured by *net* income to the extent such taxes are payable in respect of Base Rent or other Qualified Income Payments;

(B) transfer or change of ownership taxes assessed because of BNPPLC's transfer or conveyance to any third party of any rights or interest in the Improvements Lease, the Purchase Agreement or the Property (other than any such taxes assessed because of any Permitted Transfer under clauses (1), (4) or (5) of the definition of Permitted Transfer in this Agreement);

(C) federal, state and local income taxes upon any amounts paid as reimbursement for or to satisfy Losses incurred by BNPPLC or any Participant to the extent, but only to the extent, such taxes are offset by a corresponding reduction of BNPPLC's or the applicable Participant's income taxes which are not otherwise subject to reimbursement or indemnification by NAI because of BNPPLC's or such Participant's deduction of the reimbursed Losses from its taxable income or because of any tax credits attributable thereto;

(D) income taxes that are (i) payable by BNPPLC in respect of any Qualified

Prepayment or any net sales proceeds paid to BNPPLC upon a sale of the Property because of Forced Recharacterization as described in subparagraph 4(C)(3) of the Lease, and (ii) offset in the same taxable period by a reduction in the taxes of BNPPLC which are not otherwise subject to reimbursement or indemnification by NAI resulting from depreciation deductions or other tax benefits available to BNPPLC only because of the refusal of the tax authorities to treat the Lease and other Operative Documents as a financing arrangement;

(E) any withholding taxes that subparagraph 13(A) of the Lease excuses NAI from paying or requires BNPPLC to pay; and

(F) any franchise taxes payable by BNPPLC, but only to the extent that such franchise taxes would be payable by BNPPLC even if the transactions contemplated by the Lease and the other Operative Documents were characterized for tax purposes as a mere financing arrangement and not as a lease or sale.

It is understood that if tax rates used to calculate income taxes which constitute Excluded Taxes under clause (1) of this definition are increased, the resulting increase will not be subject to reimbursement or indemnification by NAI. If, however, a change in Applicable Laws after the Effective Date, as applied to the transactions contemplated by the Operative Documents on a stand-alone basis, results in an increase in such income taxes for any reason other than an increase in the applicable tax rates (*e.g.*, a disallowance of deductions that would otherwise be available against payments described in clause (1) of this definition), then for purposes of the Operative Documents, the term “Excluded Taxes” will not include the actual increase in such taxes attributable to the change. Accordingly, BNPPLC or any Participant may recover any such net increase from NAI pursuant to subparagraph 5(B) of the Lease.

It is also understood that nothing in this definition of “Excluded Taxes” will prevent any Original Indemnity Payment (as defined in subparagraph 5(C)(1) of the Lease) from being paid on an After Tax Basis.

“**Fed Funds Rate**” means, for any period, a fluctuating interest rate (expressed as a per annum rate and rounded upwards, if necessary, to the next 1/16 of 1%) equal on each day during such period to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published for such day (or, if such day is not a Business Day, for the next preceding Business Day) by the Federal Reserve Bank of New York, or, if such rates are not so published for any day which is a Business Day, the average of the quotations for each day during such period on such transactions received by BNPPLC’s Parent from three Federal funds brokers of recognized standing selected by BNPPLC’s Parent.

“**Fixed Rate**” means the fixed rate of interest established by BNPPLC’s execution of an Interest Rate Swap as described in subparagraph 3(B)(4) of the Lease.

“**Fixed Rate Lock**” has the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

“**Fixed Rate Lock Date**” has the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

“**Fixed Rate Lock Termination**” means any termination in whole or in part of the Fixed Rate Swap as described in the first and second sentences of subparagraph 3(C) of the Lease.

“**Fixed Rate Lock Termination Date**” means the date upon which a Fixed Rate Lock Termination is effective. In the case of a Fixed Rate Lock Termination that results from BNPPLC’s receipt of a Qualified Prepayment, the date such Qualified Prepayment is applied to reduce the Lease Balance will constitute the Fixed Rate Lock Termination Date. In the case of any Fixed Rate Lock Termination resulting from an acceleration of the Designated Sale Date as provided in clauses (2) or (3) the definition thereof in this Agreement, the Fixed Rate Lock Termination Date will constitute the Designated Sale Date.

“**Fixed Rate Lock Notice**” has the meaning assigned to it in subparagraph 3(B)(4) of the Lease, which includes a reference to the form attached as Annex 2.

“**Fixed Rate Loss**” means an amount reasonably determined in good faith by the Floating Rate Payor to be its total losses and costs in connection with any Fixed Rate Lock Termination. Fixed Rate Loss will include any loss of bargain, cost of funding or, at the election of the Floating Rate Payor but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position. The Floating Rate Payor will be expected to determine the Fixed Rate Loss as of the date of the relevant Fixed Rate Lock Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. The Floating Rate Payor may (but need not) determine its Fixed Rate Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.

“**Fixed Rate Settlement Amount**” means, with respect to any Fixed Rate Lock Termination:

- (a) the Market Quotation for such Fixed Rate Lock Termination, if a Market Quotation can be determined and if (in the reasonable belief of the Floating Rate Payor as the party making the determination) determining a Market Quotation would produce a commercially reasonable result; or
- (b) the Fixed Rate Loss, if any, for such Fixed Rate Lock Termination if a Market Quotation cannot be determined or would not (in the reasonable belief of the Floating Rate Payor as the party making the determination) produce a commercially reasonable result.

“**Fixed Rate Swap**” has the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

“**Floating Rate Payor**” means BNP Paribas or any successor or assign of BNP Paribas under an Interest Rate Swap.

“**Fully Subordinated or Removable**” means, with respect to any Lien encumbering the Land or any appurtenant easement, that such Lien is, either by operation of Applicable Laws or by the express terms of documents which grant or create such Lien:

(1) fully subject and subordinate to all rights and property interests of BNPPLC under the Operative Documents; or

(2) subject to release and removal by BNPPLC or any subsequent owner of the Property at any time after a Designated Sale Date without any requirement that BNPPLC or the subsequent owner compensate the holder of such Lien or make any other significant payment in connection with such release and removal;

provided, however, a Lien will not qualify as Fully Subordinated or Removable under clause (2) preceding if it provides or includes a power of sale or other right or remedy in favor of the holder of such Lien which could result in a foreclosure sale or other forfeiture of BNPPLC’s rights or interests in the Property.

“**Funding Advances**” means all advances made by BNPPLC’s Parent or any Participant to or on behalf of BNPPLC to allow BNPPLC to make the Initial Advance or maintain its investment in the Property.

“**GAAP**” means generally accepted accounting principles in the United States of America as in effect from time to time, applied on a basis consistent with those used in the preparation of the financial statements referred to in subparagraph 2(A)(4) of the Closing Certificate (except for changes with which NAI’s independent public accountants concur).

“**Governmental Authority**” means (1) the United States, the state, the county, the municipality, and any other political subdivision in which the Land is located, and (2) any other nation, state or other political subdivision or agency or instrumentality thereof having or asserting jurisdiction over NAI or the Property.

“**Hazardous Substance**” means (i) any chemical, compound, material, mixture or substance that is now or hereafter defined or listed in, regulated under, or otherwise classified pursuant to, any Environmental Laws as a “hazardous substance,” “hazardous material,” “hazardous waste,” “extremely hazardous waste or substance,” “infectious waste,” “toxic substance,” “toxic pollutant,” or any other formulation intended to define, list or classify substances by reason of deleterious properties, including ignitability, corrosiveness, reactivity, carcinogenicity, toxicity or reproductive toxicity; (ii) petroleum, any fraction of petroleum,

natural gas, natural gas liquids, liquified natural gas, synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas), and ash produced by a resource recovery facility utilizing a municipal solid waste stream, and drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources; (iii) asbestos and any asbestos containing material; and (iv) any other material that, because of its quantity, concentration or physical or chemical characteristics, is the subject of regulation under Applicable Law or poses a significant present or potential hazard to human health or safety or to the environment if released into the workplace or the environment.

“**Hazardous Substance Activity**” means any actual, proposed or threatened use, storage, holding, release (including any spilling, leaking, leaching, pumping, pouring, emitting, emptying, dumping, disposing into the environment, and the continuing migration into or through soil, surface water, groundwater or any body of water), discharge, deposit, placement, generation, processing, construction, treatment, abatement, removal, disposal, disposition, handling or transportation of any Hazardous Substance from, under, in, into or on Land or the Property, including the movement or migration of any Hazardous Substance from surrounding property, surface water, groundwater or any body of water under, in, into or onto the Property and any resulting residual Hazardous Substance contamination in, on or under the Property. “**Hazardous Substance Activity**” also means any existence of Hazardous Substances on the Property that would cause the Property or the owner or operator thereof to be in violation of, or that would subject the Land or the Property to any remedial obligations under, any Environmental Laws, assuming disclosure to the applicable Governmental Authorities of all relevant facts, conditions and circumstances pertaining to the Property.

“**Improvements**” means any and all (1) buildings and other real property improvements previously or hereafter erected on the Land, and (2) equipment (*e.g.*, HVAC systems, elevators and plumbing fixtures) attached to the buildings or other real property improvements, the removal of which would cause structural or other material damage to the buildings or other real property improvements or would materially and adversely affect the value or use of the buildings or other real property improvements.

“**Indebtedness**” of any Person means (without duplication of any item) Liabilities of such Person in any of the following categories:

- (A) Liabilities for borrowed money;
- (B) Liabilities constituting an obligation to pay the deferred purchase price of property or services;
- (C) Liabilities evidenced by a bond, debenture, note or similar instrument;
- (D) Liabilities which (1) would under GAAP be shown on such Person’s balance sheet as a liability, and (2) are payable more than one year from the date of

creation thereof (other than reserves for taxes and reserves for contingent obligations);

(E) Liabilities constituting principal under leases capitalized in accordance with GAAP;

(F) Liabilities arising under conditional sales or other title retention agreements;

(G) Liabilities owing under direct or indirect guaranties of Liabilities of any other Person or otherwise constituting obligations to purchase or acquire or to otherwise protect or insure a creditor against loss in respect of Liabilities of any other Person (such as obligations under working capital maintenance agreements, agreements to keep-well, or agreements to purchase Liabilities, assets, goods, securities or services), but excluding endorsements in the ordinary course of business of negotiable instruments in the course of collection;

(H) Liabilities (for example, repurchase agreements, mandatorily redeemable preferred stock and sale/leaseback agreements) consisting of an obligation to purchase or redeem securities or other property, if such Liabilities arises out of or in connection with the sale or issuance of the same or similar securities or property;

(I) Liabilities with respect to letters of credit or applications or reimbursement agreements therefor;

(J) Liabilities with respect to payments received in consideration of oil, gas, or other commodities yet to be acquired or produced at the time of payment (including obligations under "take-or-pay" contracts to deliver gas in return for payments already received and the undischarged balance of any production payment created by such Person or for the creation of which such Person directly or indirectly received payment);

(K) Liabilities with respect to other obligations to deliver goods or services in consideration of advance payments therefor; or

(L) Liabilities under any "synthetic" or other lease of property or related documents (including a separate purchase agreement) which obligate such Person or any of its Affiliates (whether by purchasing or causing another Person to purchase any interest in the leased property or otherwise) to guarantee a minimum residual value of the leased property to the lessor.

For purposes of this definition, the amount of Liabilities described in the last clause of the preceding sentence with respect to any lease classified according to GAAP as an "operating lease," will equal the sum of (1) the present value of rentals and other minimum lease payments required in connection with such lease [calculated in accordance with SFAS 13 and other GAAP

relevant to the determination of the whether such lease must be accounted for as an operating lease or capital lease], plus (2) the fair value of the property covered by the lease; except that such amount will not exceed the price, as of the date a determination of Indebtedness is required hereunder, for which the lessee can purchase the leased property pursuant to any valid ongoing purchase option if, upon such a purchase, the lessee will be excused from paying rentals or other minimum lease payments that would otherwise accrue after the purchase.

Notwithstanding the foregoing, the “Indebtedness” of any Person will not include Liabilities that were incurred by such Person on ordinary trade terms to vendors, suppliers, or other Persons providing goods and services for use by such Person in the ordinary course of its business, unless and until such Liabilities are outstanding more than 90 days past the original invoice or billing date therefor.

“**Initial Advance**” means, collectively, all advances made by BNPPPLC’s Parent (directly or through one or more of its Affiliates) and by Participants to or on behalf of BNPPPLC on or prior to the Effective Date to cover the purchase price payable by BNPPPLC to the for its interest in the Land and Improvements and other Property, if any, and to cover the cost to BNPPPLC of certain Transaction Expenses and other amounts confirmed in the Closing Letter.

“**Interested Party**” means each of following Persons and their Affiliates: (1) BNPPPLC and its successors and permitted assigns as to the Property or any part thereof or any interest therein, (2) BNPPPLC’s Parent, and (3) the Participants and their successors and permitted assigns under the Participation Agreement; provided, however, none of the following Persons will constitute an Interested Party: (a) any Person to whom BNPPPLC may transfer an interest in the Property by a conveyance that is not a Permitted Transfer and others that cannot lawfully claim an interest in the Property except through or under a transfer by such a Person, (b) NAI and its Affiliates, (c) any Person claiming through or under a conveyance made by NAI after any purchase by NAI of BNPPPLC’s interest in the Property pursuant to the Purchase Agreement, or (d) any Applicable Purchaser designated by NAI under the Purchase Agreement who purchases the Property pursuant to a sale arranged by NAI and any Person that cannot lawfully claim an interest in the Property except through or under a conveyance from such an Applicable Purchaser.

“**Interest Rate Swap**” means an interest rate exchange transaction, entered into between BNPPPLC, as the fixed rate payor, and BNP Paribas, as the swap counterparty and floating rate payor, under the then most recent form of Master Agreement published by the International Swaps and Derivatives Association, Inc., as supplemented by the definitions and such schedules, annexes, exhibits and supplements as are agreed upon by the parties thereto, pursuant to which BNP Paribas agrees to pay monthly to BNPPPLC a floating rate of interest equal to LIBOR and BNPPPLC agrees to pay monthly to BNP Paribas a fixed rate of interest for a term that commences on the Fixed Rate Lock Date and ends on the last day of the scheduled Term of the Lease. The notional principal amount used for any such interest rate exchange transaction will equal the Lease Balance calculated as of the date such transaction is entered into.

“**Land**” means the land described in Exhibit A attached to the Closing Certificate, the Lease and the Purchase Agreement.

“**Lease**” means the Lease Agreement (Moffett Business Center) dated as of the Effective Date between BNPPPLC, as landlord, and NAI, as tenant, pursuant to which NAI has agreed to lease BNPPPLC’s interest in the Property, as such Lease Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Lease Balance**” as of any date means the amount equal to the sum of the Initial Advance, minus all funds actually received by BNPPPLC and applied as Qualified Prepayments on or prior to such date. Under no circumstances will any payment of Base Rent or other Qualified Income Payments reduce the Lease Balance.

“**Lease Termination Damages**” has the meaning indicated in subparagraph 15(A)(3)(c) of the Lease.

“**Liabilities**” means, as to any Person, all indebtedness, liabilities and obligations of such Person, whether matured or unmatured, liquidated or unliquidated, primary or secondary, direct or indirect, absolute, fixed or contingent, and whether or not required to be considered pursuant to GAAP.

“**LIBOR**” means, for purposes of determining the Effective Rate for any Base Rent Period, the per annum rate equal to:

(a) the offered rate for deposits in U.S. dollars as of approximately 11:00 a.m., London time, on the day that is two London Banking Days (hereinafter defined) prior to the day upon which such Base Rent Period begins (the “Reset Date”), as reported:

(1) on Reuters Screen LIBOR01 page (or any replacement page or pages on which London interbank rates of major banks for U.S. dollars are displayed) by the Reuters service; or

(2) on Moneyline Telerate Page 3750, British Bankers Association Interest Settlement Rates, or another news page selected by BNPPPLC’s Parent if the Reuters Screen LIBOR01 page is removed from the Reuters system or changed such that, in the opinion of BNPPPLC’s Parent, the interest rates shown on it no longer represent the same kind of interest rates as when the Operative Documents were executed; or

(b) if such offered rate is for any reason unavailable, the rate per annum determined by BNPPPLC’s Parent on the basis of rates offered for deposits in U.S. dollars by four major banks in the London interbank market selected by BNPPPLC’s Parent



("Reference Banks") at approximately 11:00 a.m., London time, on the day that is two London Banking Days preceding the Reset Date to prime banks in the London interbank market for a period corresponding as nearly as possible to the applicable Base Rent Period. ( If this clause (b) applies, BNPPLC's Parent will request the principal London office of each of the Reference Banks to provide a quotation of its rate. If at least two quotations are provided, "LIBOR" will be the arithmetic mean of the quotations. If, however, fewer than two quotations are provided, "LIBOR" will be the arithmetic mean of the rates quoted by major banks in New York selected by BNPPLC's Parent, at approximately 11:00 a.m., New York time, on the Reset Date for loans in U.S. dollars to leading U.S. banks for a period corresponding as nearly as possible to the applicable Base Rent Period.)

As used in this definition, "London Banking Day" means any day on which commercial banks are open for general business (including dealings in foreign exchange and foreign currency deposits) in London, England.

"**LIBOR Period Election**" means an election to have the Effective Rate for any Base Rent Period calculated by reference to LIBOR, rather than by reference to the ABR or the Fixed Rate, and to have such period extend for approximately one month, three months or six months. The first Base Rent Period will be subject to a LIBOR Period Election of one month; and, subject to the limitations and qualifications set forth in this definition, NAI may make any subsequent Base Rent Period subject to a LIBOR Period Election by a notice given to BNPPLC in the form attached as Annex 3 at least five Business Days prior to the commencement of such period. After a LIBOR Period Election becomes effective, it will remain in effect for all subsequent Base Rent Periods until a different election is made in accordance with the provisions of this definition and the definition of ABR Period Election above. (For purposes of the Lease a LIBOR Period Election for any Base Rent Period will also be considered the LIBOR Period Election in effect on the Effective Date or Base Rent Date upon which such Base Rent Period begins.) Notwithstanding the foregoing:

- No LIBOR Period Election will be effective that would cause a Base Rent Period to extend beyond the end of the scheduled Term or beyond a Fixed Rate Lock Date.
- No LIBOR Period Election will commence or continue during any period that begins on or after the Fixed Rate Lock Date applicable to a Fixed Rate Lock and that ends before or on the date such Fixed Rate Lock is terminated as provided in subparagraph 3(C) of the Lease.
- Changes in any ABR Period Election or LIBOR Period Election will become effective only upon the commencement of a new Base Rent Period.
- In the event BNPPLC determines that it would be unlawful (or any central bank

or governmental authority asserts that it would be unlawful) for BNPPLC, BNPPLC's Parent or any Participant to provide or maintain Funding Advances during a Base Rent Period if the Base Rent accrued during such period at a rate based upon LIBOR, NAI will be deemed to have made such Base Rent Period subject to an ABR Period Election, not a LIBOR Period Election.

- If for any reason (including BNPPLC's receipt of a notice from NAI purporting to make a LIBOR Period Election that is contrary to the foregoing provisions), BNPPLC is unable to determine with certainty whether a particular Base Rent Period is subject to a specific LIBOR Period Election of one month, three months or six months, or if any Event of Default has occurred and is continuing on the third Business Day preceding the commencement of a particular Base Rent Period, NAI will be deemed to have made an ABR Period Election for that particular Base Rent Period.

“**Lien**” means any mortgage, pledge, security interest, encumbrance, lien or charge of any kind (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature thereof, any agreement to sell receivables with recourse, and the filing of or agreement to give any financing statement under the Uniform Commercial Code of any jurisdiction).

“**Liens Removable by BNPPLC**” means, and is limited to, Liens encumbering the Property that are asserted (1) other than as contemplated in the Operative Documents, by BNPPLC itself or by BNPPLC's Parent, (2) by third parties lawfully claiming through or under BNPPLC (which for purposes of the Operative Documents will include any judgment liens established against the Property because of a judgment rendered against BNPPLC and will also include any liens established against the Property to secure past due Excluded Taxes), or (3) by third parties claiming under a deed or other instrument duly executed by BNPPLC; provided, however, Liens Removable by BNPPLC will not include (A) any Permitted Encumbrances (regardless of whether claimed through or under BNPPLC), (B) the Operative Documents or any other document executed by BNPPLC with the knowledge of (and without objection by) NAI or NAI's counsel contemporaneously with the execution and delivery of the Operative Documents, (C) Liens which are neither lawfully claimed through or under BNPPLC (as described above) nor claimed under a deed or other instrument duly executed by BNPPLC, (D) Liens claimed by NAI or claimed through or under a conveyance made by NAI, (E) Liens arising because of BNPPLC's compliance with Applicable Law, the Operative Documents, Permitted Encumbrances or any written request made by NAI, (F) Liens securing the payment of property taxes or other amounts assessed against the Property by any Governmental Authority, other than to secure the payment of past due Excluded Taxes or to secure damages caused by (and attributed by any applicable principles of comparative fault to) BNPPLC's own Established Misconduct, (G) Liens resulting from or arising in connection with any breach by NAI of the Operative Documents; or (H) Liens resulting from or arising in connection with any Permitted Transfer that occurs more than thirty days after any Designated Sale Date upon which, for any

reason, NAI or any Applicable Purchaser does not purchase BNPPLC's interest in the Property pursuant to the Purchase Agreement for a price (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

**"Local Impositions"** means all sales, excise, ad valorem, gross receipts, business, transfer, stamp, occupancy, rental and other taxes (other than taxes on net income and corporate franchise taxes), levies, fees, charges, surcharges, assessments, interest, additions to tax, or penalties imposed by the State of California or any agency or political subdivision thereof upon BNPPLC or any owner of the Property or any part of or interest in the Property because of (i) the Lease or other Operative Documents, (ii) the status of record title to the Property, (iii) the ownership, leasing, occupancy, sale or operation of the Property or any part thereof or interest therein, or (iv) the Permitted Encumbrances; excluding, however, Excluded Taxes. **"Local Impositions"** will include any real estate taxes imposed because of a change of use or ownership of the Property resulting from, or occurring on or prior to the date of, any sale by BNPPLC pursuant to the Purchase Agreement.

**"Losses"** means the following: any and all losses, liabilities, damages (whether actual, consequential, punitive or otherwise denominated), demands, claims, administrative or legal proceedings, actions, judgments, causes of action, assessments, fines, penalties, costs of settlement and other costs and expenses (including Attorneys' Fees and the fees of outside accountants and environmental consultants), of any and every kind or character, foreseeable and unforeseeable, liquidated and contingent, proximate and remote, known and unknown.

**"Market Quotation"** means, with respect to any Fixed Rate Lock Termination, an amount determined by the Floating Rate Payor on the basis of quotations from Reference Market-makers. Each quotation will be for an amount, if any, that would be paid by the Floating Rate Payor in consideration of an agreement between it and the quoting Reference Market-maker to enter into a transaction (the "Replacement Transaction") that would have the effect of preserving for the Floating Rate Payor the economic equivalent of any payment or delivery (whether the underlying obligation was absolute or contingent and assuming the satisfaction of each applicable condition precedent) that would, but for the occurrence of the relevant Fixed Rate Lock Termination, have been required under the Fixed Rate Swap. The Replacement Transaction would be subject to such documentation as such party and the Reference Market-maker may, in good faith, agree. The Floating Rate Payor (or its agent) will request each Reference Market-maker to provide its quotation to the extent reasonably practicable as of the same day and time (without regard to different time zones) on the effective date of or as soon as reasonably practicable after the relevant Fixed Rate Lock Termination. The date and time as of which those quotations are to be obtained will be selected in good faith by the Floating Rate Payor. If more than three quotations are provided, the Market Quotation will be the arithmetic mean of the quotations, without regard to the quotations having the highest and lowest values. If exactly three such quotations are provided, the Market Quotation will be the quotation remaining after disregarding the highest and lowest quotations. For this purpose, if more than one

quotation has the same highest value or lowest value, then one of such quotations will be disregarded. If fewer than three quotations are provided, it will be deemed that the Market Quotation in respect of such Fixed Rate Lock Termination cannot be determined.

“**Material Adverse Effect**” means a material adverse effect on (a) the assets, operations, financial condition or businesses of NAI, (b) the ability of NAI to perform any of its obligations under the Operative Documents, (c) the rights of or benefits available to BNPPLC under the Operative Documents, (d) the value, utility or useful life of the Property or (e) the priority, perfection or status of any of BNPPLC’s interests in the Property or in any of the Operative Documents.

“**Maximum Remarketing Obligation**” has the meaning indicated in the Purchase Agreement.

“**Multiemployer Plan**” means a multiemployer plan as defined in Section 3(37) of ERISA to which contributions have been made by NAI or any ERISA Affiliate during the preceding six years and which is covered by Title IV of ERISA.

“**NAI**” means Network Appliance, Inc., a Delaware corporation.

“**Operative Documents**” means the Closing Letter, the Closing Certificate, the Lease, the Purchase Agreement and this Common Definitions and Provisions Agreement.

“**Participant**” means any Person other than BNPPLC that from time to time, by executing the Participation Agreement or supplements as contemplated therein, becomes a party to the Participation Agreement and thereby agrees to participate in all or some of the risks and rewards to BNPPLC of the Operative Documents; provided, however, no such Person will qualify as a Participant for purposes of the Operative Documents unless (i) such Person is approved to be a Participant by NAI or (ii) such Person becomes a Participant when an Event of Default has occurred and is continuing. As of the Effective Date, NAI has approved only BANK OF AMERICA, N.A.; GOLDMAN SACHS CREDIT PARTNERS L.P.; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION; KEYBANK NATIONAL ASSOCIATION; MORGAN STANLEY BANK; SUMITOMO MITSUI BANKING CORPORATION; and WELLS FARGO BANK, N.A. (all of which are original parties to the Participation Agreement). BNPPLC may, however, from time to time request NAI’s approval for other prospective Participants. NAI will not unreasonably withhold or delay any approval required for any prospective Participant which is an Eligible Financial Institution. However, as to any prospective Participant that is not already a party to the Participation Agreement or an Eligible Financial Institution, NAI may withhold such approval in its sole discretion. Further, it is understood that if giving such approval will increase NAI’s liability for withholding taxes or other taxes not constituting Excluded Taxes under tax laws or regulations then in effect, NAI may reasonably refuse to give such approval.

“**Participation Agreement**” means the Participation Agreement (Moffett Business

Center) dated as of the Effective Date, pursuant to which BANK OF AMERICA, N.A.; GOLDMAN SACHS CREDIT PARTNERS L.P.; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION; KEYBANK NATIONAL ASSOCIATION; MORGAN STANLEY BANK; SUMITOMO MITSUI BANKING CORPORATION; and WELLS FARGO BANK, N.A. are agreeing with BNPPLC to participate in the risks and rewards to BNPPLC of the Operative Documents, as such Participation Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms. It is understood, however, that because the Participation Agreement will expressly make NAI a third party beneficiary of each Participant's obligations thereunder to make advances to BNPPLC in connection with Construction Advances under the Construction Agreement, NAI's consent will be required to any amendment of the Participation Agreement that limits or excuses such obligations.

**"Permitted Encumbrances"** means (i) the encumbrances and other matters affecting the Property that are set forth in Exhibit B attached to the Closing Certificate, (ii) any easement agreement or other document affecting title to the Property executed by BNPPLC at the request of or with the consent of NAI, (iii) any Liens securing the payment of Local Impositions which are not delinquent or claimed to be delinquent or which are being contested in accordance with subparagraph 5(A) of the Lease, and (iv) statutory liens, if any, in the nature of contractors', mechanics' or materialmen's liens for amounts not past due or claimed to be past due for more than thirty days or which are being contested in accordance with subparagraph 11(B) of the Lease, (v) Liens which are Fully Subordinated or Removable.

**"Permitted Hazardous Substance Use"** means the use, generation, storage and offsite disposal of Permitted Hazardous Substances in strict accordance with applicable Environmental Laws and with due care given the nature of the Hazardous Substances involved; provided, the scope and nature of such use, generation, storage and disposal will not:

(1) exceed that reasonably required for the use and operation of the Property for the purposes expressly permitted under subparagraph 2(A) of the Lease; or

(2) include any disposal, discharge or other release of Hazardous Substances from the Property in any manner that might allow such substances to reach surface water or groundwater, except (i) through a lawful and properly authorized discharge (A) to a publicly owned treatment works or (B) with rainwater or storm water runoff in accordance with Applicable Laws and any permits obtained by NAI that govern such runoff; or (ii) any such disposal, discharge or other release of Hazardous Substances for which no permits are required and which are not otherwise regulated under applicable Environmental Laws.

Further, notwithstanding anything to the contrary herein contained, Permitted Hazardous Substance Use will not include any use of the Property (including as a landfill, incinerator or other waste disposal facility) in a manner that requires a treatment, storage or disposal permit under the Resource Conservation and Recovery Act of 1976, as amended by the Used Oil

Recycling Act of 1980, the Solid Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984..

“**Permitted Hazardous Substances**” means Hazardous Substances used and reasonably required for the use and operation of the Property by NAI and its permitted subtenants and assigns for the purposes expressly permitted by subparagraph 2(A) of the Lease, in either case in strict compliance with all Environmental Laws and with due care given the nature of the Hazardous Substances involved. Without limiting the generality of the foregoing, Permitted Hazardous Substances will include usual and customary office and janitorial products.

“**Permitted Transfer**” means any one or more of the following:

- (1) the creation or conveyance by BNPPLC of rights and interests in favor of Participants pursuant to the Participation Agreement;
- (2) any lien, security interest or assignment covering the Property or the Rents which is granted by BNPPLC in favor of Participants or an agent appointed for them to secure their rights under the Participation Agreement, and any subsequent assignment or conveyance made to accomplish a foreclosure of such lien or security interest, provided that such lien, security interest or assignment and any such subsequent assignment or conveyance are all made expressly subject to the rights of NAI under the Operative Documents;
- (3) other than as described in the preceding clauses, any conveyance to BNPPLC’s Parent or to any Qualified Affiliate of BNPPLC of all or any interest in or rights with respect to the Property or any portion thereof, provided that NAI and Participants must be notified before any such conveyance to BNPPLC’s Parent or a Qualified Affiliate which will be recorded in the real property records of the county in which the Land is situated;
- (4) any assignment or conveyance by BNPPLC requested by NAI or required by any Permitted Encumbrance, by the Purchase Agreement or by Applicable Laws; or
- (5) any assignment or conveyance after a Designated Sale Date on which NAI does not purchase or cause an Applicable Purchaser to purchase BNPPLC’s interest in the Property and, if applicable, after the expiration of the thirty day cure period specified in Paragraph 3(A) of the Purchase Agreement.

“**Person**” means an individual, a corporation, a partnership, an unincorporated organization, an association, a joint stock company, a joint venture, a trust, an estate, a government or agency or political subdivision thereof or other entity, whether acting in an individual, fiduciary or other capacity.

“**Personal Property**” has the meaning indicated on page 2 of the Lease.

“**Plan**” means any employee benefit or other plan established or maintained, or to which contributions have been made, by NAI or any ERISA Affiliate during the preceding six years and which is covered by Title IV of ERISA, including any Multiemployer Plan.

“**Prime Rate**” means the prime interest rate or equivalent charged by BNPPPLC’s Parent in the United States of America as announced or published by BNPPPLC’s Parent from time to time, which need not be the lowest interest rate charged by BNPPPLC’s Parent. If for any reason BNPPPLC’s Parent does not announce or publish a prime rate or equivalent, the prime rate or equivalent announced or published by either CitiBank, N.A. or any New York branch or office of Credit Commercial de France as selected by BNPPPLC will be used to compute the rate describe in the preceding sentence. The prime rate or equivalent announced or published by such bank need not be the lowest rate charged by it. The Prime Rate may change from time to time after the Effective Date without notice to NAI as of the effective time of each change in rates described in this definition.

“**Prior Owner**” means AMB Property, L.P., a Delaware limited partnership, which is at the request and direction of NAI conveying the Property to BNPPPLC contemporaneously with the execution of the Operative Documents.

“**Property**” means the Personal Property and the Real Property, collectively.

“**Purchase Agreement**” means the Purchase Agreement (Moffett Business Center) dated as of the Effective Date between BNPPPLC and NAI, as such Purchase Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Purchase Option**” has the meaning indicated in the Purchase Agreement.

“**Qualified Affiliate**” means any Person that, like BNPPPLC, (i) is one hundred percent (100%) owned, directly or indirectly, by BNPPPLC’s Parent or any successor of such bank, (ii) can make (and has in writing made) the same representations to NAI that BNPPPLC has made in subparagraphs 4(A) and 4(B) of the Closing Certificate (except that it need not be incorporated in or qualified to do business in Delaware), and (iii) is an entity organized under the laws of the State of Delaware or another state within the United States of America.

“**Qualified Income Payments**” means: (A) Base Rent; (B) payments of the following made to BNPPPLC to satisfy the Lease: the Upfront Fees, the Arrangement Fee, Administrative Fees, Increased Cost Charges and Capital Adequacy Charges; (C) any interest paid to BNPPPLC or any Participant pursuant to subparagraph 3(H) of the Lease; and (D) payments by BNPPPLC to Participants required under the Participation Agreements because of BNPPPLC’s receipt of payments described in the preceding clauses (A) through (C).

**“Qualified Prepayments”** means any payments received by BNPPPLC from time to time during the Term (1) under any property insurance policy as a result of damage to the Property, (2) as compensation for any restriction placed upon the use or development of the Property or for the condemnation of the Property or any portion thereof, (3) because of any judgment, decree or award for injury or damage to the Property, or (4) under any title insurance policy or otherwise as a result of any title defect or claimed title defect with respect to the Property. For the purposes of determining the amount of any Qualified Prepayment and other amounts dependent upon Qualified Prepayments (*e.g.*, the Lease Balance and the Break Even Price):

(i) there will be deducted all expenses and costs of every kind, type and nature (including taxes and Attorneys’ Fees) incurred by BNPPPLC with respect to the collection or application of such payments;

(ii) Qualified Prepayments will not include any payment to BNPPPLC by a Participant or an Affiliate of BNPPPLC that is made to compensate BNPPPLC for the Participant’s or Affiliate’s share of any Losses BNPPPLC may incur as a result of any of the events described in the preceding clauses (1) through (4);

(iii) Qualified Prepayments will not include any payments received by BNPPPLC that BNPPPLC has paid or is obligated to pay to NAI for the repair, restoration or replacement of the Property or that BNPPPLC is holding as Escrowed Proceeds in accordance with the Paragraph 10 of the Lease or other provisions of the Operative Documents;

(iv) payments described in the preceding clauses (i) through (iii) will be considered as Escrowed Proceeds, not Qualified Prepayments, until they are actually applied as Qualified Prepayments by BNPPPLC as provided in Paragraph 10 of the Lease; and

(v) in no event will interest that accrues under the Purchase Agreement on a past due Supplemental Payment constitute a Qualified Prepayment.

For purposes of computing the total Qualified Prepayments (and other amounts dependent upon Qualified Prepayments, such as the Lease Balance and the Break Even Price) paid to or received by BNPPPLC as of any date, payments described in the preceding clauses (1) through (4) will be considered as Escrowed Proceeds, not Qualified Prepayments, until they are actually applied as Qualified Prepayments by BNPPPLC as provided in the Paragraph 10 of the Lease.

**“Real Property”** has the meaning indicated on page 2 of the Lease.

**“Remedial Work”** means any investigation, monitoring, clean-up, containment, remediation, removal, payment of response costs, or restoration work and the preparation and implementation of any closure or other required remedial plans that any governmental agency or



political subdivision requires or approves (or could reasonably be expected to require if it was aware of all relevant circumstances concerning the Property), whether by judicial order or otherwise, because of the presence of or suspected presence of Hazardous Substances in, on, under or about the Property or because of any prior Hazardous Substance Activity.

“**Rent**” means the Base Rent and all Additional Rent.

“**Responsible Financial Officer**” means the chief financial officer, the controller, the treasurer or the assistant treasurer of NAI.

“**Rolling Four Quarters Period**” has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

“**Spread**” means, for any period beginning on and including the Effective Date or a Base Rent Date and ending on but not including the next Base Rent Date, the amount established as of the date (in this definition, the “**Spread Test Date**”) that is two Business Days prior to such period by reference to the pricing grid below, based upon the ratio calculated by dividing (1) Consolidated EBITDA for the then latest Rolling Four Quarters Period that ended prior to (and for which NAI has reported earnings as necessary to compute Consolidated EBITDA) into (2) the Consolidated Debt for Borrowed Money as of the end of such Rolling Four Quarters Period. In each case, the Spread will be established at the Level in the pricing grid below which corresponds to such ratio; provided, that:

(a) promptly after earnings are reported by NAI for the latest quarter in any Rolling Four Quarters Period, NAI must notify BNPPLC of any resulting change in the Spread under this definition, and no reduction in the Spread from one period to the next will be effective for purposes of the Operative Documents unless, prior to the Spread Test Date for the next period, NAI shall have provided BNPPLC with a written notice setting forth and certifying the calculation under this definition that justifies the reduction;

(b) if Carrying Costs are understated or Base Rent is underpaid for any Period because of any misstatement, subsequently discovered, of Consolidated EBITDA or Consolidated Debt for Borrowed Money used for purposes of the pricing grid below, BNPPLC will be entitled to collect from NAI all additional payments that would have been expected under the Operative Documents but for the misstatement, together with interest on each such additional payment computed at the Default Rate from the date it would have been expected to the date it is actually paid; and

(c) notwithstanding anything to the contrary in this definition, on any date when an Event of Default has occurred and is continuing, the Spread will equal the Default

Rate less the Effective Rate.

Levels	Ratio of Consolidated Debt for Borrowed Money to Consolidated EBITDA	Spread
Level I	less than 0.5	35.0 basis points
Level II	greater than or equal to 0.5, but less than 1.0	45.0 basis points
Level III	greater than or equal to 1.0, but less than 1.5	55.0 basis points
Level IV	greater than or equal to 1.5, but less than 2.0	70.0 basis points
Level IV	greater than or equal to 2.0	85.0 basis points

All determinations of the Spread by BNPPLC will, in the absence of clear and demonstrable error, be binding and conclusive for purposes of the Operative Documents. Further BNPPLC may, but will not be required, to rely on the determination of the Spread set forth in any notice delivered by NAI as described above in clause (a) of this definition.

“**Subsidiary**” means, with respect to any Person, any Affiliate of which at least a majority of the securities or other ownership interests having ordinary voting power then exercisable for the election of directors or other persons performing similar functions are at the time owned directly or indirectly by such Person.

“**Supplemental Payment**” has the meaning indicated in the Purchase Agreement.

“**Supplemental Payment Obligation**” has the meaning indicated in the Purchase Agreement.

“**Tangible Personal Property**” has the meaning indicated on page 2 of the Lease.

“**Term**” has the meaning indicated in subparagraph 1(A) of the Lease.

“**Transaction Expenses**” means costs incurred in connection with the preparation and negotiation of the Operative Documents and related documents and the consummation of the transactions contemplated therein.

“**Unfunded Benefit Liabilities**” means, with respect to any Plan, the amount (if any) by which the present value of all benefit liabilities (within the meaning of Section 4001(a)(16) of ERISA) under the Plan exceeds the market value of all Plan assets allocable to such benefit liabilities, as determined on the most recent valuation date of the Plan and in accordance with the provisions of ERISA for calculating the potential liability of NAI or any ERISA Affiliate under Title IV of ERISA.

“**Upfront Fees**” has the meaning indicated in subparagraph 3(E) of the Lease.

## ARTICLE II — SHARED PROVISIONS

**The following provisions will apply to and govern the construction of this Agreement and the other Operative Documents (including attachments), except to the extent (if any) a clear, contrary intent is expressed herein or therein:**

1. **Notices.** Any provision of (1) any of the Operative Documents, (2) any other document which references this provision for purposes of establishing notice requirements (in this provision, a “**Related Document**”), or (3) any Applicable Law, that makes reference to any required payment from NAI to BNPPPLC or that makes reference to the sending, mailing or delivery of any notice or demand will be subject to the following provisions (except that any notice given by BNPPPLC to satisfy any statutory requirement, including any notice of eviction or foreclosure, will be considered sufficient if it satisfies the statutory requirements applicable to the notice, regardless of whether the notice or payment satisfies the following provisions):

(i) All Rent and other amounts required to be paid by NAI to BNPPPLC must be paid to BNPPPLC in immediately available funds by wire transfer to:

Federal Reserve Bank of New York  
BNP Paribas — New York Branch  
Favor: BNP Paribas Leasing Corporation  
ABA 026 007 689  
/AC/ 0200-517000-070-78  
Reference: Network Appliance, Inc./Building 9 Lease

or at such other place and in such other manner as BNPPPLC may designate in a notice to NAI.

(ii) All notices, demands, approvals, consents and other communications to be made under any Operative Document or Related Document to or by the parties thereto must, to be effective for purposes thereof, be in writing. Notices, demands and other communications required or permitted under any Operative Document or Related

Document must be given by any of the following means: (A) personal service (including local and overnight courier), with proof of delivery or attempted delivery retained; (B) electronic communication, whether by electronic mail or telecopying (if confirmed in writing sent by United States first class mail, return receipt requested); or (C) registered or certified first class mail, return receipt requested. Such addresses may be changed by notice to the other parties given in the same manner as provided above. Any notice or other communication sent pursuant to clause (A) or (B) hereof will be deemed received upon such personal service or upon dispatch by electronic means, and, if sent pursuant to clause (C) will be deemed received five days following deposit in the mail. Notices, demands and other communications required or permitted by any Related Document are to be sent to the addresses set forth therein; and notices, demands and other communications required or permitted by under any Operative Document are to be sent to the following addresses (or in the case of communications to Participants, at the addresses set forth in Schedule 1 to the Participation Agreement):

Address of BNPPLC:

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Address of NAI:

Network Appliance, Inc.  
7301 Kit Creek Road  
Research Triangle Park, NC 27709  
Attention: Ingemar Lanevi  
Telecopy: (919) 476-5750

With a copy to:

Network Appliance, Inc.  
495 East Java Drive  
Sunnyvale, California 94089  
Attention: Mr. Thom Bryant  
Telecopy: (408)-822-4463

However, any party to any Operative Document or Related Document may change its address above or in the Related Document, as applicable, by written notice to the other parties to such Operative Document or Related Document given in accordance with this

provision.

2. **Severability.** If any term or provision of any Operative Document or the application thereof is to any extent held by a court of competent jurisdiction to be invalid and unenforceable, the remainder of such document, or the application of such term or provision other than to the extent to which it is invalid or unenforceable, will not be affected thereby.

3. **No Merger.** There will be no merger of the Lease or of the leasehold estate created by the Lease or of the mortgage and security interest granted in subparagraph 4(C)(1) of the Lease with any other interest in the Property by reason of the fact that the same person may acquire or hold, directly or indirectly, the Lease or the leasehold estate created thereby or such mortgage and security interest and any other interest in the Property, unless all Persons with an interest in the Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred. There will be no merger of the Purchase Agreement or of the purchase options or obligations created by the Purchase Agreement with any other interest in the Property by reason of the fact that the same person may acquire or hold, directly or indirectly, the rights and options granted by the Purchase Agreement and any other interest in the Property, unless all Persons with an interest in the Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred.

4. **No Implied Waiver.** The failure of any party to any Operative Document to insist at any time upon the strict performance of any covenant or agreement therein or to exercise any option, right, power or remedy contained therein will not be construed as a waiver or a relinquishment thereof for the future. The waiver of or redress for any breach of any Operative Document by any party thereto will not prevent a similar subsequent act from constituting a violation. Any express waiver of any provision of any Operative Document will affect only the term or condition specified in such waiver and only for the time and in the manner specifically stated therein. No waiver by any party to any Operative Document of any provision therein will be deemed to have been made unless expressed in writing and signed by the party to be bound by the waiver. A receipt by any party to any Operative Document of any payment thereunder (including the receipt by BNPPLC of any Rent paid under the Lease) with knowledge of the breach by another party of any covenant or agreement contained in that or any other Operative Document will not be deemed a waiver of such breach.

5. **Entire and Only Agreements.** The Operative Documents supersede any prior negotiations and agreements between BNPPLC and NAI concerning the Property, and no amendment or modification of any Operative Document will be binding or valid unless expressed in a writing executed by all parties to such Operative Document.

6. **Binding Effect.** Except to the extent, if any, expressly provided to the contrary in any Operative Document with respect to assignments thereof, all of the covenants, agreements, terms and conditions to be observed and performed by the parties to the Operative Documents will be applicable to and binding upon their respective successors and, to the extent

assignment is permitted thereunder, their respective assigns.

7. **Time is of the Essence.** Time is of the essence as to all obligations created by the Operative Documents and as to all notices expressly required by the Operative Documents.

8. **Governing Law.** Each Operative Document will be governed by and construed in accordance with the laws of the State of California without regard to conflict or choice of laws principles that might require the application of the laws of another jurisdiction.

9. **Paragraph Headings.** The paragraph and section headings contained in the Operative Documents are for convenience only and will in no way enlarge or limit the scope or meaning of the various and several provisions thereof.

10. **Negotiated Documents.** All parties to each Operative Document and their counsel have reviewed and revised or requested revisions to such Operative Document, and the usual rule of construction that any ambiguities are to be resolved against the drafting party will not apply to the construction or interpretation of any Operative Documents or any amendments thereof.

11. **Terms Not Expressly Defined in an Operative Document.** As used in any Operative Document, a capitalized term that is not defined therein or in this Agreement, but is defined in another Operative Document, will have the meaning ascribed to it in the other Operative Document.

12. **Other Terms and References.** Words of any gender used in each Operative Document will be held and construed to include any other gender, and words in the singular number will be held to include the plural and vice versa, unless the context otherwise requires. References in any Operative Document to Paragraphs, subparagraphs, Sections, subsections or other subdivisions refer to the corresponding Paragraphs, subparagraphs, Sections, subsections or subdivisions of that Operative Document, unless specific reference is made to another document or instrument. References in any Operative Document to any Schedule or Exhibit refer to the corresponding Schedule or Exhibit attached to that Operative Document, which are made a part thereof by such reference. All capitalized terms used in each Operative Document which refer to other documents will be deemed to refer to such other documents as they may be renewed, extended, supplemented, amended or otherwise modified from time to time, provided such documents are not renewed, extended or modified in breach of any provision contained in the Operative Documents or, in the case of any other document to which BNPPCL or NAI is a party or intended beneficiary, without its consent. All accounting terms used but not specifically defined in any Operative Document will be construed in accordance with GAAP. The words "this [Agreement]", "herein", "hereof", "hereby", "hereunder" and words of similar import when used in each Operative Document refer to that Operative Document as a whole and not to any particular subdivision unless expressly so limited. The phrases "this Paragraph", "this subparagraph", "this Section", "this subsection" and similar phrases used in any Operative

Document refer only to the Paragraph, subparagraph, Section, subsection or other subdivision described in which the phrase occurs. As used in the Operative Documents the word “or” is not exclusive, and the words “include”, “including” and similar terms will be construed as if followed by “without limitation to”. The rule of *ejusdem generis* will not be applied to limit the generality of a term in any of the Operative Documents when followed by specific examples. When used to qualify any representation or warranty made by a Person, the phrases “to the knowledge of [such Person]” or “to the best knowledge of [such Person]” are intended to mean only that such Person does not have knowledge of facts or circumstances which make the representation or warranty false or misleading in some material respect; such phrases are not intended to suggest that the Person does indeed know the representation or warranty is true.

13. **Execution in Counterparts.** To facilitate execution, each of the Operative Documents may be executed in multiple identical counterparts. It will not be necessary that the signature of, or on behalf of, each party, or that the signature of all persons required to bind any party, appear on each counterpart. All counterparts, taken together, will collectively constitute a single instrument. But it will not be necessary in making proof of any of the Operative Documents to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the parties to such document. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page. Signing and sending a counterpart (or a signature page detached from the counterpart) by facsimile or other electronic means to another party will have the same legal effect as signing and delivering an original counterpart to the other party. A copy (including a copy produced by facsimile or other electronic means) of any signature page that has been signed by or on behalf of a party to any of the Operative Documents will be as effective as the original signature page for the purpose of proving such party’s agreement to be bound.

14. **Not a Partnership, Etc.** Nothing in any Operative Document is intended to create any partnership, joint venture, or other joint enterprise between NAI and BNPPPLC or any other Interested Party.

15. **No Fiduciary Relationship Intended.** Neither the execution of the Operative Documents or other documents referenced in this Agreement nor the administration thereof by BNPPPLC will create any fiduciary obligations of BNPPPLC (or any other Interested Party) to NAI. Moreover, BNPPPLC and NAI disclaim any intent to create any fiduciary or special relationship between themselves (or on the part of any other Interested Party) under or by reason of the Operative Documents or the transactions described therein or any other documents or agreements referenced therein.

[The signature pages follow.]

IN WITNESS WHEREOF, this Common Definitions and Provisions Agreement (Moffett Business Center) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

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**Common Definitions and Provisions Agreement (Moffett Business Center) — Signature Page**

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[Continuation of signature pages for Common Definitions and Provisions Agreement (Moffett Business Center) dated as of November 29, 2007]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

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**Common Definitions and Provisions Agreement (Moffett Business Center) — Signature Page**

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Annex 1

**Notice of ABR Period Election**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (Moffett Business Center) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc. This letter constitutes notice of our election to make the first Base Rent Period beginning on or after \_\_\_\_\_, 20\_\_ subject to an ***ABR Period Election***.

We understand that until a different election becomes effective as provided in definitions of "ABR Period Election" and "LIBOR Period Election" in the Common Definitions and Provisions Agreement (Moffett Business Center), all subsequent Base Rent Periods will also be subject to an ABR Period Election.

**NOTE: YOU ARE ENTITLED TO DISREGARD THIS NOTICE IF THE DATE SPECIFIED ABOVE CONCERNING THE COMMENCEMENT OF THE ABR PERIOD ELECTION IS LESS THAN FIVE BUSINESS DAYS AFTER YOUR RECEIPT OF THIS NOTICE. HOWEVER, WE ASK THAT YOU NOTIFY US IMMEDIATELY IF FOR ANY REASON YOU BELIEVE THIS NOTICE IS DEFECTIVE.**

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]

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Annex 2

**Fixed Rate Lock Notice**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (Moffett Business Center) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. By this letter, which is given pursuant to subparagraph 3(B)(4) of the Lease, NAI requests that BNPPLC promptly establish a Fixed Rate for a notional amount equal to the Lease Balance as of the date of this letter for use in the calculation of the Effective Rate for all Base Rent Periods commencing on or after the following Fixed Rate Lock Date: \_\_\_\_\_, 20\_\_.

As contemplated in the conditions set forth in subparagraph 3(B)(4) of the Lease, such Fixed Rate Lock Date does not fall prior to the end of any Base Rent Period which has commenced or will commence before BNPPLC receives this notice; and NAI expects BNPPLC to receive this notice more than ten days prior to such Fixed Rate Lock Date.

In an earlier phone conversation today between a representative of NAI and \_\_\_\_\_ at the New York Branch of BNP Paribas, NAI requested an estimate from BNP Paribas of the Fixed Rate that would be established by BNPPLC and BNP Paribas entering into an Interest Rate Swap. The estimate provided by telephone was: \_\_\_\_\_ percent (\_\_\_\_%) per annum.

By this letter, NAI confirms that it will accept such a rate or any lower rate as the Fixed Rate for purposes of the Lease.

**NOTE: BNPPLC will be entitled to disregard this notice if the conditions to a Fixed Rate Lock, as specified in subparagraph 3(B)(4) of the Lease, have not been satisfied. However, NAI requests that BNPPLC notify NAI immediately if for any reason BNPPLC believes this notice will not be effective.**

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**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]

Annex 3

**Notice of LIBOR Period Election**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (Moffett Business Center) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. This letter constitutes notice of our election to make the first Base Rent Period beginning on or after \_\_\_\_\_, 20\_\_ subject to a **LIBOR Period Election** of \_\_\_\_\_ month(s).

We understand that until a different election becomes effective as provided in definitions of "ABR Period Election" and "LIBOR Period Election" in the Common Definitions and Provisions Agreement (Moffett Business Center), all subsequent Base Rent Periods will also be subject to the same LIBOR Period Election.

**NOTE: YOU ARE ENTITLED TO DISREGARD THIS NOTICE IF THE NUMBER OF MONTHS SPECIFIED ABOVE IS NOT A PERMITTED NUMBER UNDER THE DEFINITION OF "LIBOR PERIOD ELECTION" IN THE COMMON DEFINITIONS AND PROVISIONS AGREEMENT (MOFFETT BUSINESS CENTER), OR IF THE DATE SPECIFIED ABOVE CONCERNING THE COMMENCEMENT OF THE LIBOR PERIOD ELECTION IS LESS THAN FIVE BUSINESS DAYS AFTER YOUR RECEIPT OF THIS NOTICE. HOWEVER, WE ASK THAT YOU NOTIFY US IMMEDIATELY IF FOR ANY REASON YOU BELIEVE THIS NOTICE IS DEFECTIVE.**

NETWORK APPLIANCE, INC., a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]

---

“**Personal Property**” has the meaning indicated on page 2 of the Lease.

“**Plan**” means any employee benefit or other plan established or maintained, or to which contributions have been made, by NAI or any ERISA Affiliate during the preceding six years and which is covered by Title IV of ERISA, including any Multiemployer Plan.

“**Prime Rate**” means the prime interest rate or equivalent charged by BNPPPLC’s Parent in the United States of America as announced or published by BNPPPLC’s Parent from time to time, which need not be the lowest interest rate charged by BNPPPLC’s Parent. If for any reason BNPPPLC’s Parent does not announce or publish a prime rate or equivalent, the prime rate or equivalent announced or published by either CitiBank, N.A. or any New York branch or office of Credit Commercial de France as selected by BNPPPLC will be used to compute the rate describe in the preceding sentence. The prime rate or equivalent announced or published by such bank need not be the lowest rate charged by it. The Prime Rate may change from time to time after the Effective Date without notice to NAI as of the effective time of each change in rates described in this definition.

“**Prior Owner**” means AMB Property, L.P., a Delaware limited partnership, which is at the request and direction of NAI conveying the Property to BNPPPLC contemporaneously with the execution of the Operative Documents.

“**Property**” means the Personal Property and the Real Property, collectively.

“**Purchase Agreement**” means the Purchase Agreement (Moffett Business Center) dated as of the Effective Date between BNPPPLC and NAI, as such Purchase Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Purchase Option**” has the meaning indicated in the Purchase Agreement.

“**Qualified Affiliate**” means any Person that, like BNPPPLC, (i) is one hundred percent (100%) owned, directly or indirectly, by BNPPPLC’s Parent or any successor of such bank, (ii) can make (and has in writing made) the same representations to NAI that BNPPPLC has made in subparagraphs 4(A) and 4(B) of the Closing Certificate (except that it need not be incorporated in or qualified to do business in Delaware), and (iii) is an entity organized under the laws of the State of Delaware or another state within the United States of America.

“**Qualified Income Payments**” means: (A) Base Rent; (B) payments of the following made to BNPPPLC to satisfy the Lease: the Upfront Fees, the Arrangement Fee, Administrative Fees, Increased Cost Charges and Capital Adequacy Charges; (C) any interest paid to BNPPPLC or any Participant pursuant to subparagraph 3(H) of the Lease; and (D) payments by BNPPPLC to Participants required under the Participation Agreements because of BNPPPLC’s receipt of payments described in the preceding clauses (A) through (C).

“**Qualified Prepayments**” means any payments received by BNPPPLC from time to time during the Term (1) under any property insurance policy as a result of damage to the Property, (2) as compensation for any restriction placed upon the use or development of the Property or for the condemnation of the Property or any portion thereof, (3) because of any judgment, decree or award for injury or damage to the Property, or (4) under any title insurance policy or otherwise as a result of any title defect or claimed title defect with respect to the Property. For the purposes of determining the amount of any Qualified Prepayment and other amounts dependent upon Qualified Prepayments (*e.g.*, the Lease Balance and the Break Even Price):

(i) there will be deducted all expenses and costs of every kind, type and nature (including taxes and Attorneys’ Fees) incurred by BNPPPLC with respect to the collection or application of such payments;

(ii) Qualified Prepayments will not include any payment to BNPPPLC by a Participant or an Affiliate of BNPPPLC that is made to compensate BNPPPLC for the Participant’s or Affiliate’s share of any Losses BNPPPLC may incur as a result of any of the events described in the preceding clauses (1) through (4);

(iii) Qualified Prepayments will not include any payments received by BNPPPLC that BNPPPLC has paid or is obligated to pay to NAI for the repair, restoration or replacement of the Property or that BNPPPLC is holding as Escrowed Proceeds in accordance with the Paragraph 10 of the Lease or other provisions of the Operative Documents;

(iv) payments described in the preceding clauses (i) through (iii) will be considered as Escrowed Proceeds, not Qualified Prepayments, until they are actually applied as Qualified Prepayments by BNPPPLC as provided in Paragraph 10 of the Lease; and

(v) in no event will interest that accrues under the Purchase Agreement on a past due Supplemental Payment constitute a Qualified Prepayment.

For purposes of computing the total Qualified Prepayments (and other amounts dependent upon Qualified Prepayments, such as the Lease Balance and the Break Even Price) paid to or received by BNPPPLC as of any date, payments described in the preceding clauses (1) through (4) will be considered as Escrowed Proceeds, not Qualified Prepayments, until they are actually applied as Qualified Prepayments by BNPPPLC as provided in the Paragraph 10 of the Lease.

“**Real Property**” has the meaning indicated on page 2 of the Lease.

“**Remedial Work**” means any investigation, monitoring, clean-up, containment, remediation, removal, payment of response costs, or restoration work and the preparation and implementation of any closure or other required remedial plans that any governmental agency or

political subdivision requires or approves (or could reasonably be expected to require if it was aware of all relevant circumstances concerning the Property), whether by judicial order or otherwise, because of the presence of or suspected presence of Hazardous Substances in, on, under or about the Property or because of any prior Hazardous Substance Activity.

“**Rent**” means the Base Rent and all Additional Rent.

“**Responsible Financial Officer**” means the chief financial officer, the controller, the treasurer or the assistant treasurer of NAI.

“**Rolling Four Quarters Period**” has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

“**Spread**” means, for any period beginning on and including the Effective Date or a Base Rent Date and ending on but not including the next Base Rent Date, the amount established as of the date (in this definition, the “**Spread Test Date**”) that is two Business Days prior to such period by reference to the pricing grid below, based upon the ratio calculated by dividing (1) Consolidated EBITDA for the then latest Rolling Four Quarters Period that ended prior to (and for which NAI has reported earnings as necessary to compute Consolidated EBITDA) into (2) the Consolidated Debt for Borrowed Money as of the end of such Rolling Four Quarters Period. In each case, the Spread will be established at the Level in the pricing grid below which corresponds to such ratio; provided, that:

(a) promptly after earnings are reported by NAI for the latest quarter in any Rolling Four Quarters Period, NAI must notify BNPPLC of any resulting change in the Spread under this definition, and no reduction in the Spread from one period to the next will be effective for purposes of the Operative Documents unless, prior to the Spread Test Date for the next period, NAI shall have provided BNPPLC with a written notice setting forth and certifying the calculation under this definition that justifies the reduction;

(b) if Carrying Costs are understated or Base Rent is underpaid for any Period because of any misstatement, subsequently discovered, of Consolidated EBITDA or Consolidated Debt for Borrowed Money used for purposes of the pricing grid below, BNPPLC will be entitled to collect from NAI all additional payments that would have been expected under the Operative Documents but for the misstatement, together with interest on each such additional payment computed at the Default Rate from the date it would have been expected to the date it is actually paid; and

(c) notwithstanding anything to the contrary in this definition, on any date when an Event of Default has occurred and is continuing, the Spread will equal the Default



Rate less the Effective Rate.

Levels	Ratio of Consolidated Debt for Borrowed Money to Consolidated EBITDA	Spread
Level I	less than 0.5	35.0 basis points
Level II	greater than or equal to 0.5, but less than 1.0	45.0 basis points
Level III	greater than or equal to 1.0, but less than 1.5	55.0 basis points
Level IV	greater than or equal to 1.5, but less than 2.0	70.0 basis points
Level IV	greater than or equal to 2.0	85.0 basis points

All determinations of the Spread by BNPPLC will, in the absence of clear and demonstrable error, be binding and conclusive for purposes of the Operative Documents. Further BNPPLC may, but will not be required, to rely on the determination of the Spread set forth in any notice delivered by NAI as described above in clause (a) of this definition.

“**Subsidiary**” means, with respect to any Person, any Affiliate of which at least a majority of the securities or other ownership interests having ordinary voting power then exercisable for the election of directors or other persons performing similar functions are at the time owned directly or indirectly by such Person.

“**Supplemental Payment**” has the meaning indicated in the Purchase Agreement.

“**Supplemental Payment Obligation**” has the meaning indicated in the Purchase Agreement.

“**Tangible Personal Property**” has the meaning indicated on page 2 of the Lease.

“**Term**” has the meaning indicated in subparagraph 1(A) of the Lease.

“**Transaction Expenses**” means costs incurred in connection with the preparation and negotiation of the Operative Documents and related documents and the consummation of the transactions contemplated therein.

“**Unfunded Benefit Liabilities**” means, with respect to any Plan, the amount (if any) by which the present value of all benefit liabilities (within the meaning of Section 4001(a)(16) of ERISA) under the Plan exceeds the market value of all Plan assets allocable to such benefit liabilities, as determined on the most recent valuation date of the Plan and in accordance with the provisions of ERISA for calculating the potential liability of NAI or any ERISA Affiliate under Title IV of ERISA.

“**Upfront Fees**” has the meaning indicated in subparagraph 3(E) of the Lease.

## ARTICLE II — SHARED PROVISIONS

**The following provisions will apply to and govern the construction of this Agreement and the other Operative Documents (including attachments), except to the extent (if any) a clear, contrary intent is expressed herein or therein:**

1. **Notices.** Any provision of (1) any of the Operative Documents, (2) any other document which references this provision for purposes of establishing notice requirements (in this provision, a “**Related Document**”), or (3) any Applicable Law, that makes reference to any required payment from NAI to BNPPPLC or that makes reference to the sending, mailing or delivery of any notice or demand will be subject to the following provisions (except that any notice given by BNPPPLC to satisfy any statutory requirement, including any notice of eviction or foreclosure, will be considered sufficient if it satisfies the statutory requirements applicable to the notice, regardless of whether the notice or payment satisfies the following provisions):

(i) All Rent and other amounts required to be paid by NAI to BNPPPLC must be paid to BNPPPLC in immediately available funds by wire transfer to:

Federal Reserve Bank of New York  
BNP Paribas — New York Branch  
Favor: BNP Paribas Leasing Corporation  
ABA 026 007 689  
/AC/ 0200-517000-070-78  
Reference: Network Appliance, Inc./Building 9 Lease

or at such other place and in such other manner as BNPPPLC may designate in a notice to NAI.

(ii) All notices, demands, approvals, consents and other communications to be made under any Operative Document or Related Document to or by the parties thereto must, to be effective for purposes thereof, be in writing. Notices, demands and other communications required or permitted under any Operative Document or Related

Document must be given by any of the following means: (A) personal service (including local and overnight courier), with proof of delivery or attempted delivery retained; (B) electronic communication, whether by electronic mail or telecopying (if confirmed in writing sent by United States first class mail, return receipt requested); or (C) registered or certified first class mail, return receipt requested. Such addresses may be changed by notice to the other parties given in the same manner as provided above. Any notice or other communication sent pursuant to clause (A) or (B) hereof will be deemed received upon such personal service or upon dispatch by electronic means, and, if sent pursuant to clause (C) will be deemed received five days following deposit in the mail. Notices, demands and other communications required or permitted by any Related Document are to be sent to the addresses set forth therein; and notices, demands and other communications required or permitted by under any Operative Document are to be sent to the following addresses (or in the case of communications to Participants, at the addresses set forth in Schedule 1 to the Participation Agreement):

Address of BNPPLC:

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Address of NAI:

Network Appliance, Inc.  
7301 Kit Creek Road  
Research Triangle Park, NC 27709  
Attention: Ingemar Lanevi  
Telecopy: (919) 476-5750

With a copy to:

Network Appliance, Inc.  
495 East Java Drive  
Sunnyvale, California 94089  
Attention: Mr. Thom Bryant  
Telecopy: (408)-822-4463

However, any party to any Operative Document or Related Document may change its address above or in the Related Document, as applicable, by written notice to the other parties to such Operative Document or Related Document given in accordance with this

provision.

2. **Severability.** If any term or provision of any Operative Document or the application thereof is to any extent held by a court of competent jurisdiction to be invalid and unenforceable, the remainder of such document, or the application of such term or provision other than to the extent to which it is invalid or unenforceable, will not be affected thereby.

3. **No Merger.** There will be no merger of the Lease or of the leasehold estate created by the Lease or of the mortgage and security interest granted in subparagraph 4(C)(1) of the Lease with any other interest in the Property by reason of the fact that the same person may acquire or hold, directly or indirectly, the Lease or the leasehold estate created thereby or such mortgage and security interest and any other interest in the Property, unless all Persons with an interest in the Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred. There will be no merger of the Purchase Agreement or of the purchase options or obligations created by the Purchase Agreement with any other interest in the Property by reason of the fact that the same person may acquire or hold, directly or indirectly, the rights and options granted by the Purchase Agreement and any other interest in the Property, unless all Persons with an interest in the Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred.

4. **No Implied Waiver.** The failure of any party to any Operative Document to insist at any time upon the strict performance of any covenant or agreement therein or to exercise any option, right, power or remedy contained therein will not be construed as a waiver or a relinquishment thereof for the future. The waiver of or redress for any breach of any Operative Document by any party thereto will not prevent a similar subsequent act from constituting a violation. Any express waiver of any provision of any Operative Document will affect only the term or condition specified in such waiver and only for the time and in the manner specifically stated therein. No waiver by any party to any Operative Document of any provision therein will be deemed to have been made unless expressed in writing and signed by the party to be bound by the waiver. A receipt by any party to any Operative Document of any payment thereunder (including the receipt by BNPPLC of any Rent paid under the Lease) with knowledge of the breach by another party of any covenant or agreement contained in that or any other Operative Document will not be deemed a waiver of such breach.

5. **Entire and Only Agreements.** The Operative Documents supersede any prior negotiations and agreements between BNPPLC and NAI concerning the Property, and no amendment or modification of any Operative Document will be binding or valid unless expressed in a writing executed by all parties to such Operative Document.

6. **Binding Effect.** Except to the extent, if any, expressly provided to the contrary in any Operative Document with respect to assignments thereof, all of the covenants, agreements, terms and conditions to be observed and performed by the parties to the Operative Documents will be applicable to and binding upon their respective successors and, to the extent

assignment is permitted thereunder, their respective assigns.

7. **Time is of the Essence.** Time is of the essence as to all obligations created by the Operative Documents and as to all notices expressly required by the Operative Documents.

8. **Governing Law.** Each Operative Document will be governed by and construed in accordance with the laws of the State of California without regard to conflict or choice of laws principles that might require the application of the laws of another jurisdiction.

9. **Paragraph Headings.** The paragraph and section headings contained in the Operative Documents are for convenience only and will in no way enlarge or limit the scope or meaning of the various and several provisions thereof.

10. **Negotiated Documents.** All parties to each Operative Document and their counsel have reviewed and revised or requested revisions to such Operative Document, and the usual rule of construction that any ambiguities are to be resolved against the drafting party will not apply to the construction or interpretation of any Operative Documents or any amendments thereof.

11. **Terms Not Expressly Defined in an Operative Document.** As used in any Operative Document, a capitalized term that is not defined therein or in this Agreement, but is defined in another Operative Document, will have the meaning ascribed to it in the other Operative Document.

12. **Other Terms and References.** Words of any gender used in each Operative Document will be held and construed to include any other gender, and words in the singular number will be held to include the plural and vice versa, unless the context otherwise requires. References in any Operative Document to Paragraphs, subparagraphs, Sections, subsections or other subdivisions refer to the corresponding Paragraphs, subparagraphs, Sections, subsections or subdivisions of that Operative Document, unless specific reference is made to another document or instrument. References in any Operative Document to any Schedule or Exhibit refer to the corresponding Schedule or Exhibit attached to that Operative Document, which are made a part thereof by such reference. All capitalized terms used in each Operative Document which refer to other documents will be deemed to refer to such other documents as they may be renewed, extended, supplemented, amended or otherwise modified from time to time, provided such documents are not renewed, extended or modified in breach of any provision contained in the Operative Documents or, in the case of any other document to which BNPPCL or NAI is a party or intended beneficiary, without its consent. All accounting terms used but not specifically defined in any Operative Document will be construed in accordance with GAAP. The words "this [Agreement]", "herein", "hereof", "hereby", "hereunder" and words of similar import when used in each Operative Document refer to that Operative Document as a whole and not to any particular subdivision unless expressly so limited. The phrases "this Paragraph", "this subparagraph", "this Section", "this subsection" and similar phrases used in any Operative

Document refer only to the Paragraph, subparagraph, Section, subsection or other subdivision described in which the phrase occurs. As used in the Operative Documents the word “or” is not exclusive, and the words “include”, “including” and similar terms will be construed as if followed by “without limitation to”. The rule of *ejusdem generis* will not be applied to limit the generality of a term in any of the Operative Documents when followed by specific examples. When used to qualify any representation or warranty made by a Person, the phrases “to the knowledge of [such Person]” or “to the best knowledge of [such Person]” are intended to mean only that such Person does not have knowledge of facts or circumstances which make the representation or warranty false or misleading in some material respect; such phrases are not intended to suggest that the Person does indeed know the representation or warranty is true.

13. **Execution in Counterparts.** To facilitate execution, each of the Operative Documents may be executed in multiple identical counterparts. It will not be necessary that the signature of, or on behalf of, each party, or that the signature of all persons required to bind any party, appear on each counterpart. All counterparts, taken together, will collectively constitute a single instrument. But it will not be necessary in making proof of any of the Operative Documents to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the parties to such document. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page. Signing and sending a counterpart (or a signature page detached from the counterpart) by facsimile or other electronic means to another party will have the same legal effect as signing and delivering an original counterpart to the other party. A copy (including a copy produced by facsimile or other electronic means) of any signature page that has been signed by or on behalf of a party to any of the Operative Documents will be as effective as the original signature page for the purpose of proving such party’s agreement to be bound.

14. **Not a Partnership, Etc.** Nothing in any Operative Document is intended to create any partnership, joint venture, or other joint enterprise between NAI and BNPPPLC or any other Interested Party.

15. **No Fiduciary Relationship Intended.** Neither the execution of the Operative Documents or other documents referenced in this Agreement nor the administration thereof by BNPPPLC will create any fiduciary obligations of BNPPPLC (or any other Interested Party) to NAI. Moreover, BNPPPLC and NAI disclaim any intent to create any fiduciary or special relationship between themselves (or on the part of any other Interested Party) under or by reason of the Operative Documents or the transactions described therein or any other documents or agreements referenced therein.

[The signature pages follow.]

IN WITNESS WHEREOF, this Common Definitions and Provisions Agreement (Moffett Business Center) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

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**Common Definitions and Provisions Agreement (Moffett Business Center) — Signature Page**

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[Continuation of signature pages for Common Definitions and Provisions Agreement (Moffett Business Center) dated as of November 29, 2007]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

---

**Common Definitions and Provisions Agreement (Moffett Business Center) — Signature Page**

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Annex 1

**Notice of ABR Period Election**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (Moffett Business Center) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc. This letter constitutes notice of our election to make the first Base Rent Period beginning on or after \_\_\_\_\_, 20\_\_ subject to an ***ABR Period Election***.

We understand that until a different election becomes effective as provided in definitions of “ABR Period Election” and “LIBOR Period Election” in the Common Definitions and Provisions Agreement (Moffett Business Center), all subsequent Base Rent Periods will also be subject to an ABR Period Election.

**NOTE: YOU ARE ENTITLED TO DISREGARD THIS NOTICE IF THE DATE SPECIFIED ABOVE CONCERNING THE COMMENCEMENT OF THE ABR PERIOD ELECTION IS LESS THAN FIVE BUSINESS DAYS AFTER YOUR RECEIPT OF THIS NOTICE. HOWEVER, WE ASK THAT YOU NOTIFY US IMMEDIATELY IF FOR ANY REASON YOU BELIEVE THIS NOTICE IS DEFECTIVE.**

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]

Annex 2  
**Fixed Rate Lock Notice**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (Moffett Business Center) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. By this letter, which is given pursuant to subparagraph 3(B)(4) of the Lease, NAI requests that BNPPLC promptly establish a Fixed Rate for a notional amount equal to the Lease Balance as of the date of this letter for use in the calculation of the Effective Rate for all Base Rent Periods commencing on or after the following Fixed Rate Lock Date: \_\_\_\_\_, 20\_\_.

As contemplated in the conditions set forth in subparagraph 3(B)(4) of the Lease, such Fixed Rate Lock Date does not fall prior to the end of any Base Rent Period which has commenced or will commence before BNPPLC receives this notice; and NAI expects BNPPLC to receive this notice more than ten days prior to such Fixed Rate Lock Date.

In an earlier phone conversation today between a representative of NAI and \_\_\_\_\_ at the New York Branch of BNP Paribas, NAI requested an estimate from BNP Paribas of the Fixed Rate that would be established by BNPPLC and BNP Paribas entering into an Interest Rate Swap. The estimate provided by telephone was: \_\_\_\_\_ percent (\_\_\_\_%) per annum.

By this letter, NAI confirms that it will accept such a rate or any lower rate as the Fixed Rate for purposes of the Lease.

**NOTE: BNPPLC will be entitled to disregard this notice if the conditions to a Fixed Rate Lock, as specified in subparagraph 3(B)(4) of the Lease, have not been satisfied. However, NAI requests that BNPPLC notify NAI immediately if for any reason BNPPLC believes this notice will not be effective.**

---

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]

**Annex 3**

**Notice of LIBOR Period Election**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (Moffett Business Center) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. This letter constitutes notice of our election to make the first Base Rent Period beginning on or after \_\_\_\_\_, 20\_\_ subject to a ***LIBOR Period Election*** of \_\_\_\_\_ month(s).

We understand that until a different election becomes effective as provided in definitions of "ABR Period Election" and "LIBOR Period Election" in the Common Definitions and Provisions Agreement (Moffett Business Center), all subsequent Base Rent Periods will also be subject to the same LIBOR Period Election.

**NOTE: YOU ARE ENTITLED TO DISREGARD THIS NOTICE IF THE NUMBER OF MONTHS SPECIFIED ABOVE IS NOT A PERMITTED NUMBER UNDER THE DEFINITION OF "LIBOR PERIOD ELECTION" IN THE COMMON DEFINITIONS AND PROVISIONS AGREEMENT (MOFFETT BUSINESS CENTER), OR IF THE DATE SPECIFIED ABOVE CONCERNING THE COMMENCEMENT OF THE LIBOR PERIOD ELECTION IS LESS THAN FIVE BUSINESS DAYS AFTER YOUR RECEIPT OF THIS NOTICE. HOWEVER, WE ASK THAT YOU NOTIFY US IMMEDIATELY IF FOR ANY REASON YOU BELIEVE THIS NOTICE IS DEFECTIVE.**

NETWORK APPLIANCE, INC., a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]

**PURCHASE AGREEMENT  
(MOFFETT BUSINESS CENTER)**

**BETWEEN**

**NETWORK APPLIANCE, INC.  
("NAI")**

**AND**

**BNP PARIBAS LEASING CORPORATION  
("BNPPLC")**

**November 29, 2007**

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**PURCHASE AGREEMENT  
(MOFFETT BUSINESS CENTER)**

This PURCHASE AGREEMENT (MOFFETT BUSINESS CENTER) (this “**Agreement**”), dated as of November 29, 2007 (the “**Effective Date**”), is made by and between BNP PARIBAS LEASING CORPORATION (“**BNPPLC**”), a Delaware corporation, and NETWORK APPLIANCE, INC. (“**NAI**”), a Delaware corporation.

**RECITALS**

Contemporaneously with the execution of this Agreement, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement (Moffett Business Center) dated as of the Effective Date (the “**Common Definitions and Provisions Agreement**”), which by this reference is incorporated into and made a part of this Agreement for all purposes. *As used in this Agreement, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Agreement are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

Contemporaneously with this Agreement, at the request of NAI BNPPLC is acquiring the Land described in Exhibit A and existing Improvements on the Land pursuant to the Existing Contract.

Also contemporaneously with this Agreement, BNPPLC and NAI are executing a Lease Agreement (Moffett Business Center) dated as of the Effective Date (the “**Lease**”), pursuant to which NAI is leasing from BNPPLC the Land described in Exhibit A and all Improvements on such Land. (As used herein, “**Property**” means (i) all of BNPPLC’s interests, including those conveyed to it by the Prior Owner, in the Land and in the Improvements and in all other real and personal property from time to time covered or to be covered by the Lease and included within the “Property” as defined therein, and (ii) BNPPLC’s interest in any Escrowed Proceeds yet to be applied as a Qualified Prepayment or to the cost of repairs to or restoration of the Improvements or other property covered by the Lease.)

NAI and BNPPLC have agreed on the terms and conditions upon which NAI may purchase or arrange for the purchase of the Property, and by this Agreement they desire to confirm all such terms and conditions.

**AGREEMENTS**

**1 Additional Definitions.** As used in this Agreement, capitalized terms defined above have the respective meanings assigned to them above; as indicated above, capitalized terms that are defined in the Common Definitions and Provisions Agreement and that are used but not otherwise defined have the respective meanings assigned to them in the Common Definitions and Provisions Agreement; and, the following terms have the following respective meanings:

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“97-1/Default (100%)” means a Default that is or results from any of the following:

(A) a failure of NAI to make any payment required by any Operative Document, including any payment of Rent required by the Lease or any Supplemental Payment required by this Agreement;

(B) any Hazardous Substance Activities on or about the Land;

(C) any failure of NAI to insure, maintain, operate or repair the Property in accordance with all terms and conditions of the Lease;

(D) any failure of NAI to apply insurance or condemnation proceeds received by NAI as required by the Lease;

(E) any breach by NAI of the provisions in Paragraph 1 of the Closing Certificate;

(F) any bankruptcy or insolvency proceeding involving NAI or any of its Subsidiaries, as the debtor, or any of the events or circumstances described in clauses (G), (H) or (I) of the definition of Event of Default in the Common Definitions and Provisions Agreement;

(G) any breach by NAI of the financial covenants in subparagraph 3(C) of the Closing Certificate;

(H) a failure of NAI or any of its Subsidiaries to pay when due a regularly scheduled payment of the principal of or premium or interest on any of its Indebtedness which is outstanding in a principal amount of at least \$25,000,000, as described in clause (F) of the definition of Event of Default in the Common Definitions and Provisions Agreement;

(I) a failure of NAI or any of its Subsidiaries to pay any judgment or order for the payment of money rendered against it in an amount (not covered by insurance) which exceeds \$25,000,000, as described in clause (J) of the definition of Event of Default in the Common Definitions and Provisions Agreement; or

(J) subject to the proviso at the end of Exhibit B, any breach by NAI of the provisions set forth in Exhibit B.

Except as provided in subparagraph 3(B), the characterization of any Default as a 97-1/Default (100%) will not affect the rights or remedies available to BNPPPLC because of the Default.

“**Applicable Purchaser**” means (1) the third party designated by NAI to purchase the Property at any sale arranged by NAI as provided in this Agreement, or (2) the third party designated by BNPPLC as the purchaser at any Qualified Sale not arranged by NAI.

“**BNPPLC’s Actual Out of Pocket Costs**” means the out-of-pocket costs and expenses, if any, incurred by BNPPLC in connection with a sale of the Property under this Agreement or in connection with the collection of payments due to it under this Agreement (including any Breakage Costs; Attorneys’ Fees; appraisal costs; and income, transfer, withholding or other taxes which do not constitute Excluded Taxes; but not including Excluded Taxes or costs of removing any Lien Removable by BNPPLC).

“**Break Even Price**” means an amount equal to:

- the Lease Balance, *plus*
- BNPPLC’s Actual Out of Pocket Costs.

“**Committed Price**” has the meaning indicated in subparagraph 3(C)(3).

“**Conditions to NAI’s Initial Remarketing Rights**” has the meaning indicated in subparagraph 2(A)(2)(a).

“**Decision Not to Sell at a Loss**” means a decision by BNPPLC not to sell the Property on the Designated Sale Date to an Applicable Purchaser as provided in subparagraph 2(A)(2), despite NAI’s satisfaction of the Conditions to NAI’s Initial Remarketing Rights.

“**Deemed Sale**” has the meaning indicated in subparagraph 3(D).

“**Extended Remarketing Period**” means a period beginning on the Designated Sale Date and ending on the Final Sale Date.

“**Fair Market Value**” has the meaning indicated in Exhibit B.

“**Final Sale Date**” means the earliest of:

- any date after the Designated Sale Date upon which BNPPLC conveys the Property to consummate a sale of the Property to NAI because of BNPPLC’s exercise of the Put Option as provided in subparagraph 3(B); or
- any date after the Designated Sale Date upon which BNPPLC conveys the Property to consummate a sale of the Property to NAI or to any Affiliate of NAI,

including any such sale resulting from NAI's exercise of its rights under subparagraph 3(A); or

- any date after the Designated Sale Date upon which BNPPLC conveys the Property to consummate a Qualified Sale, or would have done so but for a material breach of this Agreement by NAI (including any breach of its obligation to make any Supplemental Payment required in connection with such Qualified Sale); or
- the second anniversary of the Designated Sale Date, which will be the date of a Deemed Sale as provided in subparagraph 3(D) if no earlier date qualifies as the Final Sale Date and the entire Property is not sold by BNPPLC to NAI or an Applicable Purchaser prior to the second anniversary of the Designated Sale Date.

“**Initial Remarketing Notice**” means a notice delivered to BNPPLC by NAI prior to the Designated Sale Date in which NAI confirms NAI's decision to exercise NAI's Initial Remarketing Rights and the amount of the Initial Remarketing Price. (Once given, any such notice may not be rescinded or modified without BNPPLC's consent.)

“**Initial Remarketing Price**” means the cash price set forth in an Initial Remarketing Notice delivered by NAI to BNPPLC as the price for which NAI has arranged a sale of the Property on the Designated Sale Date to an Applicable Purchaser which is not an Affiliate of NAI. Such price may be any price negotiated by the Applicable Purchaser in good faith and on an arms length basis with NAI.

“**Lease Balance**” means the Lease Balance (as defined in the Common Definitions and Provisions Agreement) on the Designated Sale Date, but computed without deduction for any Supplemental Payment or other amount paid to BNPPLC pursuant to this Agreement on the Designated Sale Date.

“**Make Whole Amount**” means the sum of the following:

(1) the amount (if any) by which the Lease Balance exceeds any Supplemental Payment which was actually paid to BNPPLC on the Designated Sale Date, together with interest on such excess computed at the Default Rate for the period commencing on the Designated Sale Date and ending on the Final Sale Date; *plus*

(2) any unpaid Base Rent or other amounts due to BNPPLC pursuant to the other Operative Documents; *plus*

(3) BNPPLC's Actual Out of Pocket Costs; *plus*

(4) the amount, but not less than zero, by which (i) all Local Impositions, insurance premiums and other Losses of every kind suffered or incurred by BNPPLC (whether or not reimbursed in whole or in part by another Interested Party) with respect to the ownership, operation or maintenance of the Property during the Extended Remarketing Period, exceeds (ii) any rents or other sums collected by BNPPLC during such period from third parties as consideration for any lease or other contracts made by BNPPLC that authorize the use and enjoyment of the Property by such parties; together with interest on such excess computed at the Default Rate for each day prior to the Final Sale Date.

“**Maximum Remarketing Obligation**” means a dollar amount equal to the following (but not less than zero):

- 85% of the Lease Balance; *less*
- any Fixed Rate Settlement Amount that NAI is required to pay pursuant to the Lease because of any acceleration of the Designated Sale Date which causes it to occur prior to the date upon which the Term of the Lease is scheduled to expire (as such date is confirmed in clause (1) of the definition of Designated Sale Date in the Common Definitions and Provisions Agreement).

“**Must Sell Price**” means, with respect to any Proposed Sale arranged by NAI pursuant to subparagraph 3(C), a cash price to BNPPLC equal to the Make Whole Amount, computed as of the Proposed Sale Date applicable to such Proposed Sale.

“**NAI’s Extended Remarketing Right**” has the meaning indicated in subparagraph 3(C).

“**NAI’s Initial Remarketing Rights**” has the meaning indicated in subparagraph 2(A)(2).

“**NAI’s Target Price**” means the cash purchase price that, according to NAI, should reasonably be expected for the Property during the Extended Remarketing Period if the parties make a reasonable marketing effort to sell the Property, as such price is set forth in a notice given by NAI to BNPPLC after the Designated Sale Date. Once established by any such notice, the amount of NAI’s Target Price will not be increased, although nothing in this definition will be construed to prevent NAI from arranging a sale of the Property pursuant to this Agreement at a price higher than NAI’s Target Price. After providing a notice of NAI’s Target Price to BNPPLC, NAI may later decrease NAI’s Target Price by another notice to BNPPLC, but only if the decrease is justified by a material adverse change in the physical condition of the Property (*e.g.*, significant damage to the Property by fire or other casualty).

“**Notice of Sale**” has the meaning indicated in subparagraph 3(C)(3).

“**Proposed Sale**” has the meaning indicated in subparagraph 3(C).

“**Proposed Sale Date**” has the meaning indicated in subparagraph 3(C)(3).

“**Purchase Option**” has the meaning indicated in subparagraph 2(A)(1).

“**Put Option**” has the meaning indicated in subparagraph 3(B).

“**Qualified Sale**” means any (1) Deemed Sale as described in subparagraph 3(D), or (2) actual sale (prior to any such Deemed Sale) of all or substantially all of the Property to an Applicable Purchaser that occurs after the thirty day period specified in subparagraph 3(A) and that:

- results from NAI’s exercise of NAI’s Extended Remarketing Right as described in subparagraph 3(C); or
- is approved in advance as a Qualified Sale by NAI; or
- is to a third party which is not an Affiliate of BNPPLC and, if it is completed by a conveyance from BNPPLC prior to eighteen months after the Designated Sale Date, is for a price not less than the least of the following amounts:
  - (a) the lowest price at which BNPPLC will be obligated, pursuant to clause (3) of subparagraph 3(E), to reimburse to NAI the entire amount of any Supplemental Payment theretofore made by NAI to BNPPLC; or
  - (b) (i) if NAI notified BNPPLC of NAI’s Target Price prior to the date BNPPLC and the third party agreed to a price for the sale, NAI’s Target Price, or (ii) if NAI did not notify BNPPLC of NAI’s Target Price prior to the date BNPPLC and the third party agreed to a price for the sale, any price satisfactory to BNPPLC in its sole good faith business judgment; or
  - (c) 90% of the Fair Market Value of the Property.

NAI acknowledges that BNPPLC’s own marketing efforts after the Designated Sale Date will depend upon the minimum price required for a Qualified Sale, and such efforts could be hampered if NAI’s Target Price is too high. Thus, after receipt of any notice of NAI’s Target Price from NAI, BNPPLC may (but will not be obligated to) invoke the Valuation Procedures in order to determine the minimum price permitted under clause (c) preceding.

“**Sale Closing Documents**” means the following documents, which BNPPLC must

tender pursuant to Paragraph 5(A) to consummate any sale of the Property pursuant to this Agreement: (1) a Deed With Limited Title Warranties in the form attached as Exhibit C, (2) a Bill of Sale and Assignment in the form attached as Exhibit D, (3) an Acknowledgment of Disclaimer of Representations and Warranties in the form attached as Exhibit E, (4) a Secretary's Certificate in the form attached as Exhibit F, and (5) a certificate concerning tax withholding in the form attached as Exhibit G.

“**Supplemental Payment**” has the meaning indicated in subparagraph 2(A)(3).

“**Supplemental Payment Obligation**” has the meaning indicated in subparagraph 2(A)(3).

“**Valuation Procedures**” means procedures set forth in Exhibit B, which are to be followed in the event a determination of the Fair Market Value of the Property or any portion thereof is required by this Agreement.

## 2 **NAI's Options and Obligations ON the Designated Sale Date.**

(A) Purchase Option; Initial Remarketing Rights; Supplemental Payment Obligation. Whether or not an Event of Default has occurred and is continuing, but subject to Paragraph 6 below:

(1) NAI will have the right (the “**Purchase Option**”) to purchase or cause an Affiliate of NAI, as the Applicable Purchaser, to purchase the Property on the Designated Sale Date for a cash price equal to the Break Even Price.

(2) If NAI does not exercise the Purchase Option, NAI will have the following rights (collectively, “**NAI's Initial Remarketing Rights**”):

(a) First, NAI will have the right to designate a third party, other than an Affiliate of NAI, as the Applicable Purchaser and to cause such Applicable Purchaser to purchase the Property on the Designated Sale Date for a cash price equal to the Initial Remarketing Price. Such right, however, will be subject to the conditions (the “**Conditions to NAI's Initial Remarketing Rights**”) that (i) NAI deliver an Initial Remarketing Notice to BNPPLC within the thirty days prior to the Designated Sale Date, (ii) on the Designated Sale Date the Applicable Purchaser tenders to BNPPLC a payment equal to the Initial Remarketing Price, and (iii) NAI itself tenders to BNPPLC the Supplemental Payment, if any, which will be required by subparagraph 2(A)(3) in the event BNPPLC completes the sale to the Applicable Purchaser. Further, notwithstanding the satisfaction of the Conditions to NAI's Initial Remarketing Rights on the Designated Sale Date, if the sum of the price to be paid by the Applicable Purchaser for the Property (*i.e.*,

the Initial Remarketing Price) and any Supplemental Payment required by subparagraph 2(A)(3) is less than the Break Even Price, then BNPPLC may affirmatively elect not to complete the sale of the Property to the Applicable Purchaser on the Designated Sale Date (and thereby defer the sale of the Property pursuant to this Agreement) by making a Decision Not to Sell at a Loss.

(b) Second, if BNPPLC completes a sale of the Property to an Applicable Purchaser on the Designated Sale Date pursuant to subparagraph 2(A)(2)(a) and the price paid by the Applicable Purchaser for the Property (*i.e.*, the Initial Remarketing Price) is greater than the Break Even Price, then BNPPLC will pay the excess to NAI or as otherwise required by Applicable Law.

(3) If for any reason whatsoever BNPPLC does not receive a cash price for the Property on the Designated Sale Date equal to or in excess of the Break Even Price in connection with a sale made pursuant to subparagraph 2(A)(1) or subparagraph 2(A)(2)(a), then NAI will have the obligation (the “**Supplemental Payment Obligation**”) to pay to BNPPLC on the Designated Sale Date a supplemental payment (the “**Supplemental Payment**”) equal to the lesser of:

- (a) the amount by which the Break Even Price exceeds any such cash price actually received by BNPPLC on the Designated Sale Date; or
- (b) the Maximum Remarketing Obligation.

Without limiting the generality of the foregoing, NAI must make the Supplemental Payment even if BNPPLC does not sell the Property to NAI or an Applicable Purchaser on the Designated Sale Date because of (A) a Decision Not to Sell at a Loss, or (B) a failure of NAI to exercise, or a decision by NAI not to exercise, the Purchase Option or NAI’s Initial Remarketing Rights, or (C) a failure of NAI or any Applicable Purchaser to tender the price required by the forgoing provisions on the Designated Sale Date following any exercise of or attempt by NAI to exercise the Purchase Option or NAI’s Initial Remarketing Rights.

NAI acknowledges that it is undertaking the Supplemental Payment Obligation in consideration of the rights afforded to it by this Agreement, but that such obligation is not contingent upon any exercise by NAI of such rights or upon any purchase of the Property by NAI or an Applicable Purchaser. If any Supplemental Payment due according to this subparagraph 2(A)(3) is not actually paid to BNPPLC on the Designated Sale Date, then NAI must pay interest on the past due amount computed at the Default Rate. However, NAI will be entitled to a credit against the interest required by the preceding sentence equal to the Base Rent, if any, actually paid by NAI pursuant to the Lease for any period



after the Designated Sale Date.

(4) For the avoidance of doubt, BNPPLC acknowledges that NAI may elect not to exercise the Purchase Option or NAI's Initial Remarketing Rights and instead pay to BNPPLC a Supplemental Payment equal to the Maximum Remarketing Obligation on the Designated Sale Date in full satisfaction of its obligations under this subparagraph 2(A).

(B) Designation of the Purchaser. To give BNPPLC the opportunity before the Designated Sale Date to prepare the Sale Closing Documents, NAI must, by a notice to BNPPLC given at least ten days prior to the Designated Sale Date, specify irrevocably, unequivocally and with particularity any party who will purchase the Property because of NAI's exercise of its Purchase Option or of NAI's Initial Remarketing Rights. If NAI fails to do so, BNPPLC may postpone the delivery of the Sale Closing Documents until a date after the Designated Sale Date and not more than ten days after NAI finally does so specify a party, but such postponement will not relieve or postpone the obligation of NAI to make a Supplemental Payment on the Designated Sale Date as provided in subparagraph 2(A)(3).

(C) Delivery of Property Related Documents If BNPPLC Retains the Property. Unless NAI or its Affiliate or another Applicable Purchaser purchases the Property pursuant to subparagraph 2(A), promptly after the Designated Sale Date NAI must deliver and assign to BNPPLC all plans and specifications for the Property previously prepared for NAI or otherwise available to NAI, together with all other files, documents and permits of NAI (including all Existing Leases and any subleases then in force) which may be necessary or useful to any future owner's or occupant's use of the Property. Without limiting the foregoing, NAI will transfer or arrange the transfer to BNPPLC of all utility, building, health and other operating permits required by any municipality or other governmental authority having jurisdiction over the Property for uses of the Property permitted by the Lease if neither NAI nor any Affiliate or other Applicable Purchaser purchases the Property pursuant to subparagraph 2(A).

(D) Effect of the Purchase Option and NAI's Initial Remarketing Rights on Subsequent Title Encumbrances. Any conveyance made to consummate a sale of the Property to NAI or any Applicable Purchaser pursuant to subparagraph 2(A) will cut off and terminate all interests in the Property claimed by, through or under BNPPLC, including Liens Removable by BNPPLC (including any leasehold estate or other interests conveyed by BNPPLC to third parties, even if conveyed in the ordinary course of BNPPLC's business, and including any judgment liens established against the Property because of a judgment rendered against BNPPLC), but not personal obligations of NAI to BNPPLC under the Lease or other Operative Documents (including obligations of NAI arising under the indemnities in the Lease, which indemnities will survive any such sale). Anyone accepting or taking any interest in the Property through or under BNPPLC on or after the Effective Date will acquire such interest subject to the Purchase Option.

(E) Security for NAI's Purchase Option. If (contrary to the intent of the parties as expressed in subparagraph 4(C) of the Lease) it is determined that NAI is not, under applicable state law as applied to the Operative Documents, the equitable owner of the Property and the borrower from BNPPPLC in a financing arrangement, but rather is a tenant under the Lease with an option to purchase from BNPPPLC as provided in subparagraph 2(A)(1), then the parties intend that the Purchase Option be secured by a lien and security interest against the Property. **Accordingly, BNPPPLC does hereby grant to NAI a lien and security interest against the Property, including all rights, title and interests of BNPPPLC from time to time in and to the Land and Improvements, in order to secure (1) BNPPPLC's obligation to convey the Property to NAI or an Affiliate designated by it if NAI exercises the Purchase Option and tenders payment of the Break Even Price to BNPPPLC on the Designated Sale Date as provided herein, and (2) NAI's right to recover any damages from BNPPPLC caused by a breach of such obligation, including any such breach caused by a rejection or termination of this Agreement in any bankruptcy or insolvency proceeding instituted by or against BNPPPLC, as debtor.** NAI may enforce such lien and security interest judicially after any such breach by BNPPPLC, but not otherwise.

### 3 NAI's Rights, Options and Obligations *AFTER* the Designated Sale Date.

(A) NAI's Right to Buy During the Thirty Days After the Designated Sale Date. Even after a failure to pay any required Supplemental Payment on the Designated Sale Date, NAI may tender (or cause an Applicable Purchaser to tender) to BNPPPLC the full Make Whole Amount (including all amounts then due under the other Operative Documents) on any Business Day within thirty days after the Designated Sale Date. If presented with such a tender within thirty days after the Designated Sale Date, BNPPPLC must accept it and promptly thereafter deliver to NAI (or the Applicable Purchaser) the Sale Closing Documents and any Escrowed Proceeds then constituting Property held by BNPPPLC. Otherwise, BNPPPLC will have no further obligation to sell the Property to NAI or to any Affiliate of NAI pursuant to this Agreement, although BNPPPLC will continue to have the option to require NAI to buy the Property if the conditions listed in the next subparagraph are satisfied.

(B) NAI's Obligation to Buy if Certain Conditions are Satisfied. Regardless of any prior Decision Not to Sell at a Loss, BNPPPLC will have the option (the "**Put Option**") to require NAI to purchase the Property upon demand at any time after the Designated Sale Date for a cash price equal to the Make Whole Amount if:

- (1) BNPPPLC has not already conveyed the Property to consummate a sale of the Property to NAI or an Applicable Purchaser pursuant to other provisions of this Agreement; and
- (2) a 97-1/Default (100%) occurs or is continuing on or after the Designated Sale Date; and

(3) BNPPLC notifies NAI of BNPPLC's exercise of the Put Option within two years following the Designated Sale Date.

Further, and without limiting the foregoing, if any Event of Default occurs as described in clauses (G), (H) or (I) of the definition Event of Default in the Common Definitions and Provisions Agreement because of any bankruptcy proceeding instituted by or against NAI, as debtor, under Title 11 of the United States Code, then NAI will be obligated (without any further act or notice or demand by BNPPLC) to pay to BNPPLC the Make Whole Amount and purchase the Property, as if (i) BNPPLC had exercised the Put Option, and (ii) the second Business Day after the commencement of such Event of Default was the Final Sale Date.

(C) NAI's Extended Right to Remarket. If the Property is not sold to NAI or an Applicable Purchaser on the Designated Sale Date pursuant to this Agreement, NAI will have the right ("**NAI's Extended Remarketing Right**") during the Extended Remarketing Period to arrange a sale of the Property to an Applicable Purchaser, other than an Affiliate of NAI, for a price equal to or in excess of the Must Sell Price (a "**Proposed Sale**"). NAI's Extended Remarketing Right will, however, be subject to all of the following conditions:

(1) BNPPLC has not exercised the Put Option as provided in subparagraph 3(B) or already contracted with another Applicable Purchaser to convey the Property in connection with a Qualified Sale.

(2) NAI's Extended Remarketing Right is not terminated pursuant to subparagraph 6(B) because of NAI's failure to pay any required Supplemental Payment.

(3) NAI must have provided a notice to BNPPLC (a "**Notice of Sale**") setting forth (i) the date proposed by NAI as the Final Sale Date (the "**Proposed Sale Date**"), which must be no sooner than thirty days after BNPPLC's receipt of the Notice of Sale and no later than the last Business Day of the Extended Remarketing Period, (ii) the full legal name of the Applicable Purchaser and such other information as is needed to prepare the Sale Closing Documents, and (iii) the cash price that will be tendered to BNPPLC for the Property (the "**Committed Price**").

(4) The Committed Price must be no less than the Must Sell Price, computed as of the Proposed Sale Date. Also, if NAI has notified BNPPLC of NAI's Target Price, the Committed Price must be no less than NAI's Target Price.

(D) Deemed Sale On the Second Anniversary of the Designated Sale Date. If no date prior to the second anniversary of the Designated Sale Date qualifies as the Final Sale Date, then on second anniversary of the Designated Sale Date BNPPLC will, for purposes of the next subparagraph, be *deemed* to have sold the Property (a "**Deemed Sale**") to an Applicable Purchaser at a Qualified Sale for a net cash price equal to its Fair Market Value.

(E) NAI's Right to Share in Sales Proceeds Received By BNPPPLC From any Qualified Sale. BNPPPLC must apply the cash proceeds received by BNPPPLC from any Qualified Sale (regardless of whether the sale is arranged by NAI as provided in subparagraph 3(C) or by BNPPPLC itself), or deemed to be received in connection with any Deemed Sale, in the following order of priority:

- (1) first, to pay to BNPPPLC the Make Whole Amount;
- (2) second, to pay to BNPPPLC any other amounts then due from NAI to BNPPPLC under any of the Operative Documents;
- (3) third, to reimburse LRC for any Supplemental Payment previously made by LRC to BNPPPLC; and
- (4) last, if any such cash proceeds exceed all the payments and reimbursements that are required or may be required as described in the preceding clauses of this subparagraph, BNPPPLC may retain the excess.

If, however, BNPPPLC completes any sale and conveyance of the Property *after* the Extended Remarketing Period expires or is terminated, BNPPPLC will not be required by this subparagraph to share any proceeds of the sale or conveyance with NAI or any other party claiming through or under NAI.

#### **4 Transfers By BNPPPLC After the Designated Sale Date.**

(A) BNPPPLC's Right to Sell. At any time more than thirty days after the Designated Sale Date, if the Property has not already been sold and conveyed by BNPPPLC pursuant to Paragraph 2 or Paragraph 3, BNPPPLC will have the right to sell the Property or offer the Property for sale to any third party on any terms believed to be appropriate by BNPPPLC in its sole good faith business judgment.

(B) Survival of NAI's Rights and the Supplemental Payment Obligation. If the Property is not sold on the Designated Sale Date, and if BNPPPLC completes a sale or other transfer of the Property after the Designated Sale Date, other than a Qualified Sale, the Supplemental Payment Obligation will survive in favor of BNPPPLC's successors and assigns with respect to the Property, and BNPPPLC's successors and assigns will take the Property subject to NAI's rights under Paragraph 3, all on the same terms and conditions as would have applied to BNPPPLC itself if BNPPPLC had not transferred or sold the Property. Without limiting the foregoing, any purchaser that acquires the Property from BNPPPLC during the Extended Remarketing Period, other than at a Qualified Sale, will be obligated to distribute proceeds of a subsequent Qualified Sale of the Property as described in the subparagraph 3(E) in the same manner and to the same extent that BNPPPLC itself would have been obligated if not for the sale

by BNPPPLC to the purchaser.

(C) Easements and Other Transfers in the Ordinary Course of Business. No "Permitted Transfer" described in clause (5) (the last clause) of the definition thereof in the Common Definitions and Provisions Agreement will constitute a Qualified Sale if it covers less than all or substantially all of BNPPPLC's then existing interests in the Property. Any such Permitted Transfer of less than all or substantially all of BNPPPLC's then existing interests in the Property will not be prohibited by this Agreement during the Extended Remarketing Period or otherwise; *provided, however*, any such Permitted Transfer made before the end of one hundred eighty days after the Designated Sale Date, or made to an Affiliate of BNPPPLC before the end of the Extended Remarketing Period, or otherwise not made in the ordinary course of business, will be made subject to NAI's rights under Paragraph 3. Thus, for example, if the Property is not sold by BNPPPLC to an Applicable Purchaser on the Designated Sale Date, then at any time more than one hundred eighty days after the Designated Sale Date BNPPPLC may in the ordinary course of business convey a utility easement or a lease of space in the Improvements to a Person not an Affiliate of BNPPPLC free from NAI's rights under Paragraph 3, although following such conveyance of the lesser estate, NAI's rights under Paragraph 3 will continue during the Extended Remarketing Period as to BNPPPLC's remaining interest in the Land and the Improvements.

#### **5 Terms of Conveyance Upon Purchase.**

(A) Tender of Sale Closing Documents. As necessary to consummate any sale of the Property to NAI or an Applicable Purchaser pursuant to this Agreement, BNPPPLC must, subject to any postponement permitted by subparagraph 2(B), promptly after the tender of the purchase price and any other payments to BNPPPLC required pursuant to Paragraph 2 or Paragraph 3, as applicable, convey the Property to NAI or the Applicable Purchaser, as the case may be, by BNPPPLC's execution, acknowledgment (where appropriate) and delivery of the Sale Closing Documents. Such conveyance by BNPPPLC will be subject to the Permitted Encumbrances and any other encumbrances that do not constitute Liens Removable by BNPPPLC, and such conveyance will not include the rights of BNPPPLC or other Interested Parties under the indemnities provided in the Operative Documents, including rights to any payments then due from NAI under the indemnities or that may become due thereafter because of any Loss incurred by BNPPPLC or another Interested Party resulting in whole or in part from events or circumstances occurring or alleged to have occurred before such conveyance. The costs, both foreseen and unforeseen, of any purchase by NAI or an Applicable Purchaser will be the responsibility of the purchaser to the extent (if any) not included in any Break Even Price or Make Whole Amount actually paid to BNPPPLC. If for any reason BNPPPLC fails to tender the Sale Closing Documents as required by this Paragraph 5(A), BNPPPLC will have the right and obligation to cure such failure at any time before thirty days after receipt of a demand for such cure from NAI. Prior to the end of such cure period, NAI may initiate appropriate legal action to specifically enforce BNPPPLC's obligation to deliver the Sale Closing Documents or to foreclose

NAI's liens or security interests against the Property which secure such obligation, but if BNPPLC does cure within such thirty day period, BNPPLC will not be liable for monetary damages because of its prior failure to deliver the Sale Closing Documents.

(B) Delivery of Escrowed Proceeds. BNPPLC may deliver any Escrowed Proceeds constituting Property directly to NAI or to any Applicable Purchaser purchasing the Property pursuant to this Agreement notwithstanding any prior actual or attempted conveyance or assignment by NAI, voluntary or otherwise, of any right to receive the same; BNPPLC will not be responsible for the proper distribution or application by NAI or any Applicable Purchaser of any such Escrowed Proceeds; and any such payment of Escrowed Proceeds to NAI or an Applicable Purchaser will discharge any obligation of BNPPLC to deliver the same to all Persons claiming an interest therein.

#### **6 Survival and Termination of the Rights and Obligations of NAI and BNPPLC.**

(A) Status of this Agreement Generally. Except as expressly provided in other provisions of this Agreement, this Agreement will not terminate; nor will NAI have any right to terminate this Agreement; nor will NAI be entitled to any reduction (by setoff or otherwise) of the Break Even Price, the Make Whole Amount or any payment required under this Agreement; nor will any of the obligations of NAI to BNPPLC under Paragraph 2 or Paragraph 3 be excused by reason of (i) any damage to or the destruction of all or any part of the Property from whatever cause, (ii) the taking of the Property or any portion thereof by eminent domain or otherwise for any reason, (iii) the prohibition, limitation or restriction of NAI's use or development of all or any portion of the Property or any interference with such use by governmental action or otherwise, (iv) any eviction of NAI or of anyone claiming through or under NAI, (v) any default on the part of BNPPLC under this Agreement or any other Operative Document or any other agreement to which BNPPLC and NAI are parties, (vi) the inadequacy in any way whatsoever of the design, construction, assembly or installation of any improvements, fixtures or tangible personal property included in the Property (it being understood that BNPPLC has not made, does not make and will not make any representation express or implied as to the adequacy thereof), (vii) any latent or other defect in the Property or any change in the condition thereof or the existence with respect to the Property of any violations of Applicable Laws, or (viii) NAI's prior acquisition or ownership of any interest in the Property, or (ix) any other cause, whether similar or dissimilar to the foregoing, any existing or future law to the contrary notwithstanding. It is the intention of the parties hereto that the obligations of NAI under this Agreement (including the obligation to make any Supplemental Payment as provided in Paragraph 2) be separate from and independent of BNPPLC's obligations under this Agreement or any other agreement between BNPPLC and NAI; however, nothing in this subparagraph will be construed as a waiver by NAI of any right NAI may have at law or in equity to the following remedies, whether because of BNPPLC's failure to remove a Lien Removable by BNPPLC or because of any other default by BNPPLC under this Agreement: (A) the recovery of monetary damages, (B) injunctive relief in

case of the violation, or attempted or threatened violation, by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Agreement which are binding upon BNPPLC, or (C) a decree compelling performance by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Agreement which are binding upon BNPPLC.

(B) Automatic Termination of NAI's Rights. If NAI fails to pay the full amount of any Supplemental Payment required by subparagraph 2(A)(3) on the Designated Sale Date, then the Purchase Option, NAI's Initial Remarketing Rights, NAI's Extended Remarketing Right and all other rights of NAI under this Agreement, other than its rights under subparagraph 3(A), will terminate automatically. No termination of NAI's rights as described in this subparagraph will limit BNPPLC's other remedies, including its right to sue NAI for any amounts due from NAI pursuant to any of the Operative Documents and its right to exercise the Put Option.

(C) Payment Only to BNPPLC. All amounts payable under this Agreement by NAI and, if applicable, by an Applicable Purchaser must be paid directly to BNPPLC. If paid to other parties, such payments will not be effective for purposes of this Agreement.

(D) Preferences and Voidable Transfers. If any payment to BNPPLC by an Applicable Purchaser is held to constitute a preference or a voidable transfer under Applicable Laws, or must for any other reason be refunded by BNPPLC to the Applicable Purchaser or to another Person, and if such payment to BNPPLC reduced or had the effect of reducing a payment required of NAI by this Agreement (*e.g.*, the Supplemental Payment) or increased or had the effect of increasing any sale proceeds paid over to NAI pursuant to subparagraph 2(A)(2)(b) or pursuant to subparagraph 3(E), then NAI must pay to BNPPLC upon demand an amount equal to the reduction of the payment required of NAI or to the increase of the excess sale proceeds paid to NAI, as applicable, and this Agreement will continue to be effective or will be reinstated as necessary to permit BNPPLC to enforce its right to collect such amount from NAI.

(E) Remedies Under the Other Operative Documents. No repossession of or re-entering upon the Property or exercise of any other remedies available to BNPPLC under the other Operative Documents will terminate NAI's rights or obligations under this Agreement, all of which will survive BNPPLC's exercise of remedies under the other Operative Documents. NAI acknowledges that the consideration for this Agreement is separate from and independent of the consideration for the Construction Agreement, the Lease, the Closing Certificate and other agreements executed by the parties, and NAI's obligations under this Agreement will not be affected or impaired by any event or circumstance that would excuse NAI from performance of its obligations under such other Operative Documents.

**7 Certain Remedies Cumulative.** No right or remedy herein conferred upon or reserved to BNPPLC is intended to be exclusive of any other right or remedy BNPPLC has with respect to the Property, and each and every right and remedy of BNPPLC will be cumulative and in addition to any other right or remedy given to it under this Agreement or now or hereafter existing in its favor at law or in equity. In addition to other remedies available under this Agreement, either party may obtain a decree compelling specific performance of any of the other party's agreements hereunder.

**8 Attorneys' Fees and Legal Expenses.** If BNPPLC commences any legal action or other proceeding because of any breach of this Agreement by NAI, BNPPLC may recover all Attorneys' Fees incurred by it in connection therewith from NAI, whether or not such controversy, claim or dispute is prosecuted to a final judgment. Any Attorneys' Fees incurred by BNPPLC in enforcing a judgment in its favor under this Agreement will be recoverable separately from such judgment, and the obligation for such Attorneys' Fees is intended to be severable from other provisions of this Agreement and not to be merged into any such judgment.

**9 Successors and Assigns.** The terms, provisions, covenants and conditions hereof will be binding upon NAI and BNPPLC and their respective permitted successors and assigns and will inure to the benefit of NAI and BNPPLC and all permitted transferees, mortgagees, successors and assignees of NAI and BNPPLC with respect to the Property; except that (A) the rights of BNPPLC hereunder will not pass to NAI or any Applicable Purchaser or any subsequent owner claiming through NAI or an Applicable Purchaser, (B) BNPPLC will not assign this Agreement or any rights hereunder except pursuant to a Permitted Transfer, and (C) NAI will not assign this Agreement or any rights hereunder without the prior written consent of BNPPLC.

[The signature pages follow.]



IN WITNESS WHEREOF, this Purchase Agreement (Moffett Business Center) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

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**Purchase Agreement (Moffett Business Center) — Signature Page**

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[Continuation of signature pages for Purchase Agreement (Moffett Business Center) dated as of November 29, 2007.]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

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**Purchase Agreement (Moffett Business Center) — Signature Page**

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**Exhibit A**

**Legal Description**

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:**

**PARCEL ONE:**

All of Parcel 1 as shown upon that certain Map entitled, "Parcel Map being a resubdivision of Parcel 6 as shown on Map recorded in Book 214 of Maps, at Page 23, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on March 1, 1978 in Book 413, at Page 53.

**PARCEL TWO:**

All of Parcel A, as shown upon that certain Map entitled, "Parcel Map being a resubdivision of Parcels 2 and 3, as shown on that certain Map recorded March 1, 1978 in Book 413 of Maps, at Page 53, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on August 21, 1979 in Book 448 of Maps, at Pages 18 and 19.

APN: 110-36-014, 110-36-015

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## Exhibit B

### Valuation Procedures

This Exhibit explains the procedures to be used to determine Fair Market Value of the Property if such a determination is required by this Agreement. In such event, either party may invoke the procedures set out herein prior to the date the determination will be needed so as to minimize any postponement of any payment, the amount of which depends upon Fair Market Value. In the event such a payment becomes due before the required determination of Fair Market Value is complete, such payment will be postponed until the determination is complete. But in that event, when the required determination is complete, the payment will be made together with interest thereon, computed at a rate equal to ABR, accruing over the period the payment was postponed.

If any determination of Fair Market Value is required, NAI and BNPPLC will attempt in good faith to reach a written agreement upon the Fair Market Value without unnecessary delay, and either party may propose such an agreement to the other. If, however, for any reason whatsoever, they do not execute such an agreement within seven days after the first such proposed agreement is offered by one party to the other, then the determination will be made by independent appraisers in accordance with the following procedures:

1. Definitions and Assumptions. For purposes of the determination, Fair Market Value will be defined as follows, and all appraisers or others involved in the determination will be instructed to use the following definition:

“**Fair Market Value**” means the most probable net cash price, as of a specified date, for which the Property should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

In addition, the appraisers or others making the determination will be instructed to assume that ordinary and customary brokerage fees, title insurance costs and other sales expenses will be incurred and deducted in the calculation of such net cash price. Such appraisers or others making the determination will also be instructed to assume that the value of the Property (or applicable portion thereof) is neither enhanced nor reduced by any lease to another tenant that BNPPLC may have executed subsequent to the termination or expiration of the Lease (a “**Replacement Lease**”). In other words, rather than determine value in light of actual rents generated or to be generated by any such Replacement Lease, the Property (or applicable portion thereof) will be valued in light of the most probable rent that it should bring in a competitive and open market (in this section, a “**Fair Market Rental**”), taking into account:

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(i) the actual physical condition of the Property <sup>1</sup> ; and

(iii) that a reasonable period of time may be required to market the Property (or applicable portion thereof) for lease and make it ready for use or occupancy before it is leased at a Fair Market Rental.

2. **Initial Selection of Appraisers; Appraiser's Agreement as to Value.** After having failed to reach a written agreement upon Fair Market Value as described in the second paragraph of this Exhibit, either party may deliver a notice to the other demanding the appointment of appraisers (the "**First Appraisal Notice**") pursuant to this Exhibit. In such event:

(a) Within fifteen days after the First Appraisal Notice is delivered, NAI and BNPPLC must each appoint an independent property appraiser who has experience appraising commercial properties in California and notify the other party of such appointment, including the name of the appointed appraiser (a "**Notice of Appointment**").

(b) If the appraiser appointed by NAI and the appraiser appointed by BNPPLC agree in writing upon the Fair Market Value (an "**Appraiser's Agreement As To Value**"), such agreement will be binding upon NAI and BNPPLC. Both NAI and BNPPLC will instruct their respective appraisers to attempt in good faith to quickly reach an Appraiser's Agreement As To Value. Neither appraiser will be required to produce a formal appraisal prior to reaching an Appraiser's Agreement As To Value.

3. **Selection of a Third Appraiser.** If the two appraisers fail to deliver an Appraiser's Agreement As to Value within thirty days following the later of the dates upon which NAI or BNPPLC delivers its Notice of Appointment, then either party (NAI or BNPPLC) may deliver another notice to the other (a "**Third Appraisal Notice**"), demanding that the two appraisers appoint a third independent property appraiser to help with the determination of Fair Market Value. Immediately after the Third Appraisal Notice is delivered, each of the first two appraisers must act promptly, reasonably and in good faith to try to reach agreement upon the third appraiser. If, however, the two appraisers fail to reach agreement upon a third appraiser within ten days after the Third Appraisal Notice is delivered:

(a) NAI and BNPPLC will each cause its respective appraiser to deliver, no later than fifteen days after the delivery of the Third Appraisal Notice, an unqualified written promise addressed to *both* of NAI and BNPPLC: (i) to act promptly, reasonably and in good faith in trying to reach agree upon the third appraiser, and (ii) to propose and consider proposals of persons as the third appraiser on the basis of objectivity and competence, not on the basis of such

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<sup>1</sup> If, however, the use of the Property by BNPPLC or any tenant under any Replacement Lease after NAI vacated the Property has resulted in excess wear and tear, such excess wear and tear will be assumed not to have occurred for purposes of determining Fair Market Value.

persons' relationships with the other appraisers or with NAI or BNPPPLC, and not on the basis of preferences expressed by NAI or BNPPPLC.

(b) If, despite the delivery of the promises described in the preceding subsection, the two appraisers fail to reach agreement upon a third appraiser within thirty days after the Third Appraisal Notice is delivered, then each of the first two appraisers must immediately submit its top choice for the third appraiser to the then highest ranking officer of the California Bar Association who will agree to help and who has no attorney/client or other significant relationship to either NAI or BNPPPLC. Such officer will have complete discretion to select the most objective and competent third appraiser from between the choice of each of the first two appraisers, and will do so within ten days after such choices are submitted to him.

4. Resolution of Issues by the Third Appraiser. If a third appraiser is selected under the procedure set out above:

(a) No later than thirty days after a third appraiser is selected, each of the first two appraisers must submit (and NAI and BNPPPLC will each cause its appointed appraiser to submit) his best estimate of Fair Market Value, together with a written report supporting such estimate. (Such report need not be in the form of a formal appraisal, and may contain any qualifications the submitting appraiser deems necessary under the circumstances. Any such qualifications, however, may be considered by the third appraiser for purposes of the selection required by the next subsection.)

(b) After receipt of the two estimates required by the preceding subsection, and no later than forty-five days after the third appraiser is selected, he must (i) choose one or the other of the two estimates of Fair Market Value submitted by the first two appraisers as being the more accurate in his opinion, and (ii) notify NAI and BNPPPLC of which estimate he chose. The third appraiser will *not* be asked or allowed to specify an amount as Fair Market Value that is different than an estimate provided by one of the other two appraisers (either by averaging the two estimates or otherwise). The estimate of Fair Market Value thus chosen by the third appraiser as being the more accurate will be binding upon NAI and BNPPPLC.

5. Criteria For Selecting Appraisers; Cost of Appraisals. All appraisers selected for the appraisal process set out in this Exhibit will be disinterested, reputable, qualified appraisers with the designation of MAI or equivalent and with at least five years experience in appraising commercial properties comparable to the Property. NAI and BNPPPLC will each bear the expense of the appraiser appointed by it, and the expense of the third appraiser and of any officer of the California Bar Association who participates in the appraisal process described above will be shared equally by NAI and BNPPPLC.

6. Time is of the Essence; Defaults.

(a) All time periods and deadlines specified in this Exhibit are of the essence.

(b) Each party must cause the appraiser appointed by it (as set forth in Section 2(a)) to comply in a timely manner with the requirements of this Exhibit applicable to such appraiser. Accordingly, if an appraiser appointed by one of the parties as provided in Section 2(a) fails to comply in a timely manner with any provision of this Exhibit, such failure will be considered a default by the party who appointed such appraiser.

(c) Any breach of or default under this Exhibit by either party will be construed as a breach of the Purchase Agreement to which this Exhibit is attached.

(d) Any such breach or default by NAI will constitute a 97-1/Default (100%); *provided, however:*

(1) Before characterizing any such breach or default as a 97-1/Default (100%), BNPPPLC must first notify NAI of the breach or default and give NAI the opportunity, during the five days after delivery of such notice, to fully rectify the breach or default.

(2) Any breach or default by NAI under this Exhibit will be deemed rectified if, within such five day period, NAI offers BNPPPLC an unqualified written agreement that all determinations of Fair Market Value required by this Agreement will, if made by the appraiser appointed by BNPPPLC as hereinabove provided, be binding upon BNPPPLC and NAI. (It is understood that following the delivery of any such agreement by NAI, no further input from NAI's appraiser or from any official of the California bar association or from a third appraiser will be required for any required determination of Fair Market Value.)

**Exhibit C**  
**Form of Deed**

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:

NAME:           **[NAI or the Applicable Purchaser]**  
ADDRESS:       \_\_\_\_\_

ATTN:           \_\_\_\_\_

CITY:            \_\_\_\_\_

STATE:          \_\_\_\_\_

Zip:             \_\_\_\_\_

**DEED WITH LIMITED TITLE WARRANTIES**

BNP Paribas Leasing Corporation (“**Grantor**”), a Delaware corporation, for and in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration paid to Grantor by **[NAI or the Applicable Purchaser]** (hereinafter called “**Grantee**”), the receipt and sufficiency of which are hereby acknowledged, does hereby GRANT, SELL, CONVEY, ASSIGN and DELIVER to Grantee (1) the land described in Annex A attached hereto and hereby made a part hereof, and (2) all other rights, titles and interests of Grantor in and to (a) such land, (b) the buildings and other improvements situated on such land, (c) any fixtures and other property affixed thereto and (d) the adjacent streets, alleys and rights-of-way (all of the property interests conveyed hereby being hereinafter collectively referred to as the “**Property**”); however, this conveyance is made by Grantor and accepted by Grantee subject to all general or special assessments due and payable after the date hereof, all encroachments, variations in area or in measurements, boundary line disputes, roadways and other matters not of record which would be disclosed by a current survey and inspection of the Property, and the encumbrances listed in Annex B attached hereto and made a part hereof (collectively, the “**Permitted Encumbrances**”).

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto belonging unto Grantee, its successors and assigns, forever, and Grantor does hereby bind Grantor and Grantor’s successors and assigns to warrant and forever defend all and singular the said premises unto Grantee, its successors and assigns against every person whomsoever lawfully claiming, or to claim the same, or any part thereof by, through or under Grantor, but not otherwise; subject, however, to the Permitted Encumbrances. Except as expressly set forth in the preceding sentence, Grantor makes no warranty of title, express or implied.

Grantee hereby assumes the obligations (including any personal obligations) of Grantor, if any, created by or under, and agrees to be bound by the terms and conditions of, the Permitted Encumbrances to the extent that the same concern or apply to the land or improvements

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conveyed by this Deed.

[Signature pages follow.]





**Annex A**

**LEGAL DESCRIPTION**

**[DRAFTING NOTE: TO THE EXTENT THAT THE “LAND” COVERED BY THE LEASE BECAUSE OF ADJUSTMENTS FOR WHICH NAI REQUESTS BNPPLC’S CONSENT OR APPROVAL AS PROVIDED IN THE CLOSING CERTIFICATE, SO TOO WILL THE DESCRIPTION OF THE LAND BELOW CHANGE. ANY SUCH CHANGES WILL BE INCORPORATED INTO THE DESCRIPTION BELOW AND THIS “DRAFTING NOTE” WILL BE DELETED BEFORE THE ASSIGNMENT TO WHICH THIS DESCRIPTION IS ATTACHED IS ACTUALLY EXECUTED AND DELIVERED.]**

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:**

**PARCEL ONE:**

All of Parcel 1 as shown upon that certain Map entitled, “Parcel Map being a resubdivision of Parcel 6 as shown on Map recorded in Book 214 of Maps, at Page 23, Santa Clara County Records”, which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on March 1, 1978 in Book 413, at Page 53.

**PARCEL TWO:**

All of Parcel A, as shown upon that certain Map entitled, “Parcel Map being a resubdivision of Parcels 2 and 3, as shown on that certain Map recorded March 1, 1978 in Book 413 of Maps, at Page 53, Santa Clara County Records”, which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on August 21, 1979 in Book 448 of Maps, at Pages 18 and 19.

APN: 110-36-014, 110-36-015

**Annex B**

**Permitted Encumbrances**

**[DRAFTING NOTE: BEFORE THIS ASSIGNMENT IS ACTUALLY EXECUTED AND DELIVERED BY BNPPLC: ALL PERMITTED ENCUMBRANCES LISTED IN EXHIBIT B TO THE CLOSING CERTIFICATE WILL BE SET OUT BELOW, IN ADDITION TO THE ITEMS ALREADY LISTED. ALSO, IF ANY ENCUMBRANCES (OTHER THAN “LIENS REMOVABLE BY BNPPLC”) ARE IDENTIFIED IN ADDITION TO THOSE DESCRIBED BELOW OR IN EXHIBIT B TO THE CLOSING CERTIFICATE, SUCH ADDITIONAL ENCUMBRANCES WILL BE ADDED TO THE LIST BELOW. AFTER SUCH ADJUSTMENTS ARE MADE, THIS “DRAFTING NOTE” WILL BE DELETED. THE ADDITIONAL ENCUMBRANCES TO BE LISTED BELOW WOULD INCLUDE ANY NEW ENCUMBRANCES APPROVED BY BNPPLC AS “PERMITTED ENCUMBRANCES” FROM TIME TO TIME OR BECAUSE OF XYZ’S REQUEST FOR BNPPLC’S CONSENT OR APPROVAL TO AN ADJUSTMENT.]**

This conveyance is subject to all encumbrances not constituting a “Lien Removable by BNPPLC” (as defined in the Common Definitions and Provisions Agreement (Moffett Business Center) incorporated by reference into the Lease Agreement (Moffett Business Center) referenced in the last item of the list below), including the following matters to the extent the same are still valid and in force:

**1. Property taxes**, which are a lien not yet due and payable, including any assessments collected with taxes to be levied for the fiscal year 20\_\_ - 20\_\_.

**2. The lien of supplemental taxes**, if any, assessed pursuant to the provisions of Chapter 3.5 (Commencing with Section 75) of the Revenue and Taxation code of the State of California. (None currently assessed.)

**3. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: City of Sunnyvale, A Municipal Corporation  
Purpose: Slope easement  
Recorded: October 9, 1964, Book 6695, Page 389, of Official Records  
Affects: as described therein

**4. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: City of Sunnyvale, A Municipal Corporation  
Purpose: Slope easement

Recorded: October 9, 1964, Book 6695, Page 409, of Official Records  
Affects: A portion of Parcel One

**5. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: City of Sunnyvale, A Municipal Corporation  
Purpose: Public Utilities  
Recorded: October 9, 1964, Book 6695, Page 457, of Official Records  
Affects: A portion of Parcel One

**6. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: City of Sunnyvale, A Municipal Corporation  
Purpose: Public Utilities  
Recorded: September 24, 1965, Book 7116, Page 489, of Official Records  
Affects: As described therein

**7. Easement(s)** for the purpose(s) shown below and rights incidental thereto as delineated or as offered for dedication, on the Map Recorded in Book 413 of Maps, Page 53:

Purpose: Public Utility Easement  
Affects: The Southwesterly 10 feet and the Northwesterly 9 feet of Parcel One; and the Southwesterly 15 feet of the Northeasterly 31 feet of the Northwesterly 492.14 feet and a portion of a strip 10 feet wide across a Southerly portion of Parcel Two  
Purpose: Ingress and Egress  
Affects: the Southeasterly 15 feet of Parcel One and the Northwesterly 15 feet of Parcel Two

**8. Covenants, conditions and restrictions** in the declaration of restrictions:

Recorded: March 8, 1978, Instrument No. 5947371, Book D511, Page 396, of Official Records

Modifications of said covenants, conditions and restrictions:

Recorded: August 19, 1980, Instrument No. 6808622, Book F514, Page 328, of Official Records  
Affects: Parcel One and other property

**9. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a

document:

Granted to: The Prudential Insurance Company of America, a New Jersey Corporation  
Purpose: Ingress and Egress  
Recorded: August 24, 1978, Book D908, Page 20, of Official Records  
Affects: A portion of Parcel Two

**10. Covenants, conditions and restrictions** in the declaration of restrictions:

Recorded: November 17, 1978, Book E102, Page 686, of Official Records

Said covenants, conditions and restrictions provide that a violation thereof shall not defeat the lien of any mortgage or deed of trust made in good faith and for value.

The provisions of said covenants, conditions and restrictions were extended to include the herein described land by an instrument:

Recorded: August 22, 1979, Instrument No. 6477044, of Official Records  
Affects: Parcel Two and other property

**11. Easement(s)** for the purpose(s) shown below and rights incidental thereto as granted in a document:

Granted to: Pacific Gas and Electric Company, a California corporation  
Purpose: One or more underground pipes with suitable service pipes and connections for the conveyance of gas by Pacific Gas and Electric Company  
Recorded: April 20, 1979, Book E434, Page 278, of Official Records

The exact location and extent of said easement is not disclosed of record.

**12. Covenants, conditions and restrictions** in the declaration of restrictions:

Recorded: August 22, 1979, Book E740, Page 437, of Official Records

Said covenants, conditions and restrictions provide that a violation thereof shall not defeat the lien of any mortgage or deed of trust made in good faith and for value.

The provisions of said covenants, conditions and restrictions were extended to include the herein described land by an instrument:

Recorded: May 5, 1980, Book F309, Page 39, of Official Records

**13. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: Harmonic Lightwaves, Inc.  
Recorded: December 18, 1996, Instrument No. 13555124, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555124, of Official Records

**14. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: Volex Group, P.L.C.  
Recorded: December 18, 1996, Instrument No. 13555120, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555120, of Official Records

**15. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: TRW Inc.  
Recorded: December 18, 1996, Instrument No. 13555122, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document



Recorded: December 18, 1996, Instrument No. 13555122, of Official Records

**16. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: TRW Inc.  
Recorded: December 18, 1996, Instrument No. 13555123, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555123, of Official Records

**17. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Subordination, Non-Disturbance and Attornment Agreement  
Lessor: Moffett Business Center, Inc., a Delaware Corporation  
Lessee: Digital Equipment Corporation  
Recorded: December 18, 1996, Instrument No. 13555121, of Official Records

An agreement (and the provisions contained therein) which states that said lease is subordinate to the Deed of Trust:

Recorded: December 17, 1996, Instrument No. 13553142, of Official Records  
By document  
Recorded: December 18, 1996, Instrument No. 13555121, of Official Records

**18. An unrecorded lease** with certain terms, covenants, conditions and provisions set forth therein as disclosed by the document:

Entitled: Notice of Non-Responsibility  
Lessor: AMB Property, L.P., a Delaware limited partnership  
Lessee: Harmonics, Incorporated  
Recorded: July 19, 2006, Instrument No. 19026667, of Official Records

**Exhibit D**

**BILL OF SALE AND ASSIGNMENT**

Reference is made to: (1) that certain Purchase Agreement (Moffett Business Center) dated as of November 29, 2007, (the “**Purchase Agreement**”) between BNP Paribas Leasing Corporation (“**Assignor**”), a Delaware corporation, and Network Appliance, Inc., a Delaware corporation, and (2) that certain Lease Agreement (Moffett Business Center) dated as of November 29, 2007 (the “**Lease**”) between Assignor, as landlord, and Network Appliance, Inc., a Delaware corporation, as tenant. *(Capitalized terms used and not otherwise defined in this document are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (Moffett Business Center) incorporated by reference into both the Purchase Agreement and Lease.)*

As contemplated by the Purchase Agreement, Assignor hereby sells, transfers and assigns unto [**NAI or the Applicable Purchaser**], a \_\_\_\_\_ (“**Assignee**”), all of Assignor’s right, title and interest in and to the following property, if any, to the extent such property is assignable:

- (a) the Lease;
- (b) any pending or future award made because of any condemnation affecting the Property or because of any conveyance to be made in lieu thereof, and any unpaid award for damage to the Property and any unpaid proceeds of insurance or claim or cause of action for damage, loss or injury to the Property; and
- (c) all other personal or intangible property included within the definition of “Property” as set forth in the Purchase Agreement, including but not limited to any of the following transferred to Assignor by the tenant pursuant to Paragraph 6 of the Lease or otherwise acquired by Assignor, at the time of the execution and delivery of the Lease and Purchase Agreement or thereafter, by reason of Assignor’s status as the owner of any interest in the Property: (1) any goods, equipment, furnishings, furniture, chattels and tangible personal property of whatever nature that are located on the Property and all renewals or replacements of or substitutions for any of the foregoing; (ii) the rights of Assignor, existing at the time of the execution of the Lease and Purchase Agreement or thereafter arising, under Permitted Encumbrances; and (iii) any general intangibles, other permits, licenses, franchises, certificates, and other rights and privileges related to the Property that Assignee would have acquired if Assignee had itself acquired the interest of Assignor in and to the Property instead of Assignor.

Provided, however, excluded from this conveyance and reserved to Assignor are any rights or privileges of Assignor under the following: (1) the indemnities set forth in the Lease, whether such rights are presently known or unknown, including rights of the Assignor to be indemnified against environmental claims of third parties as provided in the Lease which may not presently be known, all of which indemnities will survive the deliver of this Bill of Sale and Assignment

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and other documents required by the Purchase Agreement, (2) provisions in the Lease that establish the right of Assignor to recover any accrued unpaid rent under the Lease which may be outstanding as of the date hereof, (3) agreements between Assignor and Assignor's Parent or any Participant, or (4) any other instrument being delivered to Assignor contemporaneously herewith pursuant to the Purchase Agreement. **Drafting Note: The following sentence will be included unless the Property is being sold to NAI or an Affiliate pursuant to subparagraph 2(A)(1), 3(A) or 3(B) of the Purchase Agreement:** Also excluded from this conveyance and reserved to Assignor are (i) the right to retain Escrowed Proceeds, if any, that consist of condemnation or insurance proceeds resulting from a Pre-completion Force Majeure Event, and (ii) any right to receive future payments of any such condemnation or insurance proceeds. ]

Assignor does for itself and its successors covenant and agree to warrant and defend the title to the property assigned herein against the just and lawful claims and demands of any person claiming under or through a Lien Removable by Assignor, but not otherwise.

Assignee hereby assumes and agrees to keep, perform and fulfill Assignor's obligations, if any, relating to any permits or contracts (including the Lease), under which Assignor has rights being assigned herein.

[Signature pages follow.]



[Continuation of signature pages to Bill of Sale and Assignment dated to be effective as of \_\_\_\_\_, 20\_\_.]

**[NAI or the Applicable Purchaser]**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF \_\_\_\_\_ )

) SS

COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 20\_\_, before me \_\_\_\_\_, a Notary Public in and for the County and State aforesaid, personally appeared \_\_\_\_\_, who is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity and that by his/her signature on such instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS, my hand and official seal.

\_\_\_\_\_

**Exhibit E**

**ACKNOWLEDGMENT OF DISCLAIMER  
OF REPRESENTATIONS AND WARRANTIES**

THIS ACKNOWLEDGMENT OF DISCLAIMER OF REPRESENTATIONS AND WARRANTIES (this “**Certificate**”) is made as of \_\_\_\_\_, \_\_\_\_\_, by [NAI or the Applicable Purchaser], a \_\_\_\_\_ (“**Assignee**”).

Contemporaneously with the execution of this Certificate, BNP Paribas Leasing Corporation (“**Assignor**”), a Delaware corporation, is executing and delivering to Assignee (1) a Deed With Limited Title Warranties, and (2) a Bill of Sale and Assignment (the foregoing documents and any other documents to be executed in connection therewith are herein called the “**Conveyancing Documents**” and any of the properties, rights or other matters assigned, transferred or conveyed pursuant thereto are herein collectively called the “**Subject Property**”).

**Notwithstanding any provision contained in the Conveyancing Documents to the contrary, Assignee acknowledges that Assignor makes no representations or warranties of any nature or kind, whether statutory, express or implied, with respect to environmental matters or the physical condition of the Subject Property, and Assignee, by acceptance of the Conveyancing Documents, accepts the Subject Property “AS IS,” “WHERE IS,” “WITH ALL FAULTS” and without any such representation or warranty by Grantor as to environmental matters, the physical condition of the Subject Property, compliance with subdivision or platting requirements or construction of any improvements.** Without limiting the generality of the foregoing, Assignee hereby further acknowledges and agrees that warranties of merchantability and fitness for a particular purpose are excluded from the transaction contemplated by the Conveyancing Documents, as are any warranties arising from a course of dealing or usage of trade. Assignee hereby assumes all risk and liability (and agrees that Assignor will not be liable for any special, direct, indirect, consequential, or other damages) resulting or arising from or relating to the ownership, use, condition, location, maintenance, repair, or operation of the Subject Property, except for damages proximately caused by (and attributed by any applicable principles of comparative fault to) the Established Misconduct of Assignor. As used in the preceding sentence, “**Established Misconduct**” is intended to have, and be limited to, the meaning given to it in the Common Definitions and Provisions Agreement (Moffett Business Center) incorporated by reference into the Purchase Agreement (Moffett Business Center) dated as of November 29, 2007 between Assignor and Network Appliance, Inc., pursuant to which Purchase Agreement Assignor is delivering the Conveyancing Documents.

The provisions of this Certificate will be binding on Assignee, its successors and assigns and any other party claiming through Assignee. Assignee hereby acknowledges that Assignor is entitled to rely and is relying on this Certificate.

[Signature page follows.]

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**Exhibit F**

**SECRETARY'S CERTIFICATE**

The undersigned, [Secretary or Assistant Secretary] of BNP Paribas Leasing Corporation (“BNPPLC”), a Delaware corporation, hereby certifies as follows:

1. That he is the duly, elected, qualified and acting Secretary [or Assistant Secretary] of the Corporation and has custody of the corporate records, minutes and corporate seal.

2. That the following named persons have been properly designated, elected and assigned to the office in BNPPLC as indicated below; that such persons hold such office at this time and that the specimen signature appearing beside the name of such officer is his or her true and correct signature.

**[The following blanks must be completed with the names and signatures of the officers who will be signing the Sale Closing Documents on behalf of BNPPLC.]**

Name	Title	Signature

3. That the resolutions attached hereto and made a part hereof were duly adopted by the Board of Directors of BNPPLC in accordance with BNPPLC's Articles of Incorporation and Bylaws. Such resolutions have not been amended, modified or rescinded and remain in full force and effect.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the seal of the Corporation on this \_\_\_\_\_, day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
[signature and title]

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**CORPORATE RESOLUTIONS OF  
BNP PARIBAS LEASING CORPORATION**

**[DRAFTING NOTE: INSERT HERE COPIES OF RESOLUTIONS ADOPTED BY THE BOARD OF DIRECTORS OF BNPPLC SUFFICIENT TO AUTHORIZE THE DELIVERY OF SALE CLOSING DOCUMENTS. SUCH RESOLUTIONS MAY BE AS FOLLOWS:**

WHEREAS, pursuant to that certain Purchase Agreement (Moffett Business Center) (herein called the "Purchase Agreement") dated as of November 29, 2007, by and between BNP Paribas Leasing Corporation ("BNPPLC") and Network Appliance, Inc. ("NAI"), BNPPLC agreed to sell and Purchaser agreed to purchase or cause the Applicable Purchaser (as defined in the Purchase Agreement) to purchase the Corporation's interest in the property (the "Property") located in Santa Clara County, California, more particularly described therein.

NOW THEREFORE, BE IT RESOLVED, that the Board of Directors of BNPPLC, in its best business judgment, deems it in the best interest of BNPPLC and its shareholders that BNPPLC convey the Property to NAI or the Applicable Purchaser pursuant to and in accordance with the terms of the Purchase Agreement.

RESOLVED FURTHER, that the proper officers of BNPPLC, and each of them, are hereby authorized and directed in the name and on behalf of BNPPLC to cause BNPPLC to fulfill its obligations under the Purchase Agreement.

RESOLVED FURTHER, that the proper officers of BNPPLC, and each of them, are hereby authorized and directed to take or cause to be taken any and all actions and to prepare or cause to be prepared and to execute and deliver any and all deeds, assignments and other documents, instruments and agreements that are necessary, advisable or appropriate, in such officer's sole and absolute discretion, to carry out the intent and to accomplish the purposes of the foregoing resolutions. ]

**Exhibit G**

**CERTIFICATION OF NON-FOREIGN STATUS**

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. Sections 18805, 18815 and 26131 of the California Revenue and Taxation Code, as amended, provide that a transferee of a California real property interest must withhold income tax if the transferor is a nonresident seller.

To inform [NAI or the Applicable Purchaser] (“**Transferee**”) that withholding of tax is not required upon the disposition of a U.S. real property interest by BNP PARIBAS LEASING CORPORATION (“**Transferor**”), a Delaware corporation, the undersigned hereby certifies the following on behalf of Transferor:

1. Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. Transferor is not a disregarded entity (as defined in Section 1.1445-2(b)(2)(iii) of the Income Tax Regulations);
3. Transferor’s U.S. employer identification number is 75-2252918; and
4. Transferor’s office address is:

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Transferor understands that this Certification of Non-Foreign Status may be disclosed to the Internal Revenue Service by Transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this Certification of Non-Foreign Status and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of the Transferor.

Dated: \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**CLOSING CERTIFICATE  
AND AGREEMENT  
(1299 ORLEANS)**

**BETWEEN**

**NETWORK APPLIANCE, INC.  
("NAI")**

**AND**

**BNP PARIBAS LEASING CORPORATION  
("BNPPLC")**

**November 29, 2007**

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**CLOSING CERTIFICATE  
AND AGREEMENT  
(1299 ORLEANS)**

This CLOSING CERTIFICATE AND AGREEMENT (1299 ORLEANS) (this "**Certificate**"), dated as of November 29, 2007 (the "**Effective Date**"), is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and NETWORK APPLIANCE, INC. ("**NAI**"), a Delaware corporation.

**RECITALS**

Contemporaneously with the execution of this Certificate, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement (1299 Orleans) dated as of the Effective Date (the "**Common Definitions and Provisions Agreement**"), which by this reference is incorporated into and made a part of this Certificate for all purposes. *As used in this Certificate, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Certificate are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

Also contemporaneously with this Certificate, BNPPLC is acquiring the Land described in Exhibit A and existing Improvements on the Land pursuant to the Existing Contract.

Also contemporaneously with this Certificate, BNPPLC and NAI are executing a Lease Agreement (1299 Orleans) dated as of the Effective Date (the "**Lease**"), pursuant to which NAI is leasing from BNPPLC the Land, which is described in Exhibit A, and all Improvements on such Land.

Also contemporaneously with this Certificate, BNPPLC and NAI are executing a Purchase Agreement (1299 Orleans) dated as of the Effective Date (the "**Purchase Agreement**"), pursuant to which NAI may purchase or arrange for the purchase of the Property and BNPPLC may collect a Supplemental Payment from NAI sufficient to cover all or a substantial portion of the Lease Balance not otherwise repaid to BNPPLC from the proceeds of any sale of the Property.

As a condition to BNPPLC's acquisition of the Land and its execution of the other Operative Documents, BNPPLC requires the representations and covenants of NAI set out below.

**AGREEMENTS**

In consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

---

**1 Representations, Covenants and Acknowledgments of NAI Concerning the Property.** To induce BNPPLC to purchase the Property from the Prior Owner and to enter into this Certificate and the other Operative Documents, NAI represents, covenants and acknowledges as follows:

(A) Prior Inspections and Investigations Concerning the Property. NAI has thoroughly inspected, investigated and evaluated the condition of and title to the Property and Applicable Laws which will govern the use and operation of the Property required or permitted by the Operative Documents, as necessary to make the representations concerning the Property set forth in this Certificate and other Operative Documents.

(B) Title. Because of the conveyance from the Prior Owner to BNPPLC contemporaneously with the execution of this Certificate, good and indefeasible title to the Land and Improvements is currently vested in BNPPLC, subject only to the Permitted Encumbrances described in Exhibit B, the rights of NAI itself under the Operative Documents and any Liens Removable by BNPPLC. NAI will not, without the prior consent of BNPPLC, create, place or authorize, or through any act or failure to act, acquiesce to or suffer the placing of, any deed of trust, mortgage or other Lien, whether statutory, constitutional or contractual against or covering the Property or any part thereof (other than Permitted Encumbrances and Liens Removable by BNPPLC), regardless of whether the same are expressly or otherwise subordinate to the Operative Documents or BNPPLC's interest in the Property.

(C) Title Insurance. Without limiting NAI's obligations under the preceding subparagraph, contemporaneously with the execution of this Certificate NAI must provide to BNPPLC a title insurance policy or binder committing the applicable title insurer to issue a title insurance policy, without the payment of further premiums (as the case may be, the "**Title Policy**") in an amount equal to the purchase price paid by BNPPLC to the Prior Owner for the Property, in form and substance satisfactory to BNPPLC (including comprehensive, survey, variable rate, access, and such other endorsements as may be requested by BNPPLC), written by one or more title insurance companies satisfactory to BNPPLC and insuring BNPPLC's fee estate in the Land and Improvements.

(D) Condition of the Property. The Land described in Exhibit A is the same as the land described in the Title Policy and as shown on the plat included as part of the ALTA/ACSM Survey prepared by Kier & Wright, Civil Engineers & Surveyors, Inc., dated October 3, 2007, Job No. A03080-1 (the "**Survey**"), which survey was delivered to BNPPLC at the request of NAI. All material improvements on the Land as of the Effective Date are as shown on the Survey, and except as shown on the Survey there are no easements or encroachments encumbering or affecting the Property. No part of the Land is within a flood plain as designated by any governmental authority. The Improvements are in good condition, free from latent or patent defects or deficiencies that, either individually or in the aggregate, could materially and adversely affect the use or occupancy of the Property as permitted by the Lease or could



reasonably be anticipated to cause injury or death to any person. The Property and use thereof permitted by the Lease comply in all material respects with all Applicable Laws, including laws regarding access and use by disabled persons and local zoning ordinances. Adequate provision has been made for the Property to be served by electric, gas, storm and sanitary sewers, sanitary water supply, telephone and other utilities required for the use thereof. All streets, alleys and easements necessary to serve the Property for the uses permitted by the Lease have been completed and are serviceable. No extraordinary circumstances (including any use of the Land as a habitat for endangered species) exist that would materially and adversely affect such uses of the Property. The Improvements are useable for their intended purpose without the need to obtain any additional easements, rights-of-way or concessions from any third party or parties.

(E) Environmental Representations. Except as otherwise disclosed in the Environmental Report, to the knowledge of NAI: (i) no Hazardous Substances Activity has occurred prior to the Effective Date; (ii) no owner or operator of the Property has reported or been required to report any release of any Hazardous Substances on or from the Property pursuant to any Environmental Law; and (iii) no owner or operator of the Property has received from any federal, state or local governmental authority any warning, citation, notice of violation or other communication regarding a suspected or known release or discharge of Hazardous Substances on or from the Property or regarding a suspected or known violation of Environmental Laws concerning the Property. Further, NAI represents, to its knowledge, that the Environmental Report taken as a whole is not misleading or inaccurate in any material respect.

(F) Cooperation by NAI and its Affiliates.

(1) After the Designated Sale Date, if neither NAI nor an Applicable Purchaser has purchased BNPPLC's interest in the Property pursuant to the Purchase Agreement, and if a use of the Property by BNPPLC or any new Improvements or any removal or modification of Improvements proposed by BNPPLC would violate any Permitted Encumbrance or Applicable Law unless NAI or any of its Affiliates, as an owner of adjacent property or otherwise, gave its consent or approval thereto or agreed to join in a modification of a Permitted Encumbrance, then NAI must give and cause its Affiliates to give such consent or approval or join in such modification.

(2) After the Designated Sale Date, if neither NAI nor an Applicable Purchaser has purchased BNPPLC's interest in the Property pursuant to the Purchase Agreement, and if any Permitted Encumbrance or Applicable Law requires the consent or approval of NAI or any of its Affiliates or of any other Person to an assignment of any interest in the Property by BNPPLC or by any of its successors or assigns, NAI will without charge give and cause its Affiliates to give such consent or approval and will cooperate in any way reasonably requested by BNPPLC to assist BNPPLC to obtain such consent or approval from the other Person.

(3) NAI's obligations under this subparagraph 1(F) will be binding upon any successor or assign of NAI or its Affiliates with respect to the Land and other properties encumbered or benefitted by the Permitted Encumbrances, and such obligations will survive any sale of the Property by BNPPLC, other than to NAI or an Applicable Purchaser under the Purchase Agreement, for the benefit of BNPPLC's assignees.

(G) Compliance with Covenants and Laws. The use of the Property permitted by the Lease complies, or will comply after NAI obtains readily available permits (as the tenant under the Lease), in all material respects with all Applicable Laws. NAI has obtained or can and will promptly obtain all utility, building, health and operating permits required by any governmental authority or municipality having jurisdiction over the Property for the use of the Property permitted by the Lease.

**2 Representations and Covenants by NAI.** NAI also represents and covenants to BNPPLC as follows:

(A) Concerning NAI and the Operative Documents.

(1) *Entity Status.* NAI is a corporation duly incorporated and validly existing in the State of Delaware and is authorized to do business in and is in good standing under the laws of California.

(2) *Authority.* The Constituent Documents of NAI permit the execution, delivery and performance of the Operative Documents by NAI, and all actions and approvals necessary to bind NAI under the Operative Documents have been taken and obtained. Without limiting the foregoing, the Operative Documents will be binding upon NAI when signed on behalf of NAI by Ingemar Lanevi, Vice President and Corporate Treasurer of NAI. NAI has all requisite power and all governmental certificates of authority, licenses, permits and qualifications to carry on its business as now conducted and contemplated to be conducted and to perform the Operative Documents.

(3) *Solvency.* NAI is not "insolvent" on the Effective Date (that is, the sum of NAI's absolute and contingent liabilities — including the obligations of NAI under the Operative Documents — does not exceed the fair market value of NAI's assets), and NAI has no outstanding liens, suits, garnishments or court actions which could render NAI insolvent or bankrupt. NAI's capital is adequate for the businesses in which NAI is engaged and intends to be engaged. NAI has not incurred (whether by the Operative Documents or otherwise), nor does NAI intend to incur or believe that it will incur, debts which will be beyond its ability to pay as such debts mature. No petition or answer has been filed by or, to NAI's knowledge, against NAI in bankruptcy or other legal proceedings that seeks an assignment for the benefit of creditors, the appointment of a receiver, trustee, custodian or liquidator with respect to NAI or any significant portion of

NAI's property, a reorganization, arrangement, rearrangement, composition, extension, liquidation or dissolution of NAI or similar relief under the federal Bankruptcy Code or any state law.

(4) *Financial Reports.* All reports, financial statements and other data furnished by NAI to BNPPLC in connection with the agreements set forth in the Operative Documents are true and correct in all material respects and do not omit to state any fact or circumstance necessary to make the statements contained therein not misleading. No material adverse change has occurred since the dates of such reports, statements and other data in the financial condition of NAI.

(5) *Pending Legal Proceedings.* No judicial or administrative investigations, actions, suits or proceedings are pending or, to the knowledge of NAI, threatened against or affecting NAI by or before any court or other Governmental Authority that have or could reasonably be expected to have a Material Adverse Effect. NAI is not in default with respect to any order, writ, injunction, decree or demand of any court or other Governmental Authority in a manner that has or could reasonably be expected to have a Material Adverse Effect.

(6) *No Default or Violation.* The execution and performance by NAI of the Operative Documents do not and will not contravene or result in a breach of or default under any other agreement to which NAI is a party or by which NAI is bound or which affects any assets of NAI. Such execution and performance by NAI do not contravene any law, order, decree, rule or regulation to which NAI is subject. Further, such execution and performance by NAI will not result in the creation or imposition of (or the obligation to create or impose) any lien, charge or encumbrance on, or security interest in, any property of NAI pursuant to the provisions of any such other agreement.

(7) *Use of Proceeds.* In no event will the funds from any Funding Advance be used directly or indirectly for personal, family, household or agricultural purposes or for the purpose, whether immediate, incidental or ultimate, of purchasing, acquiring or carrying any "margin stock" or any "margin securities" (as such terms are defined in Regulation U promulgated by the Board of Governors of the Federal Reserve System) or to extend credit to others directly or indirectly for the purpose of purchasing or carrying any such margin stock or margin securities. NAI represents that NAI is not engaged principally, or as one of NAI's important activities, in the business of extending credit to others for the purpose of purchasing or carrying such margin stock or margin securities.

(8) *Enforceability.* The Operative Documents constitute the legal, valid and binding obligations of NAI enforceable in accordance with their terms, subject to the effect of bankruptcy, insolvency, reorganization, receivership and other similar laws affecting the rights of creditors generally.

(9) *Pari Passu*. The claims of BNPPLC against NAI under the Operative Documents rank at least *pari passu* with the claims of all its other unsecured creditors, except those whose claims are preferred solely by any laws of general application having effect in relation to bankruptcy, insolvency, liquidation or other similar events.

(10) *Conduct of Business and Maintenance of Existence*. So long as any obligations of NAI under the Operative Documents remain outstanding, NAI will continue to engage in business of the same general type as now conducted by it and will preserve, renew and keep in full force and effect its corporate existence and its rights, privileges and franchises necessary or desirable in the normal conduct of business.

(11) *Investment Company Act, etc.* NAI is not and will not become, by reason of the Operative Documents or any business or transactions in which it participates voluntarily, (a) an “investment company” or a company “controlled” by an “investment company” (as each of the quoted terms is defined or used in the Investment Company Act of 1940, as amended), or (b) subject to regulation under the Federal Power Act, or any foreign, federal or local statute or regulation limiting NAI’s ability to incur or guarantee indebtedness or obligations, or to pledge its assets to secure indebtedness or obligations, as contemplated by any of the Operative Documents.

(12) *Not a Foreign Person*. NAI is not a “foreign person” within the meaning of Sections 1445 and 7701 of the Code (i.e. NAI is not a non-resident alien, foreign corporation, foreign partnership, foreign trust or foreign estate as those terms are defined in the Code and regulations promulgated thereunder).

(13) *ERISA*. NAI is not and will not become an “employee benefit plan” (as defined in Section 3(3) of ERISA) which is subject to Title I of ERISA. The assets of NAI do not and will not in the future constitute “plan assets” of one or more such plans within the meaning of 29 C.F.R. Section 2510.3-101. NAI is not and will not become a “governmental plan” within the meaning of Section 3(32) of ERISA. Transactions by or with NAI are not subject to state statutes regulating investments of and fiduciary obligations with respect to governmental plans. No ERISA Termination Event has occurred with respect to any Plan, and NAI and its Subsidiaries are in compliance with ERISA. Neither NAI nor its Subsidiaries are required to contribute to, or has any other absolute or contingent liability in respect of, any Multiemployer Plan. As of the Effective Date no “accumulated funding deficiency” (as defined in Section 412(a) of the Code) exists with respect to any Plan, whether or not waived by the Secretary of the Treasury or his delegate, and there are no Unfunded Benefit Liabilities with respect to any Plan.

(14) *Compliance With Laws*. NAI and its Subsidiaries comply and will comply with all Applicable Laws (including environmental laws and ERISA and the rules and

regulations thereunder), except when the necessity of compliance is contested in good faith by appropriate proceedings which do not have and could not reasonably be expected to have a Material Adverse Effect. Neither NAI nor its Subsidiaries have received any notice asserting or describing a material failure on the part of NAI or any Subsidiary to comply with Applicable Laws, other than failures that have been fully rectified by NAI or the Subsidiary, as the case may be, in a manner approved or accepted by Governmental Authorities responsible for the enforcement of the Applicable Laws.

(15) *Payment of Taxes Generally.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect (taking into account any appropriate contest of taxes), NAI and its Subsidiaries have filed and will file all tax declarations, reports and returns which are required by (and in the form required by) Applicable Laws and have paid and will pay all taxes or other charges shown to be due and payable on such declarations, reports and returns and all assessments made against it or its assets by any Governmental Authority; and no liens have been filed or established by any Governmental Authority against NAI or its assets or against any Subsidiary or its assets to secure the payment of taxes or assessments that are past due or claimed to be past due.

(16) *Maintenance of Insurance Generally.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have maintained and will maintain insurance with respect to its properties and businesses, with financially sound and reputable insurers, having coverages against losses or damages of the kinds customarily insured against by reputable companies in the same or similar businesses, such insurance being the types, and in amounts no less than the amounts, which are customary for such companies under similar circumstances.

(17) *Franchises, Licenses, etc.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and comply with, and will have and will comply with, all franchises, certificates, licenses, permits and other authorizations from Governmental Authorities that are necessary for the ownership, maintenance and operation of its properties and assets.

(18) *Patents, Trademarks, etc.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and will have and maintain in full force and effect all patents, trademarks, service marks, trade names, copyrights, licenses and other such rights, free from burdensome restrictions, which are necessary for the operation of its businesses. Without limiting the foregoing, to the knowledge of NAI, no product, process, method, service or other item presently sold by or employed by NAI or any Subsidiary in

connection with its business as presently conducted infringes any patents, trademark, service mark, trade name, copyright, license or other right owned by any other Person. No claim or litigation is presently pending, or to the knowledge of NAI, threatened against or affecting NAI or any Subsidiary that contests its right to sell or use any such product, process, method, substance or other item and that has or could reasonably be expected to have a Material Adverse Effect.

(19) *Labor*. Neither NAI nor any of its Subsidiaries has experienced strikes, labor disputes, slow downs or work stoppages due to labor disagreements that currently have or could reasonably be expected to have a Material Adverse Effect, and to the knowledge of NAI there are no such strikes, disputes, slow downs or work stoppages threatened against it or against any Subsidiary. The hours worked and payment made to employees of NAI and its Subsidiaries have not been in violation in any material respect of the Fair Labor Standards Act or any other Applicable Laws dealing with such matters. All material payments due on account of wages or employee health and welfare insurance and other benefits from NAI or from any Subsidiary have been paid or accrued as liabilities on its books.

(20) *Title to Properties Generally*. Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and will have and maintain good and indefeasible fee simple title to or valid leasehold interests in all of its real property and good title to or a valid leasehold interest in all of its other material assets, as such properties and assets are reflected in the most recent financial statements delivered to BNPPPLC, other than properties or assets disposed of in the ordinary course of business since such date; *subject, however*, in the case of the Property, to Permitted Encumbrances and Liens created by the Operative Documents. NAI enjoys peaceful and undisturbed possession under all of its leases.

(21) *Books and Records*. NAI will keep proper books of record and account, containing complete and accurate entries of all its financial and business transactions.

(B) Further Assurances. NAI will, upon the reasonable request of BNPPPLC, (i) execute, acknowledge, deliver and record or file such further instruments and do such further acts as may be necessary, desirable or proper to carry out more effectively the purposes of the Operative Documents and to subject to any of the Operative Documents any property intended by the terms thereof to be covered thereby, including specifically, but without limitation, any renewals, additions, substitutions, replacements or appurtenances to the Property; (ii) execute, acknowledge, deliver, procure and record or file any document or instrument deemed advisable by BNPPPLC to protect its rights in and to the Property against the rights or interests of third persons; and (iii) provide such certificates, documents, reports, information, affidavits and other instruments and do such further acts as may be necessary, desirable or proper in the reasonable determination of BNPPPLC to enable BNPPPLC to comply with the requirements or requests of

any agency or authority having jurisdiction over it.

(C) Syndication. Without limiting the foregoing, NAI will cooperate with BNPPLC as reasonably required to allow BNPPLC to induce banks not affiliated with BNPPLC to become Participants. Such cooperation will include the execution of any modification proposed by BNPPLC to any of the Operative Documents at the request of a prospective Participant; *subject, however*, to the conditions that (i) in no event will NAI be required to approve or accept an increase in the Spread or other modifications that change the economics of the transactions contemplated by the Operative Documents to NAI, and (ii) in other respects the form and substance of any such modification agreement must not be reasonably objectionable to NAI.

(D) Financial Statements; Required Notices; Certificates. Throughout the Term of the Lease, NAI will deliver to BNPPLC and to each Participant of which NAI has been notified:

(1) as soon as available and in any event within 45 days after the end of each of the first three fiscal quarters of each fiscal year of NAI, the unaudited consolidated balance sheet of NAI and its Subsidiaries as of the end of such quarter and consolidated unaudited statements of income, stockholders' equity and cash flow of NAI and its Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such quarter, setting forth in comparative form figures for the corresponding period in the preceding fiscal year, in the case of such statements of income, stockholders' equity and cash flow, and figures for the preceding fiscal year in the case of such balance sheet, all in reasonable detail, in accordance with GAAP, and certified in a manner acceptable to BNPPLC by a Responsible Financial Officer of NAI (subject to normal year-end adjustments); *provided*, that so long as NAI is a company subject to the periodic reporting requirements of Section 12 of the Securities Exchange Act of 1934, as amended, NAI will be deemed to have satisfied its obligations under this clause (1) if NAI delivers to BNPPLC the same quarterly reports, certified by a Responsible Financial Officer of NAI (subject to year-end adjustments), that NAI delivers to its shareholders;

(2) as soon as available and in any event within ninety days after the end of each fiscal year of NAI, the consolidated balance sheet of NAI and its Subsidiaries as of the end of such fiscal year and consolidated statements of income, stockholders' equity and cash flow of NAI and its Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such fiscal year, setting forth in comparative form figures for the preceding fiscal year, all in reasonable detail, in accordance with GAAP, and certified in a manner acceptable to BNPPLC by independent public accountants of recognized national standing reasonably acceptable to BNPPLC; *provided*, that so long as NAI is a company subject to the periodic reporting requirements of Section 12 of the Securities Exchange Act of 1934, as amended, NAI will be deemed to have satisfied its obligations under this clause (ii) if NAI delivers to BNPPLC the

same annual report and report and opinion of accountants that NAI delivers to its shareholders;

(3) in each case if requested in writing by BNPPLC, together with the financial statements furnished in accordance with subparagraph 2(D)(1) and 2(D)(2), a certificate of a Responsible Financial Officer of NAI in the form of certificate attached hereto as Exhibit C (a) representing that no Event of Default or material Default by NAI has occurred (or, if an Event of Default or material Default by NAI has occurred, stating the nature thereof and the action which NAI has taken or proposes to take to rectify it), (b) stating that the representations and warranties by NAI contained herein are true and complete in all material respects on and as of the date of such certificate as though made on and as of such date, and (c) setting forth calculations which show whether NAI is complying with financial covenants set forth in subparagraph 3(C);

(4) as soon as possible and in any event within five days after the occurrence of each Event of Default or material Default known to a Responsible Financial Officer of NAI, a statement of NAI setting forth details of such Event of Default or material Default and the action which NAI has taken and proposes to take with respect thereto;

(5) promptly after the sending or filing thereof, copies of all such financial statements, proxy statements, notices and reports which NAI or any Subsidiary sends to its public stockholders, and copies of all reports and registration statements (without exhibits) which NAI or any Subsidiary files with the Securities and Exchange Commission (or any governmental body or agency succeeding to the functions of the Securities and Exchange Commission) or any national securities exchange;

(6) as soon as practicable and in any event within thirty days after a Responsible Financial Officer of NAI knows or has reason to know that any ERISA Termination Event with respect to any Plan has occurred, a statement of a Responsible Financial Officer of NAI describing such ERISA Termination Event and the action, if any, which NAI proposes to take with respect thereto;

(7) upon request by BNPPLC, a statement in writing certifying that the Operative Documents are unmodified and in full effect (or, if there have been modifications, that the Operative Documents are in full effect as modified, and setting forth such modifications) and either stating that no Default exists under the Operative Documents or specifying each such Default; it being intended that any such statement by NAI may be relied upon by any prospective purchaser or mortgagee of the Property or any prospective Participant; and

(8) such other information respecting the condition or operations, financial or otherwise, of NAI, of its Subsidiaries or of the Property as BNPPLC or BNPPLC's Parent



or any Participant through BNPPLC may from time to time reasonably request.

Reports and financial statements required to be delivered pursuant to paragraphs (1), (2) and (5) of this subparagraph 2(D) shall be deemed to have been delivered on the date on which such reports, or reports containing such financial statements, are posted for downloading (in a "PDF" or other readily available format) on one of NAI's internet websites at [www.netapp.com](http://www.netapp.com) or [www.investors.netapp.com](http://www.investors.netapp.com) or on the SEC's internet website at [www.sec.gov](http://www.sec.gov); provided, however, that after being posted they remain available for downloading at the applicable website for at least 90 days.

BNPPLC is hereby authorized to deliver a copy of any information or certificate delivered to it pursuant to this subparagraph 2(D) to any Participant and to any regulatory body having jurisdiction over BNPPLC, BNPPLC's Parent or any Participant that requires or requests it.

(E) Omissions. None of NAI's representations in the Operative Documents or in any other document, certificate or written statement furnished to BNPPLC by or on behalf of NAI contains any untrue statement of a material fact or omits a material fact necessary in order to make the statements contained herein or therein (when taken in their entireties) not misleading.

(F) OFAC. None of NAI or any subsidiary or affiliate of NAI: (i) is a person named on the list of Specially Designated Nationals or Blocked Persons maintained by the U.S. Department of the Treasury's Office of Foreign Assets Control available at <http://www.treas.gov/offices/eotffc/ofac/sdn/index.html>, or as otherwise published from time to time; or (ii) is (A) an agency of the government of a country, (B) an organization controlled by a country, or (C) a person resident in a country that is subject to a sanctions program identified on the list maintained by OFAC and available at <http://www.treas.gov/offices/eotffc/ofac/sanctions/index.html>, or as otherwise published from time to time, as such program may be applicable to such agency, organization or person; or (iii) derives more than 15% of its assets or operating income from investments in or transactions with any such country, agency, organization or person. Further, none of the proceeds from the Initial Advance will be used to finance any operations, investments or activities in, or make any payments to, any such country, agency, organization, or person.

(G) U.S. Patriot Act. NAI acknowledges that BNPPLC, BNPPLC's Parent and Participants may be required, pursuant to the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "**Patriot Act**"), to obtain, verify, record and disclose to law enforcement authorities information that identifies the NAI, including the name and address of NAI. NAI will provide to BNPPLC and Participants any such information they may request pursuant to the Patriot Act, and NAI agrees that any of BNPPLC, BNPPLC's Parent and Participants may disclose such information to law enforcement authorities if the authorities make a request or demand for disclosure pursuant to the Patriot Act. NAI also acknowledges that, in such event, none of BNPPLC, BNPPLC's Parent or Participants may be required or even

permitted by the Patriot Act to notify NAI of the request or demand for disclosure.

3 **Financial Covenants and Negative Covenants of NAI.** NAI represents and covenants as follows:

(A) Definitions Applicable in this Paragraph. As used in (and only for purposes of) this Paragraph 3:

“**Accepted Contest Requirements**” means, with respect to any Tax or other payment due or claimed to be due from NAI or any Subsidiary or any demand for payment made upon NAI or any Subsidiary, that (a) NAI or such Subsidiary must contest the validity or amount thereof in good faith by appropriate proceedings, (b) NAI or such Subsidiary has set aside on its books adequate reserves with respect thereto in accordance with GAAP and (c) the failure to make payment thereof pending such contest could not reasonably be expected to result in a Material Adverse Effect.

“**Capital Lease Obligations**” of any Person means the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP, and the amount of such obligations shall be the capitalized amount thereof determined in accordance with GAAP.

“**Change in Control**” means (a) the acquisition of ownership, directly or indirectly, beneficially or of record, by any Person or group (within the meaning of the Securities Exchange Act of 1934 and the rules of the Securities and Exchange Commission thereunder as in effect on the date hereof), of Equity Interests representing more than 40% of the aggregate ordinary voting power represented by the issued and outstanding Equity Interests of NAI; (b) occupation of a majority of the seats (other than vacant seats) on the board of directors of NAI by Persons who were neither (i) nominated by the board of directors of NAI nor (ii) appointed by directors so nominated; or (c) NAI ceasing to own, directly or indirectly, 100% of the issued and outstanding Equity Interests of each Material Domestic Subsidiary except in accordance with subparagraph 3(B)(3) below.

“**Consolidated Debt for Borrowed Money**” means at any time (1) the sum, without duplication, of (a) items that, in accordance with GAAP, would be classified as indebtedness on the consolidated balance sheet of NAI and its Subsidiaries and (b) the capitalized portion of any synthetic leases, minus (2) the then aggregate outstanding principal amount of Indebtedness under NAI’s Secured Revolver and under that certain Loan Agreement dated as of March 31, 2006 by and among Network Appliance Global Ltd. and JPMorgan Chase Bank, National Association as initial lender and as

administrative agent. (In clause (b) of this definition, “capitalized portion” means, with respect to any synthetic lease, the price for which the lessee can purchase the leased property or could purchase it if the synthetic lease expired on the date of the applicable calculation of the Consolidated Debt for Borrowed Money. Thus, for example, the “capitalized portion” of the transactions governed by the Operative Documents will equal the Lease Balance.)

“**Consolidated EBITDA**” means, with reference to any period, the sum of the following: (a) Consolidated Net Income for such period, plus (b) without duplication and to the extent deducted from revenues in determining such Consolidated Net Income, the sum of (i) Consolidated Interest Expense for such period, (ii) expense for taxes paid or accrued during such period, (iii) all amounts attributable to depreciation, (iv) amortization during such period, (v) extraordinary non-cash charges incurred other than in the ordinary course of business during such period, (vi) nonrecurring extraordinary non-cash restructuring charges, and (vii) share-based non-cash compensation expense minus without duplication and to the extent included in determining such Consolidated Net Income, (c) interest income, (d) extraordinary non-cash gains realized other than in the ordinary course of business and (e) any cash payments made during such period in respect of the item described in clause (vii) above subsequent to the fiscal quarter in which the relevant share-based non-cash compensation expense was incurred, all calculated for NAI and its Subsidiaries in accordance with GAAP on a consolidated basis. For the purposes of calculating Consolidated EBITDA for any period of four consecutive fiscal quarters (each, a “Reference Period”), (i) if at any time during such Reference Period NAI or any Subsidiary shall have made any Material Disposition, the Consolidated EBITDA for such Reference Period shall be reduced by an amount equal to the Consolidated EBITDA (if positive) attributable to the property that is the subject of such Material Disposition for such Reference Period or increased by an amount equal to the Consolidated EBITDA (if negative) attributable thereto for such Reference Period, and (ii) if during such Reference Period NAI or any Subsidiary shall have made a Material Acquisition, Consolidated EBITDA for such Reference Period shall be calculated after giving pro forma effect thereto as if such Material Acquisition occurred on the first day of such Reference Period. As used in this definition, “Material Acquisition” means any acquisition of property or series of related acquisitions of property that (a) constitutes (i) assets comprising all or substantially all or any significant portion of a business or operating unit of a business, or (ii) all or substantially all of the common stock or other Equity Interests of a Person, and (b) involves the payment of consideration by NAI and its Subsidiaries in excess of \$50,000,000; and “Material Disposition” means any sale, transfer or disposition of property or series of related sales, transfers, or dispositions of property that yields gross proceeds to NAI or any of its Subsidiaries in excess of \$50,000,000.

“**Consolidated Interest Expense**” means, with reference to any period, the

interest expense (including without limitation interest expense under Capital Lease Obligations that is treated as interest in accordance with GAAP) of NAI and its Subsidiaries calculated on a consolidated basis for such period with respect to (a) all outstanding Indebtedness of NAI and its Subsidiaries allocable to such period in accordance with GAAP and (b) Swap Agreements (including, without limitation, all commissions, discounts and other fees and charges owed with respect to letters of credit and bankers acceptance financing and net costs under interest rate Swap Agreements to the extent such net costs are allocable to such period in accordance with GAAP). In addition, for purposes of calculating the Leverage Ratio only, rents payable for any period pursuant to NAI's synthetic leases shall be included in Consolidated Interest Expense for such period; excluding, however, any amounts (whether or not designated as rents) paid or to be paid as compensation for or reimbursement of any Losses, and also excluding any payments which reduce or will reduce the outstanding lease balance of any synthetic lease. For example, Base Rents payable under the Lease will be included in Consolidated Interest Expense, but not Additional Rents.

**"Consolidated Net Income"** means, with reference to any period, the net income (or loss) of NAI and its Subsidiaries calculated in accordance with GAAP on a consolidated basis (without duplication) for such period.

**"Consolidated Total Assets"** means, as of the date of any determination thereof, total assets of NAI and its Subsidiaries calculated in accordance with GAAP on a consolidated basis as of such date.

**"Disclosure Letter"** means the disclosure letter (the form of which is attached to this Certificate as Exhibit D) given by NAI to Chase Bank, National Association, as Administrative Agent, in connection with NAI's recently executed Credit Agreement dated as of November 2, 2007, as amended or supplemented from time to time by NAI with the written consent of BNPPLC.

**"Domestic Subsidiary"** means any Subsidiary that is incorporated or organized under the laws of the United States of America, any state thereof or in the District of Columbia.

**"Equity Interests"** means shares of capital stock, partnership interests, membership interests in a limited liability company, beneficial interests in a trust or other equity ownership interests in a Person, and any warrants, options or other rights entitling the holder thereof to purchase or acquire any such equity interest.

**"Governmental Authority"** means the government of the United States of America, any other nation or any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity

exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

**“Guarantee”** of or by any Person (the “guarantor”) means any obligation, contingent or otherwise, of the guarantor guaranteeing or having the economic effect of guaranteeing any Indebtedness or other obligation of any other Person (the “primary obligor”) in any manner, whether directly or indirectly, and including any obligation of the guarantor, direct or indirect, (a) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness or other obligation or to purchase (or to advance or supply funds for the purchase of) any security for the payment thereof, (b) to purchase or lease property, securities or services for the purpose of assuring the owner of such Indebtedness or other obligation of the payment thereof, (c) to maintain working capital, equity capital or any other financial statement condition or liquidity of the primary obligor so as to enable the primary obligor to pay such Indebtedness or other obligation or (d) as an account party in respect of any letter of credit or letter of guaranty issued to support such Indebtedness or obligation; provided, that the term Guarantee shall not include endorsements for collection or deposit in the ordinary course of business.

**“Indebtedness”** of any Person means, without duplication, (a) all obligations of such Person for borrowed money, (b) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such Person upon which interest charges are paid or payable, (d) all obligations of such Person under conditional sale or other title retention agreements relating to property acquired by such Person, (e) all obligations of such Person in respect of the deferred purchase price of property or services (excluding accounts payable incurred in the ordinary course of business), (f) all Indebtedness of others secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) any Lien on property owned or acquired by such Person, whether or not the Indebtedness secured thereby has been assumed, (g) all Guarantees by such Person of Indebtedness of others, (h) all Capital Lease Obligations of such Person, (i) all obligations, contingent or otherwise, of such Person as an account party in respect of letters of credit and letters of guaranty, (j) all obligations, contingent or otherwise, of such Person in respect of bankers’ acceptances, (k) the Net Mark-to Market Exposure of all Swap Obligations of such Person, and (l) any other Off-Balance Sheet Liability. The Indebtedness of any Person shall include the Indebtedness of any other entity (including any partnership in which such Person is a general partner) to the extent such Person is liable therefor as a result of such Person’s ownership interest in or other relationship with such entity, except to the extent the terms of such Indebtedness provide that such Person is not liable therefor.

**“Leverage Ratio”** means the ratio, determined as of the end of each fiscal quarter of NAI, of Consolidated Debt for Borrowed Money as of the end of such fiscal quarter to Consolidated EBITDA for the period of 4 consecutive fiscal quarters ending with the end

of such fiscal quarter.

“**Lien**” means, with respect to any asset, (a) any mortgage, deed of trust, lien, pledge, hypothecation, encumbrance, charge or other security interest in, on or of such asset and (b) the interest of a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement (or any financing lease having substantially the same economic effect as any of the foregoing) relating to such asset.

“**Liquidity**” means, with respect to NAI and its Subsidiaries as of any date of determination, the sum of all unrestricted cash and unrestricted Permitted Investments which are not subject to any Lien (other than Liens permitted under subparagraph 3(B)(2)(e)) and which would be included on the consolidated balance sheet of NAI and such Subsidiaries in accordance with GAAP as of such date of determination.

“**Material Adverse Effect**” means a material adverse effect on (a) the business, assets, operations or condition, financial or otherwise, of NAI and its Subsidiaries taken as a whole, or (b) the ability of NAI or any Material Domestic Subsidiary to perform any of its obligations under any of the Operative Documents or (c) the rights of or benefits available to BNPPPLC under any of the Operative Documents.

“**Material Domestic Subsidiary**” means each Material Subsidiary that is a Domestic Subsidiary. The Material Domestic Subsidiaries on the Effective Date are identified as such in Schedule 3.01 to the Disclosure Letter.

“**Material Subsidiary**” means each Subsidiary (a) which, as of the most recent fiscal quarter of NAI, for the period covering the then most recently ended fiscal year and the portion of the then current fiscal year ending at the end of such fiscal quarter, for which financial statements have been delivered pursuant to subparagraph 2(D), contributed greater than five percent (5%) of NAI’s Consolidated EBITDA for such period or (b) which contributed greater than five percent (5%) of NAI’s Consolidated Total Assets as of such date.

“**Moody’s**” means Moody’s Investors Service, Inc.

“**NAI’s Secured Revolver**” means the Secured Credit Agreement dated as of October 5, 2007 by and among NAI, certain lenders and JPMorgan Chase Bank, National Association, as administrative agent, as it exists and is in force on the Effective Date.

“**Net Mark-to-Market Exposure**” of a Person means, as of any date of determination, the excess (if any) of all unrealized losses over all unrealized profits of such Person arising from each Swap Agreement transaction. “Unrealized losses” means the fair market value of the cost to such Person of replacing such transaction as of the

date of determination (assuming such transaction were to be terminated as of that date), and “unrealized profits” means the fair market value of the gain to such Person of replacing such transaction as of the date of determination (assuming such transaction was to be terminated as of that date).

“**Off-Balance Sheet Liability**” of a Person means (a) any repurchase obligation or liability of such Person with respect to accounts or notes receivable sold by such Person that is related to retained credit risk, or (b) any indebtedness, liability or obligation under any so-called “synthetic lease” transaction entered into by such Person.

“**Permitted Liens or Encumbrances**” means:

(a) Liens imposed by law for Taxes or other governmental charges that are not yet due or are being contested in accordance with Accepted Contest Requirements;

(b) carriers’, warehousemen’s, mechanics’, materialmen’s, repairmen’s, landlord’s and other like Liens imposed by law, arising in the ordinary course of business and securing obligations that are not overdue by more than sixty (60) days or are being contested in accordance with Accepted Contest Requirements;

(c) pledges and deposits made in the ordinary course of business in compliance with workers’ compensation, unemployment insurance and other social security laws or regulations;

(d) deposits to secure the performance of bids, trade contracts, leases, statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature, in each case in the ordinary course of business;

(e) judgment liens in respect of judgments that do not constitute an Event of Default under clause (J) of the definition thereof in the Common Definitions and Provisions Agreement;

(f) easements, zoning restrictions, rights-of-way and similar encumbrances on real property imposed by law or arising in the ordinary course of business that do not secure any monetary obligations and do not materially detract from the value of the affected property or interfere in any material respect with the ordinary conduct of business of NAI or any Subsidiary;

(g) leases or subleases granted to other Persons and not interfering in any material respect with the business of the lessor or sublessor;

- (h) Liens arising from precautionary Uniform Commercial Code filings or similar filings relating to operating leases;
- (i) Liens in favor of customs and revenue authorities arising as a matter of law to secure payment of customs duties in connection with the importation of goods;
- (j) Liens on insurance proceeds securing the premium of financed insurance proceeds;
- (k) Liens incurred in the ordinary course of business on cash collateral to secure letters of credit, bank guarantees and banker's acceptances and Swap Agreements;
- (l) licenses of intellectual property in the ordinary course of business;
- (m) any interest or title of a lessor or sublessor under any lease of real property or personal property; and
- (n) other Liens on assets securing Indebtedness or other obligations not prohibited under provisions of the Operative Documents other than this Paragraph 3 in an aggregate amount not to exceed \$50,000,000 at any time outstanding;

provided that the term "Permitted Liens or Encumbrances" shall not include any Lien securing Indebtedness.

**"Permitted Investments"** means:

- (a) direct obligations of, or obligations the principal of and interest on which are unconditionally guaranteed by, the United States of America (or by any agency thereof to the extent such obligations are backed by the full faith and credit of the United States of America), in each case maturing within one year from the date of acquisition thereof;
- (b) investments in commercial paper maturing within 365 days from the date of acquisition thereof and having, at such date of acquisition, a rating of "A-2" (or better) from S&P or "P-2" (or better) from Moody's;
- (c) investments in certificates of deposit, banker's acceptances and time deposits maturing within 180 days from the date of acquisition thereof issued or guaranteed by or placed with, and money market deposit accounts issued or



offered by, any domestic office of any commercial bank organized under the laws of the United States of America or any State thereof or any other country which has a combined capital and surplus and undivided profits of not less than \$500,000,000;

(d) fully collateralized repurchase agreements with a term of not more than thirty (30) days for securities described in clause (a) above and entered into with a financial institution satisfying the criteria described in clause (c) above;

(e) money market funds that (i) comply with the criteria set forth in Securities and Exchange Commission Rule 2a-7 under the Investment Company Act of 1940, as amended, to the extent such money market fund is governed thereby, (ii) are rated AA by S&P and Aa by Moody's and (iii) have portfolio assets of at least \$5,000,000,000;

(f) investments made pursuant to a cash management investment policy approved by the board of directors of the Person making such investment and as in effect on the Effective Date, as such policy may be amended or otherwise modified from time to time with the written consent of BNPPLC; and

(g) investments described in the following table:

<u>Type of Security</u>	<u>Remaining Maturity/ S&amp;P/ Moody's Rating</u>
JPMorgan Certificates of Deposit	
US Treasury Treasuries	
US Agency Securities	Less than 30 years
USD Commercial Paper	A1/P1 Less than or equal to 270 days
Money Market Funds (Must be through JPMorgan)	US Gov't Treasury Plus Cash Management 100% US Treasury Federal Money Market
Medium Term Notes, Corporate Bonds, Corporate Debentures, Floating Rate Notes, and Auction Rate Securities	A or better

“**S&P**” means Standard & Poor’s, a division of the McGraw-Hill Companies.

“**Sale and Leaseback Transaction**” means any sale or other transfer of assets or property by any Person with the intent to lease any such asset or property as lessee.

“**Subordinated Indebtedness**” means any Indebtedness of NAI or any Subsidiary the payment of which is subordinated to payment of the obligations under the Operative Documents to the written satisfaction of BNPPLC.

“**subsidiary**” means, with respect to any Person (the “parent”) at any date, any corporation, limited liability company, partnership, association or other entity the accounts of which would be consolidated with those of the parent in the parent’s consolidated financial statements if such financial statements were prepared in accordance with GAAP as of such date, as well as any other corporation, limited liability company, partnership, association or other entity (a) of which securities or other ownership interests representing more than 50% of the equity or more than 50% of the ordinary voting power or, in the case of a partnership, more than 50% of the general partnership interests are, as of such date, owned, controlled or held, or (b) that is, as of such date, otherwise Controlled, by the parent or one or more subsidiaries of the parent or by the parent and one or more subsidiaries of the parent.

“**Subsidiary**” means any subsidiary of NAI.

“**Swap Agreement**” means any agreement with respect to any swap, forward, future or derivative transaction or option or similar agreement involving, or settled by reference to, one or more rates, currencies, commodities, equity or debt instruments or securities, or economic, financial or pricing indices or measures of economic, financial or pricing risk or value or any similar transaction or any combination of these transactions; provided that no phantom stock or similar plan providing for payments only on account of services provided by current or former directors, officers, employees or consultants of NAI or the Subsidiaries shall be a Swap Agreement.

“**Swap Obligations**” of a Person means any and all obligations of such Person, whether absolute or contingent and howsoever and whensoever created, arising, evidenced or acquired (including all renewals, extensions and modifications thereof and substitutions therefor), under (a) any and all Swap Agreements, and (b) any and all cancellations, buy backs, reversals, terminations or assignments of any such Swap Agreement transaction.

“**Taxes**” means any and all present or future taxes, levies, imposts, duties, deductions, charges or withholdings imposed by any Governmental Authority.

(B) Negative Covenants. Prior to the Designated Sale Date and so long thereafter as any amount shall continue to be due and payable by NAI to BNPPPLC pursuant to any of the Operative Documents, NAI covenants and agrees as follows:

(1) *Subsidiary Indebtedness*. NAI will not permit any Subsidiary to create, incur, assume or permit to exist any Indebtedness, except:

(a) by Guarantee or assumption of any obligations evidenced or created by (x) any of the Operative Documents, (y) or other comparable agreements between BNPPPLC and NAI covering other properties, or (z) the Credit Agreement referenced on the first page of the Disclosure Letter;

(b) Indebtedness existing on the date hereof and set forth in Schedule 6.01 to the Disclosure Letter and extensions, renewals and replacements of any such Indebtedness that do not increase the then outstanding principal amount thereof;

(c) Indebtedness of (i) any Subsidiary to any Material Domestic Subsidiary and (ii) any Subsidiary that is not a Material Domestic Subsidiary to any other Subsidiary that is not a Material Domestic Subsidiary;

(d) Guarantees by any Subsidiary of Indebtedness of NAI or any other Subsidiary;

(e) Indebtedness of any Subsidiary incurred to finance the acquisition, construction or improvements of any fixed or capital assets, including Capital Lease Obligations and any Indebtedness assumed in connection with the acquisition of any such assets or secured by a Lien on any such assets (and additions, accessions, parts, improvement and attachments thereto and the proceeds thereof) prior to the acquisition thereof, and extensions, renewals and replacements of any such Indebtedness that do not increase the then outstanding principal amount thereof; provided that such Indebtedness is incurred prior to or within 120 days after such acquisition or the completion of such construction or improvement; and extensions, renewals and replacements of any such Indebtedness that do not increase the outstanding principal amount thereof;

(f) Indebtedness of any Person that becomes a Subsidiary after the date hereof; provided that such Indebtedness exists at the time such Person becomes a Subsidiary and is not created in contemplation of or in connection with such Person becoming a Subsidiary, and extensions, renewals and replacements of any such Indebtedness that do not increase the outstanding principal amount thereof;

(g) Indebtedness of any Subsidiary as an account party in respect of

letters of credit, bank guarantees and bankers' acceptances;

(h) Indebtedness in respect of Swap Agreements permitted under subparagraph 3(B)(4);

(i) Indebtedness of Subsidiaries which are not Material Domestic Subsidiaries in an aggregate principal amount not exceeding 5% of Consolidated Total Assets at any time outstanding; and

(j) other Indebtedness of any Subsidiary which is a Material Domestic Subsidiary so long as, at the time of the incurrence thereof and after giving effect thereto (on a pro forma basis), NAI is in pro forma compliance with the maximum Leverage Ratio permitted under subparagraph 3(C)(1).

(2) *Liens.* NAI will not, and will not permit any Subsidiary to, create, incur, assume or permit to exist any Lien on any property or asset now owned or hereafter acquired by it (and for purposes hereof, any capital stock issued by NAI which is held by NAI as treasury stock shall not be deemed to be property or an asset of NAI and shall not be subject to this subparagraph 3(B)(2)), or assign or sell any income or revenues (including accounts receivable) or rights in respect of any thereof, except that the following shall be permitted so long as they do not encumber any interest in the Property in violation of other provisions of the Operative Documents:

(a) Permitted Liens or Encumbrances;

(b) any Lien on any property or asset of NAI or any Subsidiary existing on the date hereof and set forth in Schedule 6.02 to the Disclosure Letter; provided that (i) such Lien shall not apply to any other property or asset of NAI or any Subsidiary and (ii) such Lien shall secure only those obligations which it secures on the date hereof and extensions, renewals and replacements thereof that do not increase the outstanding principal amount thereof;

(c) any Lien existing on any property or asset prior to the acquisition thereof by NAI or any Subsidiary or existing on any property or asset of any Person that becomes a Subsidiary after the date hereof prior to the time such Person becomes a Subsidiary; provided that (i) such Lien is not created in contemplation of or in connection with such acquisition or such Person becoming a Subsidiary, as the case may be, (ii) such Lien shall not apply to any other property or assets of NAI or any Subsidiary and (iii) such Lien shall secure only those obligations which it secures on the date of such acquisition or the date such Person becomes a Subsidiary, as the case may be, and extensions, renewals and replacements thereof that do not increase the outstanding principal amount

thereof;

(d) Liens on fixed or capital assets (and additions, accessions, parts, improvements and attachments thereto and the proceeds thereof) acquired, constructed or improved by NAI or any Subsidiary; provided that:

(i) such security interests secure Indebtedness not otherwise prohibited under the Operative Documents;

(ii) such security interests and the Indebtedness secured thereby are either (A) incurred prior to or within one hundred twenty (120) days after such acquisition or the completion of such construction or improvement, or (B) granted and incurred to extend, renew or replace any security interest and Indebtedness secured thereby that are permitted by this clause (d) and do not increase the outstanding principal amount thereof by more than 5%;

(iii) the Indebtedness secured thereby does not exceed 105% of the cost of acquiring, constructing or improving such fixed or capital assets; and

(iv) such security interests shall not apply to any other property or assets of NAI or any Subsidiary;

(e) customary bankers' Liens and rights of setoff arising by operation of law or contract and incurred on deposits made in the ordinary course of business;

(f) assignments of the right to receive income effected (i) as a part of the sale of a Subsidiary or a business unit or (ii) for factoring in the ordinary course of business;

(g) Liens on any cash earnest money deposit made by NAI or any Subsidiary in connection with any letter of intent or acquisition agreement that is not prohibited by the Operative Documents;

(h) customary Liens granted in favor a trustee to secure fees and other amounts owing to such trustee under an indenture or other agreement pursuant to Indebtedness not otherwise prohibited under the Operative Documents; and

(i) Liens granted as provided in and securing Indebtedness under NAI's Secured Revolver, provided such Liens do not at any time secure an outstanding principal balance of more than \$500,000,000.

*(3) Fundamental Changes and Asset Sales.*

(a) NAI will not, and will not permit any Subsidiary to, merge into, consolidate with, or otherwise be acquired by, any other Person, or sell, transfer, lease or otherwise dispose (including pursuant to a Sale and Leaseback Transaction) of (in one transaction or in a series of transactions) all or substantially all of its assets, or all or substantially all of the stock of any of its Subsidiaries (in each case, whether now owned or here-after acquired, and for purposes hereof, any capital stock issued by NAI which is held by NAI as treasury stock shall not be deemed to be property or an asset of NAI and shall not be subject to this subparagraph 3(B)(3), or liquidate or dissolve, except that, if at the time thereof and immediately after giving effect thereto no Default shall have occurred and be continuing (i) any Subsidiary may merge into a Material Domestic Subsidiary in a transaction in which the surviving entity is such Material Domestic Subsidiary, (ii) any wholly owned Subsidiary may merge into or consolidate with any wholly owned Subsidiary in a transaction in which the surviving entity is a wholly owned Subsidiary and no Person other than NAI or a wholly owned Subsidiary receives any consideration, provided that if any such merger described in this clause (ii) shall involve a Material Domestic Subsidiary, the surviving entity of such merger shall be a Material Domestic Subsidiary, (iii) any Subsidiary may sell, transfer, lease or otherwise dispose of its assets to a Material Domestic Subsidiary or any wholly owned Subsidiary pursuant to a transaction not otherwise prohibited under the Operative Documents, (iv) any Subsidiary may liquidate or dissolve if NAI determines in good faith that such liquidation or dissolution is in the best interests of NAI, (v) NAI may merge with any other Person so long as NAI is the surviving entity, (vi) any Subsidiary may merge with any other Person so long as the surviving entity is, in the case of a Subsidiary Guarantor, the Subsidiary Guarantor, and in all other cases, a wholly owned Subsidiary and (vii) any Subsidiary other than a Subsidiary Guarantor may merge into, and NAI or any Subsidiary may dispose of assets to, any other Person so long as NAI delivers a certificate to BNPPPLC demonstrating pro forma compliance with subparagraph 3(C) after giving effect to such transaction.

(b) NAI will not, and will not permit any of its Subsidiaries to, engage to any material extent in any business other than businesses of the type conducted by NAI and its Subsidiaries on the date of execution of the Operative Documents and businesses reasonably related thereto.

(c) NAI will not, and will not permit any of its Subsidiaries to, change its fiscal year to end on a day other than as such fiscal year end is currently determined or change NAI's method of determining fiscal quarters.

(4) *Speculative Swap Agreements.* NAI will not, and will not permit any of its Subsidiaries to, enter into any Swap Agreement, except (a) Swap Agreements entered into to hedge or mitigate risks to which NAI or any Subsidiary has actual exposure (other than those in respect of Equity Interests or Subordinated Indebtedness of NAI or any of its Subsidiaries), and (b) Swap Agreements entered into in order to effectively cap, collar or exchange interest rates (from fixed to floating rates, from one floating rate to another floating rate or otherwise) with respect to any interest-bearing liability or investment of NAI or any Subsidiary.

(5) *Transactions with Affiliates.* NAI will not, and will not permit any of its Subsidiaries to, sell, lease or otherwise transfer any property or assets to, or purchase, lease or otherwise acquire any property or assets from, or otherwise engage in any other transactions with, any of its Affiliates, except (a) in the ordinary course of business at prices and on terms and conditions not less favorable to NAI or such Subsidiary than could be obtained on an arm's-length basis from unrelated third parties, (b) transactions between or among NAI and its wholly owned Subsidiaries not involving any other Affiliate, (c) to enter into indemnification arrangements with or to pay customary fees and reimburse out-of-pocket expenses of directors or (d) as set forth on the Disclosure Letter.

(6) *Restrictive Agreements.* NAI will not, and will not permit any of its Subsidiaries to, directly or indirectly, enter into, incur or permit to exist any agreement or other arrangement that prohibits, restricts or imposes any condition upon (a) the ability of NAI or any Subsidiary to create, incur or permit to exist any Lien upon any of its property or assets, or (b) the ability of any Subsidiary to pay dividends or other distributions with respect to any shares of its capital stock or to make or repay loans or advances to NAI or any other Subsidiary or to Guarantee Indebtedness of NAI or any other Subsidiary; provided that (i) the foregoing shall not apply to restrictions and conditions imposed by law, by any Operative Document, by any document relating to NAI's unsecured syndicated revolving credit facility from certain lenders and JPMorgan Chase Bank, National Association as administrative agent, by NAI's Secured Revolver, or by any document relating to NAI's synthetic lease facilities, (ii) the foregoing shall not apply to restrictions and conditions existing on the date hereof identified on Schedule 6.06 to the Disclosure Letter (but shall apply to any extension or renewal of, or any amendment or modification expanding the scope of, any such restriction or condition), (iii) the foregoing shall not apply to customary restrictions and conditions contained in agreements relating to the sale of assets or of a Subsidiary pending such sale, provided such restrictions and conditions apply only to such assets or such Subsidiary that are to be sold and such sale is permitted hereunder, (iv) clause (a) of the foregoing shall not apply to restrictions or conditions imposed by any agreement relating to secured Indebtedness permitted by the Operative Documents if such restrictions or conditions apply only to the property or assets securing such Indebtedness, and (v) clause (a) of the

foregoing shall not apply to customary provisions in leases, licenses, joint venture agreements and other agreements entered into in the ordinary course of business restricting the assignment thereof.

(C) Financial Covenants. Prior to the Designated Sale Date and so long thereafter as any amount shall continue to be due and payable by NAI to BNPPPLC pursuant to any of the Operative Documents:

(1) *Maximum Leverage Ratio*. NAI will not permit the Leverage Ratio to be greater than 3.0 to 1.0.

(2) *Minimum Liquidity*. NAI and its Subsidiaries on a consolidated basis shall maintain, at all times, Liquidity of not less than \$300,000,000.

#### 4 Limited Representations and Covenants of BNPPPLC

##### (A) Concerning Accounting Matters.

(1) To permit NAI to determine the appropriate accounting for NAI's relationship with BNPPPLC under FASB Interpretation No. 46(R), *Consolidation of Variable Interest Entities* ("FIN 46"), BNPPPLC represents that to the knowledge of BNPPPLC the fair value of the Property and of other properties, if any, leased to NAI by BNPPPLC (collectively, whether one or more, the "**Properties Leased to NAI**") are, as of the Effective Date, less than half of the total of the fair values of all assets of BNPPPLC, excluding any assets of BNPPPLC held within a silo. Further, none of the Properties Leased to NAI are, as of the Effective Date, held within a silo. Consistent with the directions of NAI (based upon the current interpretation of FIN 46 by NAI and its auditors), and for purposes of this representation only:

- "**held within a silo**" means, with respect to any asset or group of assets leased by BNPPPLC to a single lessee or group of affiliated lessees, that BNPPPLC has obtained funds equal to or in excess of 95% of the fair value of the leased asset or group of assets to acquire or maintain its investment in such asset or group of assets through non-recourse financing or other contractual arrangements (such as targeted equity or bank participations), the effect of which is to leave such asset or group of assets (or proceeds thereof) as the only significant asset or assets of BNPPPLC at risk for the repayment of such funds;
- "**fair value**" means, with respect to any asset, the amount for which the asset could be bought or sold in a current transaction



negotiated at arms length between willing parties (that is, other than in a forced or liquidation sale);

- with respect to the Properties Leased to NAI (regardless of how BNPPLC accounts for the leases of the Properties Leased to NAI), and with respect to other assets that are subject to leases accounted for by BNPPLC as operating leases pursuant to Financial Accounting Standards Board Statement 13 (“FAS 13”), fair value is determined without regard to residual value guarantees, remarketing agreements, non-recourse financings, purchase options or other contractual arrangements, whether made by BNPPLC with NAI or with other parties, that might otherwise impact the fair value of such assets;
- with respect to assets, other than Properties Leased to NAI, that are subject to leases accounted for by BNPPLC as leveraged leases pursuant to FAS 13, fair value is determined on a gross basis prior to the application of leveraged lease accounting, recognizing that equity investments made by BNPPLC in its assets subject to leveraged lease accounting should be grossed up in applying this test (however, equity investments made by BNPPLC through another legal entity should not be so grossed up in applying this test);
- with respect to assets, other than Properties Leased to NAI, that are subject to leases accounted for by BNPPLC as direct financing leases pursuant to FAS 13, fair value is determined as the sum of the fair values (considering current interest rates at which similar loans would be made to borrowers with similar credit ratings and for the same remaining maturities) of the corresponding finance lease receivables and related unguaranteed residual values.

(2) BNPPLC also represents that BNPPLC’s Parent is, as of the Effective Date, including BNPPLC as a consolidated subsidiary in the audited financial statements issued by BNPPLC’s Parent.

(3) BNPPLC covenants that, as reasonably requested by NAI from time to time with respect to any accounting period during which the Lease is or was in effect, BNPPLC will provide to NAI confirmation of facts concerning BNPPLC and its assets as necessary to permit NAI to determine the proper accounting for the Lease (including updates of the facts set forth in clauses (1) and (2) above); except that BNPPLC will not be required by this provision to (w) provide any information that is not in the possession

or control of BNPPPLC or its Affiliates, (x) disclose the specific terms and conditions of its leases or other transactions with other parties or the names of such parties, (y) make disclosures prohibited by any law applicable to BNPPPLC or BNPPPLC's Parent, or (z) disclose any other information that is protected from disclosure by confidentiality provisions in favor of such other parties or would be protected if their agreements with BNPPPLC contained confidentiality provisions similar in scope and substance to any confidentiality provisions set forth in the Operative Documents for the benefit of NAI or its Affiliates. BNPPPLC will represent that information provided by it pursuant to this clause is true and complete in all material respects, but only to the knowledge of BNPPPLC as of the date it is provided, utilizing the form of the certificate attached hereto as Exhibit E (signed by an officer of BNPPPLC), which certificate will be provided periodically by BNPPPLC within five business days of reasonable written request therefor by NAI as provided above, or such longer period of time as may be reasonably necessary under the circumstances in order for BNPPPLC to confirm such information.

(4) Although the representations required of BNPPPLC by this subparagraph are intended to cover *facts*, it is understood and agreed (consistent with subparagraph 4(C) of the Lease) that BNPPPLC has not made and will not make any representation or warranty as to the proper accounting by NAI or its Affiliates of the Lease or as to other accounting *conclusions*.

(B) Other Limited Representations. BNPPPLC represents that:

(1) *Entity Status*. BNPPPLC is a corporation duly incorporated, validly existing and in good standing under the laws of Delaware.

(2) *Authority*. The Constituent Documents of BNPPPLC permit the execution, delivery and performance of the Operative Documents by BNPPPLC, and all actions and approvals necessary to bind BNPPPLC under the Operative Documents have been taken and obtained. Without limiting the foregoing, the Operative Documents will be binding upon BNPPPLC when signed on behalf of BNPPPLC by Lloyd G. Cox, Managing Director of BNPPPLC. BNPPPLC has all requisite power and all governmental certificates of authority, licenses, permits and qualifications to carry on its business as now conducted and contemplated to be conducted and to perform the Operative Documents, except that BNPPPLC makes no representation as to whether it has obtained governmental certificates of authority, licenses, permits, qualifications or other documentation required by state or local Applicable Laws. With regard to any such state or local requirements, NAI may require that BNPPPLC obtain a specific governmental certificates of authority, licenses, permits, qualifications or other documentation pursuant to subparagraph 4(C), subject to the conditions set forth in that subparagraph.

(3) *Solvency*. BNPPPLC is not "insolvent" on the Effective Date (that is, the

sum of BNPPLC's absolute and contingent liabilities — including the obligations of BNPPLC under the Operative Documents — does not exceed the fair market value of BNPPLC's assets), and BNPPLC has no outstanding liens, suits, garnishments or court actions which could render BNPPLC insolvent or bankrupt. BNPPLC's capital is adequate for the businesses in which BNPPLC is engaged and intends to be engaged. BNPPLC has not incurred (whether by the Operative Documents or otherwise), nor does BNPPLC intend to incur or believe that it will incur, debts which will be beyond its ability to pay as such debts mature. No petition or answer has been filed by or, to BNPPLC's knowledge, against BNPPLC in bankruptcy or other legal proceedings that seeks an assignment for the benefit of creditors, the appointment of a receiver, trustee, custodian or liquidator with respect to BNPPLC or any significant portion of BNPPLC's property, a reorganization, arrangement, rearrangement, composition, extension, liquidation or dissolution of BNPPLC or similar relief under the federal Bankruptcy Code or any state law. (As used in the Operative Documents, "**BNPPLC's knowledge**" and words of like effect mean the present actual knowledge of Lloyd G. Cox and Barry Mendelsohn, the current officers of BNPPLC having primary responsibility for the negotiation of the Operative Documents.)

(4) *Pending Legal Proceedings.* No judicial or administrative investigations, actions, suits or proceedings are pending or, to the knowledge of BNPPLC, threatened against or affecting BNPPLC by or before any court or other Governmental Authority. BNPPLC is not in default with respect to any order, writ, injunction, decree or demand of any court or other Governmental Authority in a manner that has or could reasonably be expected to have a material adverse effect on BNPPLC or its ability to perform its obligations under the Operative Documents.

(5) *No Default or Violation.* The execution and performance by BNPPLC of the Operative Documents do not and will not contravene or result in a breach of or default under any other agreement to which BNPPLC is a party or by which BNPPLC is bound or which affects any assets of BNPPLC. Such execution and performance by BNPPLC do not contravene any law, order, decree, rule or regulation to which BNPPLC is subject. Further, such execution and performance by BNPPLC will not result in the creation or imposition of (or the obligation to create or impose) any lien, charge or encumbrance on, or security interest in, any property of BNPPLC pursuant to the provisions of any such other agreement.

(6) *Enforceability.* The Operative Documents constitute the legal, valid and binding obligations of BNPPLC enforceable in accordance with their terms, subject to the effect of bankruptcy, insolvency, reorganization, receivership and other similar laws affecting the rights of creditors generally.

(7) *Conduct of Business and Maintenance of Existence.* So long as any of the

Operative Documents remains in force, BNPPPLC will continue to engage in business of the same general type as now conducted by it and will preserve, renew and keep in full force and effect its corporate existence and its rights, privileges and franchises necessary or desirable in the normal conduct of business.

(8) *Not a Foreign Person.* BNPPPLC is not a “foreign person” within the meaning of Sections 1445 and 7701 of the Code (i.e. BNPPPLC is not a non-resident alien, foreign corporation, foreign partnership, foreign trust or foreign estate as those terms are defined in the Code and regulations promulgated thereunder).

Notwithstanding the foregoing, however or any other provision herein or in other Operative Documents to the contrary, it is understood that NAI is not relying upon BNPPPLC for any evaluation of California or local Applicable Laws upon the transactions contemplated in the Operative Documents, and BNPPPLC makes no representation and will not make any representation that conditions imposed by zoning ordinances or other state or local Applicable Laws to the purchase, ownership, lease or operation of the Property have been satisfied.

(C) Further Assurances. During the Term of the Lease BNPPPLC will take any action reasonably requested by NAI to facilitate the use of the Property permitted by the Lease; subject, however, to the following terms and conditions:

(1) This subparagraph 4(C) will not impose upon BNPPPLC the obligation to take any action that can be taken by NAI, NAI’s Affiliates or anyone else other than BNPPPLC in its capacity as the owner of the Property.

(2) BNPPPLC will not be required by this subparagraph 4(C) to incur any expense or to make any payments to another Person unless BNPPPLC has received funds from NAI, in excess of any other amounts due from NAI under any of the Operative Documents, sufficient to cover all such expenses or payments or other Persons.

(3) BNPPPLC will not be required by this subparagraph 4(C) to incur or assume any significant potential liability to another Person.

(4) BNPPPLC will have no obligations whatsoever under this subparagraph 4(C) at any time when a Default has occurred and is continuing.

(5) NAI must request any action to be taken by BNPPPLC pursuant to this subparagraph 4(C), and such request must be specific and in writing, if required by BNPPPLC at the time the request is made.

(6) No action may be required of BNPPPLC pursuant to this subparagraph 4(C) that could constitute a violation of any Applicable Laws or compromise or constitute a

waiver of BNPPLC's rights under other provisions of this Certificate or any of the other Operative Documents or that for any other reason is reasonably objectionable to BNPPLC.

The actions BNPPLC will take pursuant to this subparagraph 4(C) if reasonably requested by NAI will include, subject to the conditions listed in the proviso above, executing or consenting to, or exercising or assisting NAI to exercise rights under any: (I) grant of easements, licenses, rights of way, and other rights in the nature of easements encumbering the Land or the Improvements, (II) release, relocation or termination of easements, licenses, rights of way or other rights in the nature of easements which are for the benefit of the Land or Improvements or any portion thereof, (III) dedication or transfer of portions of the Land not improved with a building, for road, highway or other public purposes, (IV) agreements (other than with NAI or its Affiliates) for the use and maintenance of common areas, for reciprocal rights of parking, ingress and egress and amendments to any covenants and restrictions affecting the Land or any portion thereof, (V) documents required to create or administer a governmental special benefit district or assessment district for public improvements and collection of special assessments, (VI) instruments necessary or desirable for the exercise or enforcement of rights or performance of obligations under any Permitted Encumbrance or any contract, permit, license, franchise or other right included within the term "Property", (VII) modifications of Permitted Encumbrances, (VIII) permit applications or other documents required to accommodate any construction permitted by the Lease, (IX) confirmations of NAI's rights under any particular provisions of the Operative Documents which NAI may wish to provide to a third party, or (X) tract or parcel map subdividing the Land into lots or parcels. However, the determination of whether any such action is reasonably requested or reasonably objectionable to BNPPLC may depend in whole or in part upon the extent to which the requested action may result in a lien to secure payment or performance obligations against BNPPLC's interest in the Property, may cause the value of the Property to be less than the Lease Balance after any Qualified Prepayments that may result from such action are taken into account, or may impose upon BNPPLC any present or future obligations greater than the obligations BNPPLC is willing to accept, taking into consideration the indemnifications provided by NAI under the Lease. In addition, with respect to any request made by NAI to facilitate a relocation of any easements, the following will be relevant to the determination of whether the request is reasonable:

(i) whether material encroachments will result from the relocation, and whether title to the land over or under which any such easement is to be relocated is encumbered by Liens other than those which are Fully Subordinated or Removable or which otherwise constitute Permitted Encumbrances;

(ii) whether the relocation will result in any interruption of access or services provided to the Property which is likely to extend beyond the Designated Sale Date (it being understood, however, that any such interruption which is not likely to extend beyond the Designated Sale Date will not be a reason for BNPPLC to decline the

request); and

(iii) whether the relocation is to be accomplished in a manner that will not, when the relocation is complete, result in a material adverse change in the access to or services provided to the Improvements or the Land.

Any and all Losses incurred by BNPPLC because of any action taken pursuant to this subparagraph 4(C) will be covered by the indemnification set forth in subparagraph 5(C) of the Lease. Further, for purposes of such indemnification, any such action taken by BNPPLC will be deemed to have been made at the request of NAI if made pursuant to any request of counsel to or any officer of NAI (or with their knowledge, and without their objection) in connection with the execution or administration of the Lease or the other Operative Documents.

(D) Actions Permitted by NAI Without BNPPLC's Consent. No refusal by BNPPLC to execute or join in the execution of any agreement, application or other document requested by NAI pursuant to the preceding subparagraph 4(C) will prevent NAI from itself executing such agreement, application or other document, so long as NAI is not purporting to act for BNPPLC and does not thereby create or expand any obligations or restrictions that encumber BNPPLC's title to the Property. Further, subject to the other terms and conditions of the Lease and other Operative Documents, NAI may do any of the following in NAI's own name and to the exclusion of BNPPLC during the Term of the Lease, so long as no Default has occurred and is continuing, and provided NAI is not purporting to act for BNPPLC and does not thereby create or expand any obligations or restrictions that encumber BNPPLC's title to the Property:

(1) perform obligations arising under and exercise and enforce the rights of NAI or the owner of the Property under the Permitted Encumbrances;

(2) perform obligations arising under and exercise and enforce the rights of NAI or the owner of the Property with respect to any other contracts or documents (such as building permits) included within the Personal Property; and

(3) recover and retain any monetary damages or other benefit inuring to NAI or the owner of the Property through the enforcement of any rights, contracts or other documents included within the Personal Property (including the Permitted Encumbrances); provided, that to the extent any such monetary damages may become payable as compensation for an adverse impact on value of the Property, the rights of BNPPLC and NAI under the other Operative Documents with respect to the collection and application of such monetary damages will be the same as for condemnation proceeds payable because of a taking of all or any part of the Property.

(E) Waiver of Landlord's Liens. BNPPLC waives any security interest, statutory landlord's lien or other interest BNPPLC may have in or against computer equipment and other

tangible personal property placed on the Land from time to time that NAI or its Affiliates own or lease from other lessors; however, BNPPPLC does not waive its interest in or rights with respect to equipment or other property included within the "Property" as described in Paragraph 7 of the Lease. Although computer equipment or other tangible personal property may be "bolted down" or otherwise firmly affixed to Improvements, it will not by reason thereof become part of the Improvements if it can be removed without causing structural or other material damage to the Improvements and without rendering HVAC or other major building systems inoperative and if it does not otherwise constitute "Property" as provided in Paragraph 7 of the Lease.

Without limiting the foregoing, BNPPPLC acknowledges that NAI may obtain financing from other parties for inventory, furnishings, equipment, machinery and other personal property that is located in or about the Improvements, but that is not included in or integral to the Property, and to secure such financing NAI may grant a security interest under the California Uniform Commercial Code in such inventory, furnishings, equipment, machinery and other personal property. Further, BNPPPLC acknowledges that the lenders providing such financing may require confirmation from BNPPPLC of its agreements concerning landlord's liens and other matters set forth in this subparagraph 4(E), and NAI may obtain such confirmation in any statement required of BNPPPLC by the next subparagraph.

(F) Estoppel Letters. Upon thirty days written request by NAI at any time and from time to time prior to the Designated Sale Date, BNPPPLC must provide a statement in writing certifying that the Operative Documents are unmodified and in full effect (or, if there have been modifications, that the Operative Documents are in full effect as modified, and setting forth such modifications), certifying the dates to which the Base Rent payable by NAI under the Lease has been paid, stating whether BNPPPLC is aware of any Default by NAI that may exist under the Operative Documents and confirming BNPPPLC's agreements concerning landlord's liens and other matters set forth in subparagraph 4(E). Any such statement by BNPPPLC may be relied upon by anyone with whom NAI may intend to enter into an agreement for construction of the Improvements or other significant agreements concerning the Property.

(G) No Implied Representations or Promises by BNPPPLC. **NAI acknowledges and agrees that neither BNPPPLC nor its representatives or agents have made any representations or promises with respect to the Property or the transactions contemplated in the Operative Documents except as expressly set forth in the Operative Documents, and no rights, easements or licenses are being acquired by NAI from BNPPPLC by implication or otherwise, except as expressly set forth in the other Operative Documents.**

**5 Usury Savings Provision.** Notwithstanding anything to the contrary in any of the Operative Documents, BNPPPLC does not intend to contract for, charge or collect any amount of money from NAI that constitutes interest in excess of the maximum nonusurious rate of interest, if any, allowed by applicable usury laws (the "**Maximum Rate**"). BNPPPLC and NAI agree that

it is their intent in the execution of the Lease, the Purchase Agreement and other Operative Documents to contract in strict compliance with applicable usury laws, if any. In furtherance thereof, BNPPLC and NAI stipulate and agree that none of the provisions of the Lease, the Purchase Agreement or the other Operative Documents shall ever be construed to create a contract requiring compensation for the use, forbearance or detention of money at a rate in excess of the Maximum Rate, and the provisions of this paragraph shall control over all other provisions of this Certificate or other Operative Documents which may be in apparent conflict herewith. All interest paid or agreed to be paid by NAI to BNPPLC shall, to the extent permitted by applicable usury laws, be amortized, prorated, allocated, and spread throughout the period that any principal upon which such interest accrues is expected to be outstanding (including without limitation any renewal or extension of the term of the Lease) so that the amount of interest included in such payments does not exceed the maximum nonusurious amount permitted by applicable usury laws. If the Designated Sale Date is accelerated and as a result thereof amounts paid by NAI to BNPPLC as interest are determined to exceed the interest that would have accrued at the Maximum Rate for the period prior to the Designated Sale Date, then BNPPLC shall, at its option, either refund to NAI the amount of such excess or credit such excess as a Qualified Prepayment (and thus reduce the Lease Balance and other amounts, the determination of which depend upon Qualified Prepayments credited to NAI) and thereby shall render inapplicable any and all penalties of any kind provided by applicable usury laws as a result of such excess interest. If BNPPLC receives money (or anything else) that is determined to constitute interest and that would, but for this provision, increase the effective interest rate received by BNPPLC under or in connection with the Operative Documents to a rate in excess of the Maximum Rate, then the amount determined to constitute interest in excess of the maximum nonusurious interest shall, immediately following such determination, be returned to NAI or be credited as a Qualified Prepayment, in which event any and all penalties of any kind under applicable usury law shall be inapplicable. If BNPPLC does not actually receive, but shall contract for, request or demand, a payment of money (or anything else) which is determined to constitute interest and to increase the effective interest rate contracted for or charged to a rate in excess of the Maximum Rate, BNPPLC shall be entitled, following such determination, to waive or rescind the contractual claim, request or demand for the amount determined to exceed the Maximum Rate, in which event any and all penalties of any kind under applicable usury law shall be inapplicable. If at any time NAI should have reason to believe that the transactions evidenced by the Operative Documents are in fact usurious, NAI shall promptly give BNPPLC notice of such condition, after which BNPPLC shall have ninety days in which to make appropriate refund or other adjustment in order to correct such condition if it in fact exists.

**6 Obligations of NAI Under Other Operative Documents Not Limited by this Certificate.** Except as provided above in Paragraph 5, nothing contained in this Certificate will limit, modify or otherwise affect any of NAI's obligations under the other Operative Documents. Subject to Paragraph 5, those obligations are intended to be separate, independent and in addition to, and not in lieu of, those established by this Certificate.



**7 Obligations of NAI Hereunder Not Limited by Other Operative Documents.** Recognizing that but for this Certificate (including the representations of NAI set forth in Paragraph 1) BNPPPLC would not acquire the Property or enter into the other Operative Documents, NAI agrees that BNPPPLC's rights for any breach of this Certificate (including a breach of such representations) will not be limited by any provision of the other Operative Documents that would limit NAI's liability thereunder.

**8 Waiver of Jury Trial.** Each of the parties hereto hereby waives its right to a jury trial of any claim or cause of action based upon or arising out of this Agreement, the other Operative Documents or any of the transactions contemplated hereby or thereby, including contract claims, tort claims, breach of duty claims, and all other common law or statutory claims (collectively, the "**Claims**"). If and to the extent that the foregoing waiver of the right to a jury trial is unenforceable for any reason in such forum, each of the parties hereto hereby consents to the adjudication of all Claims pursuant to judicial reference as provided in California Code of Civil Procedure Section 638, and the judicial referee shall be empowered to hear and determine all issues in such reference, whether fact or law. Each of the parties hereto represents that each has reviewed this waiver and consent and each knowingly and voluntarily waives its jury trial rights and consents to judicial reference following consultation with legal counsel on such matters. In the event of litigation, a copy of this Agreement may be filed as a written consent to a trial by the court or to judicial reference under California Code of Civil Procedure Section 638 as provided herein.

[The signature pages follow.]

IN WITNESS WHEREOF, this Closing Certificate and Agreement (1299 Orleans) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

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**Closing Certificate and Agreement (1299 Orleans) — Signature Page**

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[Continuation of signature pages for Closing Certificate and Agreement (1299 Orleans) dated as of November 29, 2007.]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

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**Closing Certificate and Agreement (1299 Orleans) — Signature Page**

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**Exhibit A**

**Legal Description**

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:**

All of Parcel 1, as shown upon that certain Map entitled, "Parcel Map being a Resubdivision of Parcel A as shown on Map recorded in Book 431 of Maps, at page 32, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California, on March 8, 1979 in Book 437 of Maps, at Page 9.

APN 110-36-007

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**Exhibit B**

**Permitted Encumbrances**

**1. The lien of supplemental taxes**, if any, assessed pursuant to the provisions of Chapter 3.5 (Commencing with Section 75) of the Revenue and Taxation code of the State of California. (none currently assessed)

**2. Covenants, conditions and restrictions** in the declaration of restrictions:

Recorded: March 8, 1978, Book D511, Page 396, of Official Records  
and re-recorded: December 12, 1978, Book E157, Page 147, of Official Records

Said covenants, conditions and restrictions provide that a violation thereof shall not defeat the lien of any mortgage or deed of trust made in good faith and for value.

**3. Easement** for the purposes stated herein, and incidental purposes, shown or dedicated by the Map recorded in Book 431 of Maps, at Page 32

For: Public Utility Easement  
Affects: The Easterly 10 feet of Said Land

Said easement is as depicted on the ALTA/ACSM Survey by Kier & Wright, Civil Engineers & Surveyors, Inc., dated October 1, 2007, Job No. A03080-1

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**Exhibit C**  
**Quarterly Certificate**

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director

Gentlemen:

This Certificate is furnished pursuant to subparagraph 2(D)(3) of the Closing Certificate and Agreement (1299 Orleans) dated as of November 29, 2007 between Network Appliance, Inc. and BNP Paribas Leasing Corporation (as amended, the "**Closing Certificate**"). Terms defined in the Closing Certificate and used but not otherwise defined in this Certificate are intended to have the respective meanings ascribed to them in the Closing Certificate.

The undersigned, being a Responsible Financial Officer of Network Appliance, Inc., represents and certifies the following to BNP Paribas Leasing Corporation:

(a) No Event of Default or material Default by NAI has occurred except as follows:

**[If an Event of Default or material Default by NAI has occurred, insert a description of the nature thereof and the action which NAI has taken or proposes to take to rectify it; otherwise, insert the word "*none*".]**

(b) The representations and warranties by NAI in the Closing Certificate are true and complete in all material respects on and as of the date of this Certificate as though made on and as of such date.

(c) the calculations set forth in the attachment to this Certificate, which show whether NAI is complying with financial covenants set forth in subparagraph 3(C) of the Closing Certificate based upon the most recent information available, are true and complete.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

**[INSERT SIGNATURE BLOCK FOR A  
RESPONSIBLE FINANCIAL OFFICER]**

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**Exhibit D**

**Form of Disclosure Letter**

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**NETWORK APPLIANCE, INC.**

**DISCLOSURE LETTER**

To: JPMorgan Chase Bank, National Association, as Administrative Agent ("Agent"), under that certain Credit Agreement dated as of November \_\_\_\_, 2007 (as such agreement may be amended, restated or otherwise modified in writing from time to time, the "Credit Agreement") among Network Appliance, Inc. (the "Borrower"), the lenders from time to time party thereto, BNP Paribas, as syndication agent, and Agent.

This Disclosure Letter is delivered to you pursuant to the Credit Agreement. The items set forth in the attached Schedules represent exceptions, qualifications, permitted items and disclosures that are listed herein pursuant to the terms of the Credit Agreement. Capitalized terms used herein (or in the attached schedules) and defined in the Credit Agreement shall have the meanings ascribed in the Credit Agreement, unless the context otherwise requires.

IN WITNESS WHEREOF, the undersigned has executed this Disclosure Letter as of November \_\_\_\_, 2007.

NETWORK APPLIANCE, INC.

By: \_\_\_\_\_

Name: Ingemar Lanevi

Title: Treasurer

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**Schedule 3.01  
Subsidiaries**

Subsidiary	Material Domestic Subsidiary (Y/N)	Jurisdiction	Shareholder	Percentage Interest
Network Appliance Global Ltd.	N	Bermuda	Network Appliance Inc.	100%
Network Appliance Holdings Ltd.	N	Cyprus	Network Appliance Global Ltd.	100%
Network Appliance Holding & Manufacturing BV	N	Netherlands	Network Appliance Holdings Ltd.	100%
Network Appliance BV	N	Netherlands	Network Appliance Holding & Mfg BV	100%
Network Appliance ApS	N	Denmark	Network Appliance Holdings Ltd.	100%
Network Appliance Ltd	N	UK	Network Appliance BV	100%
Network Appliance SAS	N	France	Network Appliance BV	100%
Network Appliance GmbH	N	Germany	Network Appliance BV	100%
Network Appliance Srl.	N	Italy	Network Appliance BV	100%
Network Appliance GmbH	N	Switzerland	Network Appliance BV	100%



Subsidiary	Material Domestic Subsidiary (Y/N)	Jurisdiction	Shareholder	Percentage Interest
Network Appliance (Sales) Limited	N	Ireland	Network Appliance BV	100%
Network Appliance GesmbH	N	Austria	Network Appliance BV	100%
Network Appliance SL	N	Spain	Network Appliance BV	100%
Network Appliance BVBA	N	Belgium	Network Appliance BV	100%
Network Appliance Israel Ltd.	N	Israel	Network Appliance BV	100%
Network Appliance Israel R&D, Ltd.	N	Israel	Network Appliance Inc.	100%
Network Appliance Poland Sp. z.o.o.	N	Poland	Network Appliance BV	100%
Network Appliance Sweden AB	N	Sweden	Network Appliance BV	100%
Network Appliance South Africa (Pty) Ltd.	N	South Africa	Network Appliance BV	100%
Network Appliance Finland Oy	N	Finland	Network Appliance BV	100%
Network Appliance Norway AS	N	Norway	Network Appliance BV	100%
Network Appliance BV (Representative Office)	N	UAE	Network Appliance BV	100%

Subsidiary	Material Domestic Subsidiary (Y/N)	Jurisdiction	Shareholder	Percentage Interest
Network Appliance BV (Representative Office)	N	Turkey	Network Appliance BV	100%
Network Appliance BV (Representative Office)	N	Russia	Network Appliance BV	100%
Network Appliance Luxembourg S.a.r.l.	N	Luxembourg	Network Appliance BV	100%
Network Appliance BV (Representative Office)	N	Indonesia	Network Appliance BV	100%
Network Appliance BV (Representative Office)	N	Philippines	Network Appliance BV	100%
Network Appliance KK	N	Japan	Network Appliance Inc.	100%
Network Appliance Pty. Ltd.	N	Australia	Network Appliance Global Ltd.	100%
Network Appliance Mexico S. de R.L. de C.V.	N	Mexico	Network Appliance Inc.	100%
Network Appliance Singapore Private Ltd.	N	Singapore	Network Appliance Inc.	100%
Network Appliance Sdn Bhd	N	Malaysia	Network Appliance Inc.	100%
Network Appliance Systems Private Ltd.	N	India	Network Appliance Inc.	100%
Network Appliance Argentina Srl	N	Argentina	Network Appliance Inc.	100%

Subsidiary	Material Domestic Subsidiary (Y/N)	Jurisdiction	Shareholder	Percentage Interest
Network Appliance Ltd.	N	Brazil	Network Appliance Inc.	100%
Network Appliance Canada Ltd.	N	Canada	Network Appliance Inc.	100%
Network Appliance (Shanghai) Commercial Co., Ltd.	N	China	Network Appliance BV	100%
Network Appliance (Hong Kong) Limited	N	Hong Kong	Network Appliance BV	100%
Network Appliance, Inc. (Representative Office)	N	China, Beijing	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	China, Shanghai	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	China, Guangzhou	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	Korea	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	Taiwan	Network Appliance Inc.	100%
Network Appliance, Inc. (Representative Office)	N	Hong Kong	Network Appliance Inc.	100%
Network Appliance Federal Systems, Inc.	N	California	Network Appliance Inc.	100%
Network Appliance Financial Solutions, Inc.	N	Delaware	Network Appliance Inc.	100%

Subsidiary	Material Domestic Subsidiary (Y/N)	Jurisdiction	Shareholder	Percentage Interest
Spinnaker Networks, Inc.	N	Delaware	Network Appliance Inc.	100%
Spinnaker Networks, LLC	N	Delaware	Network Appliance Inc.	100%
Alacritus, Inc.	N	Delaware	Network Appliance Inc.	100%
Decru, Inc.	N	Delaware	Network Appliance Inc.	100%
Decru BV	N	Netherlands	Network Appliance Holding & Mfg BV	100%
Network Appliance Limited	N	Thailand	Network Appliance Inc.	100%
Network Appliance Saudi Arabia LLFC	N	Saudi Arabia	Network Appliance BV	100%
Decru Ltd.	N	U.K.	Decru Inc.	100%
Topio, Inc.	N	Delaware	Network Appliance Inc.	100%

Commitments or Obligations of Borrower or any Subsidiary to issue capital or other equity interests:

None.

Options, warrants or other rights to acquire capital or other equity interests of Borrower or any Subsidiary:

None.

**Schedule 3.06  
Disclosed Matters**

None.

**Schedule 6.01  
Existing Indebtedness**

Secured Credit Agreement, dated as of October 5, 2007, by and among Network Appliance, Inc., the lenders party thereto and JPMorgan Chase Bank, National Association, as administrative agent.

Loan Agreement, dated as of March 31, 2006, by and among Network Appliance Global, Ltd., as the borrower, the lenders party thereto and JPMorgan Chase Bank, N.A., as administrative agent. See attached schedule of existing letters of credit and bank guarantees.

Lease Agreements, dated as of December 15, 2005, December 16, 2006, and July 17, 2007, by and between BNP Paribas Leasing Corporation and Network Appliance, Inc., and those certain Closing Certificates executed in connection with such Lease Agreements, dated as of December 15, 2005, December 16, 2006, and July 17, 2007, by and between BNP Paribas Leasing Corporation and Network Appliance, Inc.

**Schedule 6.02  
Existing Liens**

Liens in connection with items disclosed on Schedule 6.01.

**Schedule 6.05**  
**Existing Affiliate Transactions**

Transaction arising in connection with commissionaire agreements between Network Appliance B. V. and each of its subsidiaries and related arrangements with respect to payment of value added taxes.

Transactions arising in connection that certain Technology License Agreement, effective as of May 1, 2000, by and between Network Appliance Global Ltd. and Network Appliance B.V.

Transactions arising in connection that certain Technology License Agreement, effective as of May 1, 2000, by and between Network Appliance Global Ltd. and Network Appliance Inc.

Transactions arising in connection with that certain Technology License Agreement, entered into as of April 27, 2002, by and between Network Appliance, Inc. and Network Appliance Global Ltd.

Transactions arising in connection with that certain Technology License Agreement, entered into as of May 1, 2004, by and between Network Appliance Global Ltd. and Spinnaker Networks Inc.

Transactions arising in connection with that certain Technology License Agreement, entered into as of May 3, 2005, by and between Network Appliance Inc. and Alacritus Inc.

Transactions arising in connection with that certain Technology License Agreement, entered into as of April 29, 2006, by and between Network Appliance Global Ltd. and Decru Inc.



**Schedule 6.06**  
**Existing Restrictive Agreements**

Secured Credit Agreement, dated as of October 5, 2007, by and among Network Appliance, Inc., the lenders party thereto and JPMorgan Chase Bank, National Association, as administrative agent.

Loan Agreement dated as of March 31, 2006, by and among Network Appliance Global, Ltd., as the borrower, the lenders party thereto and JPMorgan Chase Bank, N.A., as administrative agent

Lease Agreements, dated as of December 15, 2005, December 16, 2006, and June 17, 2007, by and between BNP Paribas Leasing Corporation and Network Appliance, Inc., and those certain

Closing Certificates executed in connection with such Lease Agreements, dated as of December 15, 2005, December 16, 2006, and June 17, 2007, by and between BNP Paribas Leasing Corporation and Network Appliance, Inc.

Letter Agreement between Wells Fargo Bank, National Association, and Borrower, dated as of December 1, 2006, providing Borrower with a revolving line of credit for the issuance of letters of credit in an aggregate principal amount not to exceed \$5,000,000.

**Exhibit E**

**Certificate of BNPPPLC Re: Accounting**

Network Appliance, Inc.  
7301 Kit Creek Road  
Research Triangle Park, NC 27709  
Attention: Ingemar Lanevi

Gentlemen:

This certificate is furnished pursuant to subparagraph 4(A) of the Closing Certificate and Agreement (1299 Orleans) dated as of November 29, 2007 between BNP Paribas Leasing Corporation and Network Appliance, Inc. (as amended, the "**Closing Certificate**"). Terms defined in the Closing Certificate and used but not otherwise defined in this certificate are intended to have the respective meanings ascribed to them in the Closing Certificate.

BNP Paribas Leasing Corporation ("**BNPPPLC**") certifies that the following are true and complete in all material respects, but only to the knowledge of BNPPPLC as of the date hereof:

(A) The facts disclosed in any financial statements or other documents listed in the Annex attached to this certificate were (as of their respective dates) true and complete in all material respects. Copies of such statements or other documents were provided by or behalf of BNPPPLC to NAI prior to the date hereof to permit NAI to determine the appropriate accounting for NAI's relationship with BNPPPLC under FASB Interpretation No. 46(R), *Consolidation of Variable Interest Entities* ("**FIN 46**").

(B) The fair value of the Property and of other properties, if any, leased to NAI by BNPPPLC (collectively, whether one or more, the "**Properties Leased to NAI**") are, as of the date hereof, less than half of the total of the fair values of all assets of BNPPPLC, excluding any assets of BNPPPLC which are held within a silo. Further, none of the Properties Leased to NAI are, as of the date hereof, held within a silo.

Although the representations required of BNPPPLC by this certificate are intended to cover *facts*, it is understood and agreed (consistent with subparagraph 4(C) of the Lease) that BNPPPLC has not made and will not make any representation or warranty as to the proper accounting by NAI or its Affiliates of the Lease or other Operative Documents or as to other accounting *conclusions*.

---

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**LEASE AGREEMENT  
(1299 ORLEANS)  
BETWEEN  
NETWORK APPLIANCE, INC.  
("NAI")  
AND  
BNP PARIBAS LEASING CORPORATION  
("BNPPLC")  
November 29, 2007**

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**LEASE AGREEMENT  
(1299 ORLEANS)**

This LEASE AGREEMENT (1299 ORLEANS) (this "**Lease**"), dated as of November 29, 2007 (the "**Effective Date**"), is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and NETWORK APPLIANCE, INC. ("**NAI**"), a Delaware corporation.

**RECITALS**

Contemporaneously with the execution of this Lease, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement (1299 Orleans) dated as of the Effective Date (the "**Common Definitions and Provisions Agreement**"), which by this reference is incorporated into and made a part of this Lease for all purposes. *As used in this Lease, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Lease are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

At the request of NAI and to facilitate the transactions contemplated in the other Operative Documents, BNPPLC is acquiring the Land described in Exhibit A and improvements on the Land from AMB Property, L.P., a Delaware limited partnership, (the "**Prior Owner**") contemporaneously with the execution of this Lease.

In anticipation of BNPPLC's acquisition of the Land and other property described below, BNPPLC and NAI have reached agreement as to the terms and conditions upon which BNPPLC is willing to lease to NAI the Land and the Improvements, and by this Lease BNPPLC and NAI desire to evidence such agreement.

**GRANTING CLAUSES**

BNPPLC does hereby LEASE, DEMISE and LET unto NAI for the Term (as hereinafter defined) all right, title and interest of BNPPLC, now owned or hereafter acquired, in and to:

- (1) the Land, including all interests in the Land acquired by BNPPLC from the Prior Owner;
  - (2) any and all Improvements;
  - (3) all easements and other rights appurtenant to the Land or to the Improvements; and
  - (4) (A) any land lying within the right-of-way of any street, open or proposed, adjoining the Land, (B) any sidewalks and alleys adjacent to the Land, and (C) any strips
-

and gores between the Land and abutting land.

BNPPLC's interest in all property described in clauses (1) through (4) above is hereinafter referred to collectively as the "**Real Property**".

To the extent, but only to the extent, that assignable rights or interests in, to or under the following have been or will be acquired by BNPPLC from the Prior Owner or as described in Paragraph 7 below, BNPPLC also hereby grants and assigns to NAI for the term of this Lease the right to use and enjoy (and, in the case of contract rights, to enforce) such rights or interests of BNPPLC:

- (a) any goods, equipment, furnishings, furniture and other tangible personal property of whatever nature that are located on the Real Property and all renewals or replacements of or substitutions for any of the foregoing (collectively, the "**Tangible Personal Property**");
- (b) the benefits, if any, conferred upon the owner of the Real Property by the Permitted Encumbrances; and
- (c) any permits, licenses, franchises, certificates, and other rights and privileges against third parties related to the Real Property or Tangible Personal Property, including warranties, if any, given by vendors from whom any Tangible Personal Property was or may be acquired.

Such rights and interests of BNPPLC, whether now existing or hereafter arising, are hereinafter collectively called the "**Personal Property**". The Real Property and the Personal Property are hereinafter sometimes collectively called the "**Property**."

However, the leasehold estate conveyed by this Lease and NAI's rights hereunder are expressly made subject and subordinate to the terms and conditions of this Lease, to the matters listed in Exhibit B to the Closing Certificate (including the Existing Space Leases) and all other Permitted Encumbrances, and to any other claims or encumbrances not constituting Liens Removable by BNPPLC.

Without limiting the foregoing, it is understood that so long as NAI continues to be entitled to possession of the Property pursuant to this Lease, NAI's possession will extend to and include (to the exclusion of BNPPLC) not only the Improvements, but also the Land (subject only to BNPPLC's limited right of entry on and subject to the terms and conditions set forth in this Lease), and NAI will be entitled to any benefits conferred upon the owner of the Property by Permitted Encumbrances, including the right to receive and retain rents as they become due under Existing Space Leases and to otherwise enforce Existing Space Leases during the term of this Lease. Accordingly, it is the intent of the parties that BNPPLC will not assume or retain

responsibility for the condition of the Land or the Improvements or for any obligations undertaken by NAI under the Existing Space Leases or under other Permitted Encumbrances.

#### **GENERAL TERMS AND CONDITIONS**

The Property is leased by BNPPLC to NAI and is accepted and is to be used and possessed by NAI upon and subject to the following terms and conditions:

##### **1 Term.**

(A) Scheduled Term. The term of this Lease (the "**Term**") will commence on the Effective Date and will end on the first Business Day of December, 2012, unless extended as provided in subparagraph 1(B) or sooner terminated as expressly provided in other provisions of this Lease.

(B) Extension of the Term. The Term may be extended at the option of NAI for up to two successive periods of five years each; provided, however, that prior to each such extension the following conditions must have been satisfied: (A) NAI must have delivered a notice of its election to exercise the option at least one hundred eighty days prior to the end of the Term, and prior to the commencement of any such extension BNPPLC and NAI must have agreed in writing upon, and received the written consent and approval of BNPPLC's Parent and all Participants (other than Participants being replaced at the request of NAI as provided in Paragraph 6) to, (1) a corresponding extension of the date specified in clause (1) of the definition of Designated Sale Date in the Common Definitions and Provisions Agreement, and (2) an adjustment to the Rent that NAI will be required to pay during the extension, it being expected that the Rent for the extension may be different than the Rent required for the original Term or any prior extension, and it being understood that the Rent for any extension must in all events be satisfactory to both BNPPLC and NAI, each in its sole and absolute discretion; (B) at the time of NAI's exercise of its option to extend, no Event of Default has occurred and is continuing and no Event of Default will result from the extension; (C) immediately prior to any such extension, this Lease must then remain in effect; and (D) if this Lease has been assigned by NAI, then NAI must have executed a guaranty (or confirmed an existing guaranty, if applicable), guaranteeing NAI's assignee's obligations under the Operative Documents throughout such extended Term. With respect to the condition that BNPPLC and NAI must have agreed upon the Rent required for any extension of the Term, neither NAI nor BNPPLC is willing to submit itself to a risk of liability or loss of rights hereunder for being judged unreasonable. Similarly, neither BNPPLC's Parent nor any Participant is expected to submit itself to a risk of liability or loss of rights for being judged to have unreasonably withheld consent or approval to any extension of the Term. Accordingly, NAI, BNPPLC, BNPPLC's Parent and Participants will each have sole and absolute discretion in making its determination, and both NAI and BNPPLC hereby disclaim any obligation express or implied to be reasonable in negotiating the Rent for any such extension. Subject to the changes to the Rent and satisfaction of the other conditions listed in this

subparagraph, if NAI exercises its option to extend the Term as provided in this subparagraph, this Lease will continue in full force and effect, and the leasehold estate hereby granted to NAI will continue without interruption and without any loss of priority over other interests in or claims against the Property that may be created or arise after the Effective Date and before the extension.

## 2 Use and Condition of the Property.

(A) Use. Subject to the Permitted Encumbrances, NAI may use and occupy the Property during the Term, but only for the following purposes and other lawful purposes incidental thereto:

- (1) administrative and office space;
- (2) activities related to NAI's research and development or production of products that are of substantially the same type and character as those regularly sold by NAI in the ordinary course of its business as of the Effective Date;
- (3) cafeteria and other support facilities that NAI may provide to its employees; and
- (4) other lawful purposes (including NAI's research and development or production of products that are not of substantially the same type and character as those regularly sold by NAI in the ordinary course of its business as of the Effective Date) approved in advance and in writing by BNPPPLC, which approval will not be unreasonably withheld (but NAI acknowledges that BNPPPLC's withholding of such approval shall be reasonable if BNPPPLC determines in good faith that (1) giving the approval may materially increase BNPPPLC's risk of liability for any existing or future environmental problem, or (2) giving the approval is likely to substantially increase BNPPPLC's administrative burden of complying with or monitoring NAI's compliance with the requirements of this Lease or other Operative Documents).

The foregoing provisions of this subparagraph will not prevent a tenant under an Existing Space Lease executed prior to the Effective Date from using the space covered thereby for purposes expressly authorized by the terms and conditions of such Existing Space Lease.

(B) Condition of the Property. **NAI acknowledges that it has carefully and fully inspected the Property and accepts the Property in its present state, AS IS, and without any representation or warranty, express or implied, as to the condition of such property or as to the use which may be made thereof. NAI also accepts the Property without any covenant, representation or warranty,**

**express or implied, by BNPPLC or other Interested Parties regarding the title thereto or the rights of any parties in possession of any part thereof, except as expressly set forth in Paragraph 17. BNPPLC will not be responsible for any latent or other defect or change of condition in the Land, Improvements or other Property or for any violations with respect thereto of Applicable Laws. Further, BNPPLC will not be required to furnish to NAI any facilities or services of any kind, including water, phone, sewer, steam, heat, gas, air conditioning, electricity, light or power.**

(C) Consideration for and Scope of Waiver. The provisions of subparagraph 2(B) have been negotiated by BNPPLC and NAI as being consistent with the Rent payable under this Lease, and such provisions are intended to be a complete exclusion and negation of any representations or warranties of BNPPLC or other Interested Parties, express or implied, with respect to the Property that may arise pursuant to any law now or hereafter in effect or otherwise, except as expressly set forth herein.

However, such exclusion of representations and warranties by BNPPLC is not intended to impair any representations or warranties made by other parties, including the Prior Owner, the benefit of which may pass to NAI during the Term because of the definition of Personal Property and Property above.

### **3 Rent.**

(A) Base Rent Generally. On each Base Rent Date through the end of the Term, NAI must pay BNPPLC rent (“**Base Rent**”), calculated as provided below. Each payment of Base Rent must be received by BNPPLC no later than 1:00 p.m. (Eastern time) on the date it becomes due; if received after 1:00 p.m. (Eastern time) it will be considered for purposes of this Lease as received on the next following Business Day. At least five days prior to any Base Rent Date upon which an installment of Base Rent becomes due, BNPPLC will notify NAI in writing of the amount of each installment, calculated as provided below. Any failure by BNPPLC to so notify NAI, however, will not constitute a waiver of BNPPLC’s right to payment, but absent such notice NAI will not be in default hereunder for any underpayment resulting therefrom if NAI, in good faith, reasonably estimates the payment required, makes a timely payment of the amount so estimated and corrects any underpayment within three Business Days after being notified by BNPPLC of the underpayment.

(B) Calculation of and Due Dates for Base Rent. Payments of Base Rent will be calculated and become due as follows:

(1) Determination of Payment Due Dates Generally. For Base Rent Periods subject to a LIBOR Period Election of six months, Base Rent will be payable in two

installments, with the first installment becoming due on the Base Rent Date that occurs on the first Business Day of the third calendar month following the commencement of such Base Rent Period, and with the second installment becoming due on the Base Rent Date upon which the Base Rent Period ends. For all other Base Rent Periods, Base Rent will be due in one installment on the Base Rent Date upon which the Base Rent Period ends.

(2) Special Adjustments to Base Rent Payment Dates and Periods. Notwithstanding the foregoing, if NAI or any Applicable Purchaser purchases BNPPLC's interest in the Property pursuant to the Purchase Agreement, any accrued unpaid Base Rent and all outstanding Additional Rent will be due on the date of purchase in addition to the purchase price and other sums due to BNPPLC under the Purchase Agreement.

(3) Base Rent Formula. Each installment of Base Rent payable for any Base Rent Period will equal:

- the Lease Balance on the first day of such Base Rent Period, *times*
- the sum of the Effective Rate and the Spread, *times*
- the number of days in the period from and including the preceding Base Rent Date to but not including the Base Rent Date upon which the installment is due, *divided by*
- three hundred sixty.

Only for the purpose of illustration, assume the following for a hypothetical Base Rent Period: that prior to the first day of such Base Rent Period Qualified Prepayments have been received by BNPPLC, leaving a Lease Balance of \$30,000,000; that the Effective Rate for the Base Rent Period is 6%; that the Spread is one hundred fifty basis points (150/100 of 1%); and that such Base Rent Period contains exactly thirty days. Under such assumptions, Base Rent for the hypothetical Base Rent Period will equal:

$$\$30,000,000 \times [6\% + 1.50\%] \times 30/360 = \$187,500.$$

(4) Fixed Rate Lock. At any time during the Term, NAI may deliver a notice in the form attached to the Common Definitions and Provisions Agreement as Annex 2 (a "**Fixed Rate Lock Notice**"), requesting that BNPPLC establish a fixed rate for use in the calculation of the Effective Rate hereunder (a "**Fixed Rate Lock**") for all Base Rent Periods commencing on or after a date specified in such notice, which date must be the first Business Day of a calendar month (the "**Fixed Rate Lock Date**"). Promptly after receiving a Fixed Rate Lock Notice, BNPPLC will enter into an Interest Rate Swap with

BNP Paribas (the “**Fixed Rate Swap**”); except that BNPPLC may decline to enter into the Fixed Rate Swap and to establish a Fixed Rate Lock if:

- (a) NAI does not deliver the Fixed Rate Lock Notice to BNPPLC at least ten Business days prior to the Fixed Rate Lock Date specified therein;
- (b) NAI specifies a Fixed Rate Lock Date in the Fixed Rate Lock Notice that is prior to the end of any Base Rent Period which commenced before BNPPLC receives the Fixed Rate Lock Notice;
- (c) any notice has been given to accelerate the Designated Sale Date as provided in the definition thereof in the Common Definitions and Provisions Agreement;
- (d) the estimate of the Fixed Rate (hereinafter defined) specified by NAI in the Fixed Rate Lock Notice is for any reason less than the fixed rate available to BNPPLC under any Interest Rate Swap proposed by BNP Paribas;
- (e) at the time the Fixed Rate Lock Notice is given, the Interest Rate Swap requested thereby is contrary to any Applicable Laws or any interpretation thereof by any governmental authority, central bank or comparable agency charged with the interpretation or administration thereof, or any request or directive (whether or not having the force of law) of any such authority, central bank or comparable agency (including, without limitation, any such requirement imposed by the Board of Governors of the United States Federal Reserve System); or
- (f) any event has occurred or circumstance exists that constitutes a Default.

The notional principal amount of the Fixed Rate Swap will equal the Lease Balance on the date such notice is given. The fixed rate used to calculate payments required of BNPPLC under the Fixed Rate Swap, as the counterparty designated the fixed rate payor, will constitute the “**Fixed Rate**” for purposes of this Lease.

(C) Early Termination of Fixed Rate Lock. After a Fixed Rate Lock is established, BNPPLC may cause or suffer a termination in whole or in part of the Fixed Rate Swap in the event that (i) NAI fails to make any payment of Base Rent required hereunder on the Base Rent Date when it first becomes due, (ii) the Designated Sale Date occurs before the date specified in clause (1) of the definition thereof in the Common Definitions and Provisions Agreement, (iii) for any reason a Qualified Prepayment is applied to reduce the Lease Balance, (iv) the Lease Balance on the Fixed Rate Lock Date is less than the notional amount of the Fixed Rate Swap for

any reason. NAI must reimburse to BNPPLC any Fixed Rate Settlement Amount charged to BNPPLC in connection with such a termination, and if the termination is a complete, rather than a partial, termination of the Fixed Rate Swap then in effect, it will for purposes of this Lease constitute a termination of the Fixed Rate Lock itself. Further, if BNPPLC is charged penalties or interest because of its failure to make a timely payment required under the Fixed Rate Swap, and if BNPPLC's failure to make the timely payment was caused by NAI's failure to make a timely payment of Base Rent or other amounts due hereunder or under other Operative Documents, then such penalties or interest will constitute Losses against which BNPPLC is entitled to be indemnified pursuant to subparagraph 5(C). If a Fixed Rate Lock is terminated as provided in this subparagraph, NAI shall have no right to require BNPPLC to enter into another Interest Rate Swap in order to establish a new fixed rate.

(D) Additional Rent. All amounts which NAI is required to pay to or on behalf of BNPPLC pursuant to this Lease, together with every charge, premium, interest and cost set forth herein which may be added for nonpayment or late payment thereof, will constitute rent (all such amounts, other than Base Rent, are herein called "**Additional Rent**"; and, collectively, Base Rent and Additional Rent are herein sometimes called "**Rent**").

(E) Arrangement Fee and Upfront Fees. In addition to other amounts payable by NAI hereunder, contemporaneously with the execution of this Lease NAI must pay BNPPLC an arrangement fee (the "**Arrangement Fee**") and upfront fees (the "**Upfront Fees**") as provided in the Closing Letter. The Arrangement Fee and the Upfront Fees will represent Additional Rent for the first Base Rent Period.

(F) Administrative Fees. In addition to other amounts payable by NAI hereunder, on or before each anniversary of the Effective Date and prior to the Designated Sale Date, NAI must pay BNPPLC an annual administrative agency fee (an "**Administrative Fee**") as provided in the Closing Letter. Each payment of an Administrative Fee will represent Additional Rent for the first Base Rent Period during which it first becomes due.

(G) No Demand or Setoff. Except as expressly provided herein, NAI must pay all Rent without notice or demand and without counterclaim, deduction, setoff or defense.

(H) Default Interest and Order of Application. All Rent will bear interest, if not paid when first due, at the Default Rate in effect from time to time from the date due until paid; provided, that nothing herein contained will be construed as permitting the charging or collection of interest at a rate exceeding the maximum rate permitted under Applicable Laws. BNPPLC may apply any amounts paid by or on behalf of NAI against any Rent then past due in the order the same became due or in such other order as BNPPLC elects.

(I) Calculations by BNPPLC Are Conclusive. All calculations by BNPPLC of Base Rent, Additional Rent or any amount needed to calculate Base Rent (including the Effective Rate



for any Base Rent Period and the Lease Balance) or Additional Rent will, in the absence of clear and demonstrable error, be conclusive and binding upon NAI.

#### 4 Nature of this Agreement.

(A) “Net” Lease Generally. Subject only to the exceptions listed in subparagraph 5(D) below, it is the intention of BNPPLC and NAI that Base Rent and other payments herein specified will be absolutely net to BNPPLC and that NAI must pay all costs, expenses and obligations of every kind relating to the Property or this Lease which may arise or become due. Further, it is understood that all amounts payable by NAI to BNPPLC under this Lease and the other Operative Documents are expressed as minimum payments to be made net of any deduction or withholding required under any Applicable Laws.

(B) No Termination. Except as expressly provided in this Lease itself, this Lease will not terminate, nor will NAI have any right to terminate this Lease, nor will NAI be entitled to any abatement of or setoff against the Rent, nor will the obligations of NAI under this Lease be excused, for any reason whatsoever, including any of the following: (i) any damage to or the destruction of all or any part of the Property from whatever cause, (ii) the taking of the Property or any portion thereof by eminent domain or otherwise for any reason, (iii) the prohibition, limitation or restriction of NAI’s use or development of all or any portion of the Property or any interference with such use by governmental action or otherwise, (iv) any eviction of NAI or of anyone claiming through or under NAI, (v) any default on the part of BNPPLC under this Lease or any of the other Operative Documents or any other agreement to which BNPPLC and NAI are parties, (vi) the inadequacy in any way whatsoever of the design, construction, assembly or installation of any improvements, fixtures or Tangible Personal Property included in the Property (it being understood that BNPPLC has not made, does not make and will not make any representation express or implied as to the adequacy thereof), (vii) any latent or other defect in the Property or any change in the condition thereof or the existence with respect to the Property of any violations of Applicable Laws, (viii) NAI’s ownership of any interest in the Property, (ix) any breach of an Existing Space Lease by the tenant thereunder, or (x) any other cause, whether similar or dissimilar to the foregoing, any existing or future law to the contrary notwithstanding. It is the intention of the parties hereto that the obligations of NAI hereunder be separate and independent of the covenants and agreements of BNPPLC, that Base Rent and all other sums payable by NAI hereunder continue to be payable in all events and that the obligations of NAI hereunder continue unaffected, unless the requirement to pay or perform the same have been terminated or limited pursuant to an express provision of this Lease. Without limiting the foregoing, NAI waives to the extent permitted by Applicable Laws, except as otherwise expressly provided herein, all rights to which NAI may now or hereafter be entitled by law (including any such rights arising because of any “warranty of suitability” or other warranties implied as a matter of law) (i) to quit, terminate or surrender this Lease or the Property or any part thereof or (ii) to any abatement, suspension, deferment or reduction of the Rent.

However, nothing in this subparagraph 4(B) will be construed as a waiver by NAI of any right NAI may have at law or in equity to the following remedies, whether because of BNPPLC's failure to remove a Lien Removable by BNPPLC or because of any other default by BNPPLC under this Lease: (i) the recovery of monetary damages in the case of any default that continues beyond the period for cure provided in Paragraph 16, (ii) injunctive relief in case of the violation, or attempted or threatened violation, by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Lease which are binding upon BNPPLC (including the confidentiality provisions set forth in subparagraph 22(B) below), or (iii) a decree compelling performance by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Lease which are binding upon BNPPLC.

(C) Characterization of this Lease.

(1) Both NAI and BNPPLC intend that (A) for the purposes of determining the proper accounting for this Lease by NAI, BNPPLC will be treated as the owner and landlord of the Property and NAI will be treated as the tenant of the Property, and (B) for income tax purposes and commercial law (including real estate and bankruptcy law) and regulatory purposes, (1) this Lease and the other Operative Documents will be treated as a financing arrangement, (2) BNPPLC will be deemed a lender making loans to NAI in the principal amount equal to the Lease Balance, which loans are secured by the Property, and (3) NAI will be treated as the owner of the Property and will be entitled to all tax benefits available to the owner of the Property. ***Consistent with such intent, by the provisions set forth in Exhibit B, NAI is granting to BNPPLC a lien upon and mortgaging and warranting title to the Land and the Improvements and all rights, titles and interests of NAI in and to other Property, WITH POWER OF SALE, to secure all obligations (monetary or otherwise) of NAI arising under or in connection with any of the Operative Documents.*** Without limiting the generality of the foregoing, NAI and BNPPLC desire that their intent as set forth in this subparagraph be given effect both in the context of any bankruptcy, insolvency or receivership proceedings concerning NAI or BNPPLC and in other contexts. Accordingly, NAI and BNPPLC expect that in the event of any bankruptcy, insolvency or receivership proceedings affecting NAI or BNPPLC or any enforcement or collection actions arising out of such proceedings, the transactions evidenced by this Lease and the other Operative Documents will be characterized and treated as loans made to NAI by BNPPLC, as an unrelated third party lender to NAI, secured by the Property.

(2) Notwithstanding the foregoing, NAI acknowledges and agrees that none of BNPPLC or the other Interested Parties has made, or will be deemed to have made, in the Operative Documents or otherwise, any representations or warranties concerning how this Lease and the other Operative Documents will be characterized or treated under applicable accounting rules, income tax, regulatory, commercial or real estate law, bankruptcy, insolvency or receivership law or any other rules or requirements concerning

the tax, accounting or legal characteristics of the Operative Documents. NAI further acknowledges and agrees that it is sophisticated and knowledgeable regarding all such matters and that it has, as it deemed appropriate, obtained from and relied upon its own professional accountants, counsel and other advisors for such tax, accounting and legal advice concerning the Operative Documents.

(3) In any event, NAI will be required by subparagraph 5(C) below to indemnify and hold harmless BNPPLC from and against all additional taxes that may arise or become due because of any refusal of taxing authorities to recognize and give effect to the intention of the parties as set forth in subparagraph 4(C)(1) (“**Unexpected Recharacterization Taxes**”), including any additional income or capital gain tax that may become due because of payments to BNPPLC of the purchase price upon any sale under the Purchase Agreement resulting from any insistence of such taxing authorities that BNPPLC be treated as the “true owner” of the Property for tax purposes (a “**Forced Recharacterization**”); provided, however, NAI will not be required to pay or reimburse Unexpected Recharacterization Taxes to the extent that they are, in any given tax year, eliminated or offset by actual savings to BNPPLC because of additional depreciation deductions or other tax benefits available to BNPPLC in the same year only by reason of the Forced Recharacterization (“**Unexpected Tax Savings**”). To the extent Unexpected Recharacterization Taxes are eliminated or offset by Unexpected Tax Savings in a given tax year, including the tax year in which any sale under the Purchase Agreement occurs (the “**Year of Sale**”), such Unexpected Recharacterization Taxes will constitute Excluded Taxes as provided in clause (D) of the definition thereof in the Common Definitions and Provisions Agreement. Also, for purposes of this provision, it is understood that any depreciation deductions first available to BNPPLC in tax years prior to the Year of Sale and resulting from a Forced Recharacterization (“**Prior Year Depreciation Deductions**”) will be considered “available to BNPPLC” in the Year of Sale (and thus will eliminate or offset any Unexpected Recharacterization Taxes resulting from the recapture of such Prior Year Depreciation Deductions upon a sale under the Purchase Agreement) to the extent that (A) such Prior Year Depreciation Deductions are not otherwise used to generate Unexpected Tax Savings or Unexpected Net Tax Benefits (as defined below), and (B) the tax laws and regulations applicable in the Year of Sale effectively permit BNPPLC to carry over the Prior Year Depreciation Deductions to the Year of Sale by allowing BNPPLC to carry over net operating losses from the years in which the Prior Year Depreciation Deductions were first available to BNPPLC to the Year of Sale.

(4) After any Forced Recharacterization, BNPPLC will make a reasonable effort to determine whether Unexpected Tax Savings *exceed* Unexpected Recharacterization Taxes in any given tax year (any such excess being hereinafter called an “**Unexpected Net Tax Benefit**”); and if BNPPLC does determine that an Unexpected Net Tax Benefit has been realized and the amount thereof, BNPPLC will notify NAI of

the same and either credit the amount thereof against payments otherwise then due or to become due from NAI under this Lease or the other Operative Documents or pay the amount of such Unexpected Net Tax Benefit to NAI. It is understood, however, that the tax position of BNPPLC (and the consolidated tax group of which it is a part) may, in any given tax year, be such that no Unexpected Net Tax Benefit exists or can be determined with a reasonable effort on the part of BNPPLC. Therefore, BNPPLC makes no representation that NAI will receive any credits or payments pursuant to this provision after any Forced Recharacterization. Also, the determination by BNPPLC of the amount of any Unexpected Net Tax Benefit will be conclusive absent clear and manifest error, as will any determination by BNPPLC that the amount of any Unexpected Net Tax Benefit in a given tax year cannot be calculated with a reasonable effort. If NAI is dissatisfied with any such determination by BNPPLC prior to the Designated Sale Date, NAI will be entitled to accelerate the Designated Sale Date (as provided in clause (2) of the definition thereof), after which NAI may purchase or cause an Applicable Purchaser to purchase the Property on the accelerated Designated Sale Date pursuant to the Purchase Agreement.

**5 Payment of Executory Costs and Losses Related to the Property.**

(A) Local Impositions. Subject only to the exceptions listed in subparagraph 5(D) below, NAI must pay or cause to be paid prior to delinquency all Local Impositions. If requested by BNPPLC from time to time, NAI must furnish BNPPLC with receipts or other appropriate evidence showing payment of all Local Impositions at least ten days prior to the applicable delinquency date therefor.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity, applicability or amount of any asserted Local Imposition, and pending such contest NAI will not be deemed in default under any of the provisions of this Lease because of the Local Imposition if (1) NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPLC, and (2) NAI promptly causes to be paid any amount adjudged by a court of competent jurisdiction to be due, with all costs, penalties and interest thereon, promptly after such judgment becomes final; provided, however, in any event each such contest must be concluded and the contested Local Impositions must be paid by NAI prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPLC or its directors, officers or employees because of the nonpayment thereof or (ii) the date any writ or order is issued under which any property owned or leased by BNPPLC (including the Property) may be seized or sold or any other action is taken or overtly threatened against BNPPLC or against any property owned or leased by BNPPLC because of the nonpayment thereof, or (iii) any Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPLC's interest in the Property pursuant to the Purchase Agreement for a price (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(B) Increased Costs: Capital Adequacy Charges. Subject only to the exceptions listed in subparagraph 5(D) below:

(1) If there is any increase in the cost to BNPPLC's Parent or any Participant of agreeing to make or making, funding or maintaining advances to BNPPLC in connection with the Property because of any Banking Rules Change, then NAI must from time to time (after receipt of a request from BNPPLC's Parent or such Participant as provided below) pay to BNPPLC for the account of BNPPLC's Parent or such Participant, as the case may be, additional amounts sufficient to compensate BNPPLC's Parent or the Participant for such increased cost. A certificate as to the amount of such increased cost, submitted to BNPPLC and NAI by BNPPLC's Parent or the Participant, will be conclusive and binding upon NAI, absent clear and demonstrable error.

(2) BNPPLC's Parent or any Participant may demand additional payments ("**Capital Adequacy Charges**") if BNPPLC's Parent or the Participant determines that any Banking Rules Change affects the amount of capital to be maintained by it and that the amount of such capital is increased by or based upon the existence of advances made or to be made to or for BNPPLC to permit BNPPLC to maintain BNPPLC's investment in the Property. To the extent that BNPPLC's Parent or any Participant demands Capital Adequacy Charges as compensation for the additional capital requirements reasonably allocable to such investment or advances, NAI must pay to BNPPLC for the account of BNPPLC's Parent or the Participant, as the case may be, the amount so demanded.

(3) Notwithstanding the foregoing provisions of this subparagraph 5(B), NAI will not be obligated to pay any claim for compensation pursuant to this subparagraph 5(B) that arises or accrues (a) in the case of BNPPLC's Parent, as a result of any change in the rating assigned to BNPPLC by rating agencies or bank regulators in regard to BNPPLC's creditworthiness, record keeping or failure to comply with Applicable Laws (including U.S. banking regulations applicable to subsidiaries of a bank holding company), or (b) in the case of BNPPLC's Parent or any Participant, more than nine months prior to the date NAI is notified of the intent of BNPPLC's Parent or such Participant to make a claim for such charges; provided, that if the Banking Rules Change which results in a claim for compensation is retroactive, then the nine month period will be extended to include the period of the retroactive effect of such Banking Rules Change. Further, BNPPLC will cause BNPPLC's Parent and any Participant that is an Affiliate of BNPPLC to use commercially reasonable efforts to reduce or eliminate any claim for compensation pursuant to this subparagraph 5(B), including a change in the office of BNPPLC's Parent or such Participant through which it provides and maintains Funding Advances if such change will avoid the need for, or reduce the amount of, such compensation and will not, in the reasonable judgment of BNPPLC's Parent or such Participant, be otherwise disadvantageous to it. It is understood that NAI may also

request similar commercial reasonable efforts on the part of any Participant that is not an Affiliate of BNPPLC, but if a claim for additional compensation by any such Participant is not eliminated or waived, then NAI may request that BNPPLC replace such Participant as provided in Paragraph 6. Nothing in this subparagraph will be construed to require BNPPLC's Parent or any Participant to create any new office through which to make or maintain Funding Advances.

(4) Any amount required to be paid by NAI under this subparagraph 5(B) will be due ten days after a notice requesting such payment is received by NAI from BNPPLC's Parent or the applicable Participant.

(C) NAI's Payment of Other Losses: General Indemnification. Subject only to the exceptions listed in subparagraph 5(D) below:

(1) *Agreement to Indemnify.* As directed by BNPPLC, NAI must pay, reimburse, indemnify, defend, protect and hold harmless BNPPLC and all other Interested Parties from and against all Losses (including Environmental Losses) asserted against or incurred or suffered by any of them at any time and from time to time by reason of, in connection with, arising out of, or in any way related to the following:

- the ownership or alleged ownership of any interest in the Property or the Rents;
- the purchase, design, construction, preparation, installation, inspection, delivery, non-delivery, acceptance, rejection, possession, use, operation, maintenance, management, rental, lease, sublease, repossession, condition (including defects, whether or not discoverable), destruction, repair, alteration, modification, restoration, addition or substitution, storage, transfer of title, redelivery, return, sale or other disposition of all or any part of or interest in the Property;
- the imposition of any Lien (or incurring of any liability to refund or pay over any amount as a result of any Lien) against all or any part of or interest in the Property;
- any failure of the Property or NAI itself to comply with Applicable Laws;
- Existing Space Leases or other Permitted Encumbrances or any violation thereof;

- Hazardous Substance Activities, including those occurring prior to the Term;
- the negotiation, administration or enforcement of the Operative Documents or the Participation Agreement;
- the making or maintenance of Funding Advances;
- any Interest Rate Swap that BNPPLC enters into as described in subparagraph 3(B)(4) of this Lease;
- the breach by NAI of this Lease, any other Operative Document or any other document executed by NAI pursuant to or in connection with any Operative Document;
- any obligations of BNPPLC under the Closing Certificate; or
- any bodily or personal injury or death or property damage occurring in or upon or in the vicinity of the Property through any cause whatsoever.

NAI's obligations under this indemnity will apply whether or not any Interested Party is also indemnified as to the applicable Loss by another Interested Party and whether or not the Loss arises or accrues because of any condition of the Property or other circumstance concerning the Property prior to the Effective Date.

Further, in the event, for income tax purposes, an Interested Party must include in its taxable income any payment or reimbursement from NAI which is required by this indemnity (in this provision, the "**Original Indemnity Payment**"), and yet the Interested Party is not entitled during the same taxable year to a corresponding and equal deduction from its taxable income for the Loss paid or reimbursed by such Original Indemnity Payment (in this provision, the "**Corresponding Loss**"), then NAI must also pay to such Interested Party on demand the additional amount (in this provision, the "**Additional Indemnity Payment**") needed to gross up the Original Indemnity Payment for any and all resulting additional income taxes. That is, NAI must pay an Additional Indemnity Payment as is needed so that the Corresponding Loss (computed net of the reduction, if any, of the Interested Party's income taxes because of credits or deductions that are attributable to the Interested Party's payment or deemed payment of the Corresponding Loss and that are recognized for tax purposes in the same taxable year during which the Interested Party must recognize the Original Indemnity Payment as income) will not exceed the difference computed by subtracting (i) all income taxes (determined for this purpose based on the highest marginal income tax rates charged to corporations by

federal, state and local tax authorities, as applicable, for the relevant period or periods) imposed because of the receipt or constructive receipt of the Original Indemnity Payment and the Additional Indemnity Payment, from (ii) the sum of the Original Indemnity Payment and the Additional Indemnity Payment. (With regard to any payment or reimbursement of an Original Indemnity Payment, “**After Tax Basis**” means that such payment or reimbursement is or will be made together with the additional amount needed to gross up such Original Indemnity Payment as described in this provision.)

(2) *Scope of Indemnities and Releases.* **Every indemnity and release provided in this Lease and the other Operative Documents for the benefit of BNPPPLC or other Interested Parties, including the indemnity set forth in subparagraph 5(C)(1), will apply even if and when the subject matter of the indemnity or release arises out of or results from the negligence or strict liability of BNPPPLC or any other Interested Party.** Further, all such indemnities and releases will apply even if insurance obtained by NAI or required of NAI by this Lease or the other Operative Documents is not adequate to cover Losses against or for which the indemnities and releases are provided. (However, NAI’s liability for any failure to obtain insurance required by this Lease or the other Operative Documents will not be limited to Losses against which indemnities are provided, it being understood that the parties have agreed upon insurance requirements for reasons that extend beyond providing a source of payment for Losses against which BNPPPLC and other Interested Parties may be indemnified by NAI.)

(3) *Nonexclusive List of Costs Covered by Indemnity.* Costs and expenses for which NAI is responsible on an After Tax Basis pursuant to this subparagraph 5(C) will include all of the following, except to the extent that the following are included in the Initial Advance or in the calculation of any Break Even Price or Make Whole Amount paid to BNPPPLC pursuant to the Purchase Agreement:

- appraisal fees;
- Uniform Commercial Code search fees;
- filing and recording fees;
- inspection fees and expenses;
- brokerage fees and commissions;



- survey fees;
- title policy premiums and escrow fees;
- any Breakage Costs or Fixed Rate Settlement Amount;
- Attorneys' Fees incurred by BNPPLC with respect to the drafting, negotiation, administration or enforcement of this Lease or the other Operative Documents; and
- all taxes (except Excluded Taxes) related to the Property or to the transactions contemplated in the Operative Documents.

(4) *Defense and Settlement of Indemnified Claims.*

(a) By notice to NAI BNPPLC may direct NAI to assume on behalf of BNPPLC or any other Interested Party and to conduct with due diligence and in good faith the defense of and the response to any claim, proceeding or investigation included in or concerning any Loss for which NAI is responsible pursuant to subparagraph 5(C)(1). NAI must promptly comply with any such direction using counsel selected by NAI and reasonably satisfactory to BNPPLC or the other Interested Party, as applicable, to represent BNPPLC or the other Interested Party, as applicable. In the event NAI fails to promptly comply with any such direction from BNPPLC, BNPPLC or any other affected Interested Party may contest or settle the claim, proceeding or investigation using counsel of its own selection at NAI's expense, subject to subparagraph 5(D)(3) if that subparagraph is applicable.

(b) Also, although subparagraphs 5(D)(3) and 5(D)(4) will apply to tort claims asserted against any Interested Party related to the Property, the right of an Interested Party to be indemnified pursuant to this subparagraph 5(C) for taxes or other payments made to satisfy governmental requirements ("**Government Mandated Payments**") will not be conditioned in any way upon NAI having consented to or approved of, or having been provided with an opportunity to defend against or contest, such Government Mandated Payments. In all cases, however, including those which may involve Government Mandated Payments, the rights of each Interested Party to be indemnified will be subject to subparagraph 5(D)(5).

(5) *Payments Due.* Any amount to be paid by NAI under this subparagraph 5(C) will be due ten days after a notice requesting such payment is given to NAI, subject to any applicable contest rights expressly granted to NAI by other

provisions of this Lease.

(6) *Survival*. NAI's obligations under this subparagraph 5(C) will survive the termination or expiration of this Lease with respect to Losses suffered by any Interested Party on or prior to, or by reason of any actual or alleged occurrence or circumstances on or prior to, the later of the dates upon which (a) this Lease terminates or expires, or (b) NAI surrenders possession and control of the Property.

(D) Exceptions and Qualifications to Indemnities.

(1) *Exceptions*. BNPPLC acknowledges and agrees that nothing in Paragraph 4 or the preceding subparagraphs of this Paragraph 5 will be construed to require NAI to pay or reimburse:

- Excluded Taxes; or
- Losses incurred or suffered by any Interested Party to the extent proximately caused by (and attributed by any applicable principles of comparative fault to) the Established Misconduct of that Interested Party; or
- Losses that result from any Liens Removable by BNPPLC; or
- transaction expenses (including Attorneys' Fees) incurred by any of the Participants in connection with the drafting, negotiation or execution of the Participation Agreement (or supplements making them parties thereto) or in connection with any due diligence Participants may undertake before entering into the Participation Agreement; or
- Local Impositions or other Losses contested, if and so long as they are contested, by NAI in accordance with any of the provisions of this Lease or other Operative Documents which expressly authorize such contests; or
- transaction expenses or other Losses caused by or necessary to accomplish any conveyance by BNPPLC to BNPPLC's Parent or a Qualified Affiliate which constitutes a Permitted Transfer only by reason of clause (3) of the definition of Permitted Transfer in the Common Definitions and Provisions Agreement; or
- any amount which may from time to time be payable by BNPPLC to any Participant representing the excess of "Base Rent" as defined in the Participation Agreement over Base Rent as defined in and calculated pursuant to this Lease and the Common Definitions and Provisions Agreement; or

- any decline in the value of the Property solely by reason of decline in general market conditions and not because of any breach of this Lease or other Operative Documents by NAI.

Further, without limiting BNPPLC's rights (as provided in other provisions of this Lease and other Operative Documents) to include the following in the calculation of the Lease Balance, the Break Even Price and the Make Whole Amount (as applicable) or to collect Base Rent, a Supplemental Payment and other amounts, the calculation of which depends upon the Lease Balance, BNPPLC acknowledges and agrees that nothing in Paragraph 4 or the preceding subparagraphs of this Paragraph 5 will be construed to require NAI to pay or reimburse an Interested Party for costs paid by BNPPLC with the proceeds of the Initial Advance as part of the Transaction Expenses.

(2) *Notice of Claims.* If an Interested Party receives a written notice of a claim for taxes or a claim alleging a tort or other unlawful conduct that the Interested Party believes is covered by the indemnity in subparagraph 5(C)(1), then such Interested Party will be expected to promptly furnish a copy of such notice to NAI. The failure to so provide a copy of the notice will not excuse NAI from its obligations under subparagraph 5(C)(1); except that if such failure continues for more than fifteen days after the notice is received by such Interested Party and NAI is unaware of the matters described in the notice, with the result that NAI is unable to assert defenses or to take other actions which could minimize its obligations, then NAI will be excused from its obligation to indemnify such Interested Party (and any Affiliate of such Interested Party) against Losses, if any, which would not have been incurred or suffered but for such failure. For example, if BNPPLC fails to provide NAI with a copy of a notice of an overdue tax obligation covered by the indemnity set out in subparagraph 5(C)(1) and NAI is not otherwise already aware of such obligation, and if as a result of such failure BNPPLC becomes liable for penalties and interest covered by the indemnity in excess of the penalties and interest that would have accrued if NAI had been promptly provided with a copy of the notice, then NAI will be excused from any obligation to BNPPLC (or any Affiliate of BNPPLC) to pay the excess.

(3) *Withholding of Consent to Settlements Proposed by NAI.* With regard to any tort claim against an Interested Party for which NAI undertakes to defend the Interested Party as provided in subparagraph 5(C)(4)(a), if the Interested Party unreasonably refuses to consent to a settlement of the claim which is proposed by NAI and which will meet the conditions listed in the next sentence, NAI's liability for the cost of continuing the defense and for any other amounts payable in respect of the claim will be limited to the total cost for which the settlement proposed by NAI would have been accomplished but for the unreasonable refusal to consent. Any such settlement proposed by NAI must meet the following conditions: (A) at the time of the settlement by NAI, NAI must pay all amounts required to release the Interested Party and its property

interests from any further obligation for or liens securing the applicable claim and from any interest, penalties and other related liabilities, and (B) the settlement or compromise must not involve an admission of fraud or criminal wrongdoing or result in some other material adverse consequence to the Interested Party.

*(4) Settlements Without the Prior Consent of NAI.*

(a) Except as otherwise provided in subparagraph 5(D)(4)(b), if any Interested Party settles any tort claim for which it is entitled to be indemnified by NAI without NAI's consent, then NAI may, by notice given to the Interested Party no later than ten days after NAI is notified of the settlement, elect to pay Reasonable Settlement Costs to the Interested Party in lieu of a payment or reimbursement of actual settlement costs. (With respect to any tort claim asserted against an Interested Party, "**Reasonable Settlement Costs**" means the maximum amount that a prudent Person in the position of the Interested Party, but able to pay any amount, might reasonably agree to pay to settle the tort claim, taking into account the nature and amount of the claim, the relevant facts and circumstances known to such Interested Party at the time of settlement and the additional Attorneys Fees' and other costs of defending the claim which could be anticipated but for the settlement.) After making an election to pay Reasonable Settlement Costs with regard to a particular tort claim and a particular Interested Party, NAI will have no right to rescind or revoke the election, despite any subsequent determination that Reasonable Settlement Costs exceed actual settlement costs. It is understood that Reasonable Settlement Costs may be more or less than actual settlement costs and that a final determination of Reasonable Settlement Costs may not be possible until after NAI must decide between paying Reasonable Settlement Costs or paying actual settlement costs.

(b) Notwithstanding the foregoing, NAI will have no right to elect to pay Reasonable Settlement Costs in lieu of actual settlement costs if an Interested Party settles claims without NAI's consent at any time when an Event of Default has occurred and is continuing or after a failure by NAI to conduct with due diligence and in good faith the defense of and the response to any claim, proceeding or investigation as provided in subparagraph 5(C)(4)(a).

(c) Except as provided in this subparagraph 5(D)(4), no settlement by any Interested Party of any claim made against it will excuse NAI from any obligation to indemnify the Interested Party against the settlement costs or other Losses suffered by reason of, in connection with, arising out of, or in any way related to such claim.

*(5) No Authority to Admit Wrongdoing by NAI or to Bind NAI to any*

*Settlement.* No Interested Party will under any circumstances have any authority to bind NAI to an admission of wrongdoing or responsibility to any third party claimant with regard to matters for which such Interested Party claims a right to indemnification from NAI under this Lease.

Further, nothing herein contained, including the foregoing provisions concerning settlements by Interested Parties of indemnified Losses, will be construed as authorizing any Interested Party to bind NAI to do or refrain from doing anything to satisfy a third party claimant. If, for example, a claim is made by a Governmental Authority that NAI must refrain from some particular conduct on or about the Land in order to comply with Applicable Laws, BNPPLC cannot bind NAI (and will not purport to bind NAI) to any agreement to refrain from such conduct or otherwise prevent NAI from continuing to contest the claim by reason of any provision set forth herein.

Moreover, so long as this Lease continues, no Interested Party may settle any claim involving the Property by executing any agreement (including any consent decree proposed by any Governmental Authority) which purports to prohibit, limit or impose conditions upon any use of the Property by NAI without the prior written consent of NAI. In the case of any proposed settlement of a claim asserted by a Governmental Authority against BNPPLC, NAI will not unreasonably withhold such consent. However, for purposes of determining whether it is reasonable for NAI to withhold such consent, any diligent ongoing undertaking by NAI to contest such the claim on behalf of BNPPLC will be relevant.

Subject to the foregoing provisions in this subparagraph 5(D)(5), any Interested Party may agree for itself (and only for itself) to act or refrain from doing anything as demanded or requested by a third party claimant; provided, however, in no event will such an agreement impede NAI from continuing to exercise its rights to operate its business on the Property or elsewhere in any lawful manner deemed appropriate by NAI, nor will any such agreement limit or impede NAI's right to contest claims raised by any third party claimants (including Governmental Authorities) that NAI is not complying or has not complied with Applicable Laws.

(6) *Defense of Tax Claims.* This Lease does not grant to NAI any right to control the defense of or contest any tax claim for which an Interested Party may have a right to indemnity under subparagraph 5(C), other than the right to contest Local Impositions as provided in subparagraph 5(A), nor does this Lease grant to NAI the right to inspect the income tax returns, books or records of any Interested Party. Nevertheless, if a tax claim is asserted against BNPPLC for which it is entitled to be indemnified pursuant to subparagraph 5(C), BNPPLC will consider in good faith any defenses and strategies proposed by NAI with regard to such claim. Further, if any such tax claim is asserted against BNPPLC which involves assertions that apply not only to the

transactions contemplated by this Lease, but also to other similar transactions in which BNPPLC has participated, then BNPPLC will not settle the claim on a basis that results in a disproportionately greater tax burden with respect to the transactions contemplated herein than with respect to such other similar transactions. For example, if taxing authorities assert that both this Lease and other comparable lease agreements made by BNPPLC are not financing arrangements as intended by the parties thereto, and on the basis of such assertions the taxing authorities claim that BNPPLC owes income taxes which are not Excluded Taxes, then BNPPLC will not settle the claim in a manner that would cause NAI's liability under subparagraph 5(C) to be disproportionately greater than the indemnity obligation of another similarly situated tenant of BNPPLC under another lease agreement with an indemnity provision comparable to subparagraph 5(C). Also, BNPPLC will not grant to another tenant the right to dictate to BNPPLC the tax position BNPPLC must take in regard to the Property or the Operative Documents, except that BNPPLC may include provisions comparable to the foregoing in other leases to assure other tenants against a disproportionately greater burden than NAI will bear in regard to any settlement of a tax claim by BNPPLC.

(7) *Indemnified Parties Other than Landlord.* As a condition to making any indemnity payment for Losses directly to any Interested Party other than BNPPLC itself, NAI may require the Interested Party to confirm and agree in writing that it will be obligated to make the payments to NAI as provided in subparagraph 5(E)(2) in the event the Interested Party subsequently receives a refund of the Losses covered by such indemnity payment.

(E) Refunds and Credits Related to Losses Paid by NAI.

(1) If BNPPLC receives a refund of any Losses paid, reimbursed or advanced by NAI pursuant to this Paragraph 5 that has not already been accounted for in the After Tax Basis calculation described in subparagraph 5(C)(1), BNPPLC will promptly pay to NAI the amount of such refund, plus or minus any net tax benefits or detriments realized by BNPPLC as a result of the refund and such payment to NAI; provided, that the amount payable to NAI will not exceed the amount of the indemnity payment in respect of such refunded Losses that was made by NAI. If it is subsequently determined that BNPPLC was not entitled to the refund, the portion of the refund that is repaid or recaptured will be treated as a Loss for which NAI must indemnify BNPPLC pursuant to this Paragraph 5 without regard to subparagraph 5(D). If, in connection with any such refund, BNPPLC also receives an amount representing interest on such refund, BNPPLC will promptly pay to NAI the amount of such interest, plus or minus any net tax benefits or detriments realized by BNPPLC as a result of the receipt or accrual of the interest and as a result of such payment to NAI; provided, that BNPPLC will not be required to make any such payment in respect of the interest (if any) that is fairly attributable to a period for which NAI had not yet paid, reimbursed or advanced the Losses refunded to

BNPPLC.

(2) If any Interested Party (other than BNPPLC itself) receives a refund of any Loss paid, reimbursed or advanced by NAI pursuant to this Paragraph 5 that has not already been accounted for in the After Tax Basis calculation described in subparagraph 5(C)(1), NAI may demand (and enforce the demand pursuant to any agreement previously delivered by the Interested Party as provided in subparagraph 5(D)(7)) that such Interested Party promptly pay to NAI the amount of such refund, plus or minus any net tax benefits or detriments realized by such Interested Party as a result of the refund and such payment to NAI; provided, that the amount payable to NAI will not exceed the amount of the indemnity payment in respect of such refunded Losses that was made by NAI. If it is subsequently determined that such Interested Party was not entitled to the refund, the portion of the refund that is repaid or recaptured will be treated as a Loss for which NAI must indemnify such Interested Party pursuant to this Paragraph 5 without regard to subparagraph 5(D). If, in connection with any such refund, such Interested Party also receives an amount representing interest on such refund, NAI may demand that such Interested Party promptly pay to NAI the amount of such interest, plus or minus any net tax benefits or detriments realized by such Interested Party as a result of the receipt or accrual of the interest and as a result of such payment to NAI; provided, that such Interested Party will not be required to make any such payment in respect of the interest (if any) which is fairly attributable to a period before NAI paid, reimbursed or advanced the Losses refunded to such Interested Party.

(3) With respect to Losses incurred or suffered by an Interested Party and paid or reimbursed by NAI on an After Tax Basis, if taxes of such Interested Party which are not subject to indemnification by NAI are reduced because of such Losses (whether by reason of a deduction, credit or otherwise) and such reduction was not taken into account in the calculation of the required reimbursement or payment by NAI, then for purposes of this subparagraph 5(E) such reduction will be considered a "refund".

(4) Notwithstanding the foregoing, in no event will BNPPLC or any other Interested Party be required to make any payment to NAI pursuant to this subparagraph 5(E) when an Event of Default has occurred and is continuing.

(F) Reimbursement of Excluded Taxes Paid by NAI. If NAI is ever required (by laws imposing withholding tax obligations or otherwise) to pay Excluded Taxes that any Interested Party should have paid, but failed to pay when due, in connection with this Lease, such Interested Party must reimburse NAI for such Excluded Taxes (together with any additional amount required to preserve for NAI the full amount of such reimbursement after related taxes are considered, calculated in the same manner that an Additional Indemnity Payment would be calculated under subparagraph 5(C)(1) in the case of a reimbursement owed by NAI to an Interested Party) within 30 days after such Interested Party's receipt of a written demand for such

reimbursement by NAI.

(G) Collection on Behalf of Participants. BNPPLC may, on behalf of any Participant or its Affiliates, collect any amount that becomes due from NAI to such Participant or its Affiliates pursuant to subparagraph 5(B) or 5(C), in which case BNPPLC will be obligated to such Participant in respect of the collected amount as provided in the Participation Agreement. Alternatively, as provided in the Participation Agreement, BNPPLC may assign the right to collect any such amount to such Participant, in which case the Participant will be entitled to collect the same directly from NAI.

#### **6 Replacement of Participants.**

(A) NAI's Right to Substitute Participants. During the Term, so long as no Event of Default exists and subject to the terms and conditions set forth in subparagraph 6(B), if any Participant which is not an Affiliate of BNPPLC (in this Paragraph, the “**Unrelated Participant**”) (1) declines to approve the Rent for an extension of this Lease under subparagraph 1(B), or (2) makes a demand for compensation under subparagraph 5(B), NAI may request that BNPPLC execute Participation Agreement Supplements (as defined in the Participation Agreement) as needed to transfer the rights of the Unrelated Participant thereunder to one or more new Participants (in this subparagraph, whether one or more, the “**New Participants**”) designated by NAI who are willing and able to accept such interests and to make Funding Advances as necessary to terminate the Unrelated Participant's right to payments in respect of Base Rent and the Lease Balance under the Operative Documents. BNPPLC will execute such Participation Agreement Supplements within ten Business Days of the later to occur of such request by NAI and satisfaction of all conditions set forth in subparagraph 6(B).

(B) Conditions to Replacement of Participants. NAI and BNPPLC, working together, will endeavor in good faith to identify New Participants that are willing to replace any Unrelated Participant described in the preceding subparagraph and that are acceptable to both NAI and BNPPLC. (The term New Participants may include new parties to the Participation Agreement and it may include existing Participants that increase their Funding Advances as needed to replace the Unrelated Participant.) However, nothing contained herein will be construed to require BNPPLC itself to increase its Percentage (as defined in the Participation Agreement) to replace an Unrelated Participant, and nothing herein contained will be construed to require BNPPLC itself to provide or to obtain from its Affiliates Funding Advances to replace the Funding Advances that an Unrelated Participant has provided or agreed to provide. Also, New Participants will be subject to the approval of BNPPLC; provided, that BNPPLC must not unreasonably withhold its approval for the substitution of any New Participant proposed by NAI for any Unrelated Participant so long as (i) no Event of Default has occurred and is continuing, (ii) BNPPLC determines it can give such approval without violating Applicable Laws, without breaching its obligations under the Participation Agreement, and without waiving rights or remedies it has under this Lease or the other Operative Documents, (iii) BNPPLC or BNPPLC's



Parent is not involved in any material litigation adverse to the New Participant in any pending lawsuit or other legal proceeding, and (iv) all of the conditions listed in the next sentence are satisfied. Any substitution of New Participants for an Unrelated Participant as provided in this Paragraph will be subject to the following conditions:

(1) the proposed substitution does not include a waiver of rights by BNPPLC against any Unrelated Participant or require BNPPLC to pay any amounts out-of-pocket that are not reimbursed concurrently by NAI or the New Participants;

(2) the New Participants must become parties to the Participation Agreement (by executing supplements to that agreement as provided therein) and must provide all funds due to the Unrelated Participant being replaced because of the termination of the Unrelated Participant's rights to receive payments in respect of Net Cash Flow and Net Sales Proceeds (both as defined in the Participation Agreement); and

(3) the obligations of BNPPLC to the New Participants must not exceed the obligations that BNPPLC would have had to the Unrelated Participant if there had been no substitution, other than those for which NAI is liable.

Upon consummation of any such substitution NAI must pay to the replaced Participant Breakage Costs, if any, incurred by the replaced Participant because of the substitution.

**7 Items Included in the Property.** The Land and all Improvements on the Land from time to time will constitute "Property" covered by this Lease. Further, to the extent heretofore or hereafter acquired by NAI (in whole or in part) with any portion of the Initial Advance or with other funds for which NAI receives reimbursement from the Initial Advance, all furnishings, furniture, chattels, permits, licenses, franchises, certificates and other personal property of whatever nature will be deemed to have been acquired on behalf of BNPPLC by NAI and will constitute "Property" covered by this Lease, as will all renewals or replacements of or substitutions for any such Property. Upon request of BNPPLC, but not more often than once in any period of twelve consecutive months, NAI will deliver to BNPPLC an inventory describing all significant items of Personal Property (and, in the case of Tangible Personal Property, showing the make, model, serial number and location thereof), with a certification by NAI that such inventory is true and complete and that all items specified in the inventory are covered by this Lease free and clear of any Lien other than the Permitted Encumbrances or Liens Removable by BNPPLC.

## 8 Environmental.

### (A) Environmental Covenants by NAI.

(1) NAI will not conduct or permit others to conduct Hazardous Substance Activities on the Property, except Permitted Hazardous Substance Use and Remedial Work.

(2) NAI will not discharge or permit the discharge of anything (including Permitted Hazardous Substances) on or from the Property that would require any permit under applicable Environmental Laws, other than (i) storm water runoff, (ii) waste water discharges through a publicly owned treatment works, (iii) discharges that are a necessary part of any Remedial Work, and (iv) other similar discharges consistent with the definition herein of Permitted Hazardous Substance Use which do not significantly increase the risk of Environmental Losses to BNPPPLC, in each case in strict compliance with Environmental Laws.

(3) Following any discovery that Remedial Work is required by Environmental Laws or is otherwise reasonably believed by BNPPPLC to be required, and to the extent not inconsistent with the other provisions of this Lease, NAI must promptly perform and diligently and continuously pursue such Remedial Work.

(4) If requested by BNPPPLC in connection with any Remedial Work required by this subparagraph, NAI must retain environmental consultants reasonably acceptable to BNPPPLC to evaluate any significant new information generated during NAI's implementation of the Remedial Work and to discuss with NAI whether such new information indicates the need for any additional measures that NAI should take to protect the health and safety of persons (including employees, contractors and subcontractors and their employees) or to protect the environment. NAI must implement any such additional measures to the extent required with respect to the Property by Environmental Laws or otherwise reasonably believed by BNPPPLC to be required.

(B) Right of BNPPPLC to do Remedial Work Not Performed by NAI. If NAI's failure to perform any Remedial Work required as provided in subparagraph 8(A) continues beyond the Environmental Cure Period (as defined below), BNPPPLC may, in addition to any other remedies available to it, conduct all or any part of the Remedial Work. To the extent that Remedial Work is done by BNPPPLC pursuant to the preceding sentence (including any removal of Hazardous Substances), the cost thereof will be a demand obligation owing by NAI to BNPPPLC. As used in this subparagraph, "**Environmental Cure Period**" means the period ending on the earliest of: (1) ninety days after NAI is notified of the breach which must be cured within such period or, if during such ninety days NAI initiates the Remedial Work and diligently and continuously pursues it in accordance with a timetable accepted and approved by applicable Governmental

Authorities (which may include delays waiting for permits or other authorizations), the date by which such Remedial Work is to be completed according to such timetable, (2) the date that any writ or order is issued for the levy or sale of any property owned by BNPPPLC (including the Property) because of such breach, (3) the date that any criminal action is instituted or overtly threatened against BNPPPLC or any of its directors, officers or employees because of such breach, or (4) any Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPPLC's interest in the Property pursuant to the Purchase Agreement for a net price to BNPPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(C) Environmental Inspections and Reviews. BNPPPLC reserves the right to retain environmental consultants to review any report prepared by NAI or to conduct BNPPPLC's own investigation to confirm whether NAI is complying with the requirements of this Paragraph 8. NAI grants to BNPPPLC and to BNPPPLC's agents, employees, consultants and contractors the right to enter upon the Property during reasonable hours and after reasonable notice to inspect the Property and to perform such tests as BNPPPLC deems reasonably necessary or appropriate to review or investigate Hazardous Substances in, on, under or about the Property or any discharge or reasonably suspected discharge of Hazardous Substances into groundwater or surface water from the Property. NAI must promptly reimburse BNPPPLC for the fees of its environmental consultants and the costs of any such inspections and tests; provided, however, BNPPPLC's right to reimbursement for the fees of any consultant engaged as provided in this subparagraph or for the costs of any inspections or test undertaken as provided in this subparagraph will be limited to the following circumstances: (1) an Event of Default has occurred and is continuing at the time of such engagement, tests or inspections; (2) NAI has not exercised the Purchase Option and BNPPPLC has retained the consultant to establish the condition of the Property prior to any conveyance thereof pursuant to the Purchase Agreement or to the expiration of this Lease; (3) BNPPPLC has retained the consultant to satisfy any regulatory requirements applicable to BNPPPLC or its Affiliates; (4) BNPPPLC has retained the consultant because it has reason to believe, and does in good faith believe, that a significant violation of Environmental Laws concerning the Property has occurred; or (5) BNPPPLC has retained the consultant because BNPPPLC has been notified of a possible violation of Environmental Laws concerning the Property by any Governmental Authority having jurisdiction.

(D) Communications Regarding Environmental Matters.

(1) NAI must promptly advise BNPPPLC and Participants of (i) any discovery known to NAI of any event or circumstance which would render any of the representations of NAI herein or in any of the other Operative Documents concerning environmental matters materially inaccurate or misleading if made at the time of such discovery and assuming that NAI was aware of all relevant facts, (ii) any Remedial Work (or change in Remedial Work) required or undertaken by NAI or its Affiliates in response

to any (A) discovery of any Hazardous Substances on, under or about the Property other than Permitted Hazardous Substances or (B) any claim for damages resulting from Hazardous Substance Activities, (iii) any discovery known to NAI of any occurrence or condition on any real property adjoining or in the vicinity of the Property which would or could reasonably be expected to cause the Property or any part thereof to be subject to any ownership, occupancy, transferability or use restrictions under Environmental Laws, or (iv) any investigation or inquiry known to NAI of any failure or alleged failure by NAI to comply with Environmental Laws affecting the Property by any Governmental Authority responsible for enforcing Environmental Laws. In such event, NAI will deliver to BNPPPLC within thirty days after BNPPPLC's request, a preliminary written environmental plan setting forth a general description of the action that NAI proposes to take with respect thereto, if any, to bring the Property into compliance with Environmental Laws or to correct any breach by NAI of this Paragraph 8, including any proposed Remedial Work, the estimated cost and time of completion, the name of the contractor and a copy of the construction contract, if any, and such additional data, instruments, documents, agreements or other materials or information as BNPPPLC may reasonably request.

(2) NAI will provide BNPPPLC and Participants with copies of all material written communications with Governmental Authorities relating to the matters listed in the preceding clause (1). NAI will also provide BNPPPLC and Participants with copies of any correspondence from third Persons which threaten litigation over any significant failure or alleged significant failure of NAI to maintain or operate the Property in accordance with Environmental Laws.

(3) Prior to NAI's submission of a communication to any regulatory agency or third party which causes, or potentially could cause (whether by implementation of or response to said communication), a material change in the scope, duration, or nature of any Remedial Work, NAI must, to the extent practicable, deliver to BNPPPLC and Participants a draft of the proposed submission (together with the proposed date of submission), and in good faith assess and consider any comments of BNPPPLC regarding the same. Promptly after BNPPPLC's request, NAI will meet with BNPPPLC to discuss the submission, will provide any additional information reasonably requested by BNPPPLC and will provide a written explanation to BNPPPLC addressing the issues raised by comments (if any) of BNPPPLC regarding the submission.

#### **9 Insurance Required and Condemnation.**

(A) Liability Insurance. Throughout the Term NAI must maintain commercial general liability insurance against claims for bodily and personal injury, death and property damage occurring in or upon or resulting from any occurrence in or upon the Property under one or more insurance policies, all in such amounts, with such insurance companies and upon such terms and

conditions (including self-insurance, whether by deductible, retention, or otherwise) as are consistent with NAI's normal insurance practices in the country where the Land is located. In any event, policies under which NAI maintains such insurance will provide, by endorsement or otherwise, that BNPPPLC and the other Interested Parties are also insured thereunder against such claims with coverage that is not limited by any negligence or allegation of negligence on their part and with coverage that is primary, not merely excess over or contributory with the other commercial general liability coverage they may themselves maintain. NAI must deliver and maintain with BNPPPLC for each liability insurance policy required by this Lease written confirmation of the policy and the scope of the coverage provided thereby issued by the applicable insurer or its authorized agent.

**(B) Property Insurance.**

(1) Throughout the Term NAI must keep all Improvements (including all alterations, additions and changes made to the Improvements) insured against fire and other casualty under one or more property insurance policies, all in such amounts, with such insurance companies and upon such terms and conditions (including self-insurance, whether by deductible, retention, or otherwise) as are consistent with NAI's normal insurance practices in the country where the Property is located. In any event, policies under which NAI maintains such insurance will (a) provide coverage for the full replacement cost of the Improvements (exclusive of footings and foundations) and on a basis that eliminates any risk of reduced coverage under co-insurance provisions, (b) show BNPPPLC as an insured as its interest may appear and (c) provide that the protection afforded to BNPPPLC thereunder is primary (such that any policies maintained by BNPPPLC itself will be excess, secondary and noncontributing) and is not to be reduced or impaired by acts or omissions of NAI or any other beneficiary or insured. NAI must deliver and maintain with BNPPPLC for each property insurance policy required by this Lease written confirmation of the policy and the scope of the coverage provided thereby issued by the applicable insurer or its authorized agent.

(2) If any of the Property is destroyed or damaged by fire, explosion, windstorm, hail or by any other casualty against which insurance is required hereunder, (a) BNPPPLC may, but will not be obligated to, make proof of loss if not made promptly by NAI after notice from BNPPPLC, (b) each insurance company concerned is hereby authorized and directed to make payment for such loss directly to BNPPPLC (or, if so instructed by BNPPPLC, to NAI) for application as required by Paragraph 10, and (c) BNPPPLC will be entitled, in its own name or in the name of NAI or in the name of both, to settle, adjust or compromise any and all claims for loss, damage or destruction under any policy or policies of insurance; except that, if any such claim is for less than \$1,000,000 and no Event of Default has occurred and is continuing, NAI alone will have the right to settle, adjust or compromise the claim as NAI deems appropriate; and, except that, during the Term, so long as no Event of Default has occurred and is continuing,

BNPPLC must provide NAI with at least forty-five days notice of BNPPLC's intention to settle any such claim before settling it unless NAI has already approved of the settlement by BNPPLC.

(3) BNPPLC will not in any event or circumstances be liable or responsible for failure to collect, or to exercise diligence in the collection of, any insurance proceeds.

(4) If any casualty results in damage to or loss or destruction of the Property, NAI must give prompt notice thereof to BNPPLC and Paragraph 10 will apply.

(C) Failure to Obtain Insurance. If NAI fails to obtain any insurance or to provide confirmation of any such insurance as required by this Lease, BNPPLC will be entitled (but not required) to obtain the insurance that NAI has failed to obtain or for which NAI has not provided the required confirmation and, without limiting BNPPLC's other remedies under the circumstances, BNPPLC may require NAI to reimburse BNPPLC for the cost of such insurance and to pay interest thereon computed at the Default Rate from the date such cost was paid by BNPPLC until the date of reimbursement by NAI.

(D) Condemnation. Immediately upon obtaining knowledge of the institution of any proceedings for the condemnation of the Property or any portion thereof, or any other similar governmental or quasi-governmental proceedings arising out of injury or damage to the Property or any portion thereof, each party will promptly notify the other (provided, however, BNPPLC will have no liability for its failure to provide such notice) of the pendency of such proceedings. NAI must, at its expense, diligently prosecute any such proceedings and must consult with BNPPLC, its attorneys and experts and cooperate with them as reasonably requested in the carrying on or defense of any such proceedings. BNPPLC is hereby authorized, in its own name or in the name of NAI or in the name of both, at any time when an Event of Default has occurred and is continuing, but not otherwise without NAI's prior consent, to execute and deliver valid acquittances for, and to appeal from, any such judgment, decree or award concerning condemnation of any of the Property. BNPPLC will not in any event or circumstances be liable or responsible for failure to collect, or to exercise diligence in the collection of, any such proceeds, judgments, decrees or awards.

Notwithstanding the foregoing provisions of this subparagraph, if condemnation proceeds totaling not more than \$1,000,000 are to be recovered as a result of a taking of less than all or substantially all of the Property, NAI may directly receive and hold such proceeds during the Term, so long as no Event of Default has occurred and is continuing and NAI applies such proceeds as required herein.

(E) Waiver of Subrogation. NAI, for itself and for any Person claiming through it (including any insurance company claiming by way of subrogation), waives any and every claim which arises or may arise in its favor against BNPPLC or any other Interested Party to recover

Losses for which NAI is compensated by insurance or would be compensated by the insurance contemplated in this Lease, but for any deductible or self-insured retention maintained under such insurance or but for a failure of NAI to maintain the insurance as required by this Lease. NAI agrees to have such insurance policies properly endorsed so as to make them valid notwithstanding this waiver, if such endorsement is required to prevent a loss of insurance.

**10 Application of Insurance and Condemnation Proceeds.**

(A) Collection and Application of Insurance and Condemnation Proceeds Generally. This Paragraph 10 will govern the application of proceeds received by BNPPPLC or NAI during the Term from any third party (1) under any property insurance policy as a result of damage to the Property (including proceeds payable under any insurance policy covering the Property which is maintained by NAI), (2) as compensation for any restriction placed upon the use or development of the Property or for the condemnation of the Property or any portion thereof, or (3) because of any judgment, decree or award for injury or damage to the Property (*e.g.*, damage resulting from a third party's release of Hazardous Materials onto the Property); excluding, however, any funds paid to BNPPPLC by BNPPPLC's Parent, by an Affiliate of BNPPPLC or by any Participant that is made to compensate BNPPPLC for any Losses BNPPPLC may suffer or incur in connection with this Lease or the Property. Except as provided in subparagraph 10(D), NAI must promptly pay over to BNPPPLC any insurance, condemnation or other proceeds covered by this Paragraph 10 which NAI may receive from any insurer, condemning authority or other third party. All proceeds covered by this Paragraph 10, including those received by BNPPPLC from NAI or third parties, will be applied as follows:

(1) First, proceeds covered by this Paragraph 10 will be used to reimburse BNPPPLC for any reasonable costs and expenses, including Attorneys' Fees, that BNPPPLC incurred to collect the proceeds.

(2) Second, the proceeds remaining after such reimbursement to BNPPPLC (hereinafter, the "**Remaining Proceeds**") will be applied, as hereinafter more particularly provided, either as a Qualified Prepayment or to reimburse NAI or BNPPPLC for the actual out-of-pocket costs of repairing or restoring the Property. Until, however, any Remaining Proceeds received by BNPPPLC are applied by BNPPPLC as a Qualified Prepayment or applied by BNPPPLC to reimburse costs of repairs to or restoration of the Property pursuant to this Paragraph 10, BNPPPLC will hold and maintain such Remaining Proceeds as Escrowed Proceeds in an interest bearing account, and all interest earned on such account will be added to and made a part of such Escrowed Proceeds.

(B) Advances of Escrowed Proceeds to NAI. Except as otherwise provided below in this Paragraph 10, BNPPPLC will advance all Remaining Proceeds held by it as Escrowed Proceeds to reimburse NAI for the actual out-of-pocket cost to NAI of repairing or restoring the Property in accordance with the requirements of this Lease and the other Operative Documents

as the applicable repair or restoration, progresses and upon compliance by NAI with such terms, conditions and requirements as may be reasonably imposed by BNPPPLC to assure the completion of such repair or restoration with available funds. So long as any Lease Balance remains outstanding, however, BNPPPLC will not be required to pay Escrowed Proceeds to NAI in excess of the actual out-of-pocket cost to NAI of the applicable repair or restoration, as evidenced by invoices or other documentation reasonably satisfactory to BNPPPLC, it being understood that BNPPPLC may retain and, after NAI has completed the applicable repair or restoration and been reimbursed for the out-of-pocket cost thereof, apply any such excess (or so much thereof as is needed to reduce the Lease Balance to zero) as a Qualified Prepayment.

(C) Application of Escrowed Proceeds as a Qualified Prepayment. Provided no Event of Default has occurred and is continuing, BNPPPLC will apply any Remaining Proceeds paid to it (or other amounts available for application as a Qualified Prepayment) as a Qualified Prepayment on any date that BNPPPLC is directed to do so by a notice from NAI; however, if such a notice from NAI specifies an effective date for a Qualified Prepayment that is less than five Business Days after BNPPPLC's actual receipt of the notice, BNPPPLC may postpone the date of the Qualified Prepayment to any date not later than five Business Days after BNPPPLC's receipt of the notice. In any event, BNPPPLC may deduct Breakage Costs or any Fixed Rate Settlement Amount incurred in connection with any Qualified Prepayment from the Remaining Proceeds or other amounts available for application as the Qualified Prepayment, and NAI must reimburse BNPPPLC upon request for any such Breakage Costs or Fixed Rate Settlement Amount that BNPPPLC incurs but does not deduct.

(D) Right of NAI to Receive and Apply Remaining Proceeds Below a Certain Level. If any condemnation of any portion of the Property or any casualty resulting in the diminution, destruction, demolition or damage to any portion of the Property will (in the good faith judgment of BNPPPLC) reduce the then current "AS IS" market value by less than \$1,000,000 and (in the good faith estimation of BNPPPLC) be unlikely to result in Remaining Proceeds of more than \$1,000,000, and if no Event of Default has occurred and is continuing, then BNPPPLC will, upon NAI's request, instruct the condemning authority or insurer, as applicable, to pay the Remaining Proceeds resulting therefrom directly to NAI. NAI must apply any such Remaining Proceeds to the repair or restoration of the Property to a safe and secure condition and to a value of no less than the value before taking or casualty.

(E) Special Provisions Applicable After an Event of Default. Notwithstanding the foregoing, when any Event of Default has occurred and is continuing, BNPPPLC will be entitled to receive and collect all insurance, condemnation or other proceeds governed by this Paragraph 10 and to apply all Remaining Proceeds, when and to the extent deemed appropriate by BNPPPLC in its sole discretion, either (A) to the reimbursement of NAI or BNPPPLC for the out-of-pocket cost of repairing or restoring the Property, or (B) as Qualified Prepayments. Further, when any Event of Default has occurred and is continuing, if the Remaining Proceeds paid to BNPPPLC with respect to any damage or destruction of the Property are reduced by



reason of any insurance deductible or self-insured retention, NAI must pay to BNPPLC upon demand an additional amount equal to the full amount of such deductible or self-insured retention, whereupon the additional amount paid will be added to the Remaining Proceeds and applied as such by BNPPLC in accordance with the provisions of this Lease.

(F) NAI's Obligation to Restore. Regardless of the adequacy of any Remaining Proceeds available to NAI hereunder, if the Property is damaged by fire or other casualty or less than all or substantially all of the Property is taken by condemnation, NAI must either (1) promptly restore or improve the Property or the remainder thereof to a value no less than the Lease Balance and to a reasonably safe and sightly condition, or (2) promptly restore the Property or remainder thereof to a reasonably safe and sightly condition and pay to BNPPLC for application as a Qualified Prepayment the amount (if any), as determined by BNPPLC, needed to reduce the Lease Balance to no more than the then current "AS IS" market value of the Property or remainder thereof.

(G) Takings of All or Substantially All of the Property. In the event of any taking of all or substantially all of the Property, BNPPLC will be entitled to apply all Remaining Proceeds (or so much thereof as is required to reduce the Lease Balance to zero) as a Qualified Prepayment. Any taking of so much of the Property as, in BNPPLC's good faith judgment, makes it impracticable to restore or improve the remainder thereof as required by part (1) of the preceding subparagraph will be considered a taking of substantially all the Property for purposes of this Paragraph 10.

(H) If Remaining Proceeds Exceed the Lease Balance. Notwithstanding the various provisions of this Paragraph 10 authorizing BNPPLC to apply Remaining Proceeds received by it during the Term as a Qualified Prepayment, in the event any such Remaining Proceeds exceed the sum of (i) all payments thereof made to NAI to reimburse it for the costs of repairs and restoration to the Property, (ii) any application thereof to cover costs incurred by BNPPLC for the repair or restoration the Property and (iii) the Lease Balance, such excess will not be applied as a Qualified Prepayment, but rather will constitute Escrowed Proceeds which must, if NAI exercises the Purchase Option pursuant to the Purchase Agreement, be delivered to the purchaser of the Property (be it NAI or an Applicable Purchaser) as provided therein.

**11 Additional Representations, Warranties and Covenants of NAI Concerning the Property.** NAI represents, warrants and covenants as follows:

(A) Operation and Maintenance. NAI must operate and maintain the Property in a good and workmanlike manner and in compliance with Applicable Laws in all material respects and pay or cause to be paid all fees or charges of any kind due in connection therewith. (If NAI does not promptly correct any failure of the Property to comply with Applicable Laws that is the subject of a written complaint or demand for corrective action given by any Governmental Authority to NAI, or to BNPPLC and forwarded by it to NAI, then for purposes of the preceding

sentence, NAI will be considered not to have maintained the Property “in compliance with all Applicable Laws in all material respects” whether or not the noncompliance would be material in the absence of the complaint or demand.) NAI will not use or occupy, or allow the use or occupancy of, the Property in any manner which violates any Applicable Laws or which constitutes a public or private nuisance or which makes void, voidable or cancelable any insurance then in force with respect to the Property. To the extent that any of the following would, individually or in the aggregate, materially and adversely affect the value of the Property or the use of the Property for purposes permitted by this Lease, NAI will not, without BNPPPLC’s prior consent: (i) initiate or permit any zoning reclassification of the Property; (ii) seek any variance under existing zoning ordinances applicable to the Property; (iii) use or permit the use of the Property in a manner that would result in such use becoming a nonconforming use under applicable zoning ordinances or similar laws, rules or regulations; (iv) execute or file any subdivision plat affecting the Property; or (v) consent to the annexation of the Property to any municipality. NAI will not cause or permit any drilling or exploration for, or extraction, removal or production of, minerals from the surface or subsurface of the Property, and NAI will not do anything that could reasonably be expected to significantly reduce the market value of the Property. If NAI receives a notice or claim from any Governmental Authority that the Property is not in compliance with any Applicable Law, or that any action may be taken against BNPPPLC because the Property does not comply with any Applicable Law, NAI must promptly furnish a copy of such notice or claim to BNPPPLC.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity and applicability of any Applicable Law with respect to the Property, and pending such contest NAI will not be deemed in default hereunder because of the violation of such Applicable Law, if NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPPLC, and if NAI promptly causes the Property to comply with any such Applicable Law upon a final determination by a court of competent jurisdiction that the same is valid and applicable to the Property; provided, however, in any event such contest must be concluded and the violation of such Applicable Law must be corrected by NAI and any claims asserted against BNPPPLC or the Property because of such violation must be paid by NAI, all prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPPLC or any of its directors, officers or employees because of such violation, (ii) the date that any action is taken or overtly threatened by any Governmental Authority against BNPPPLC or any property owned by BNPPPLC (including the Property) because of such violation, or (iii) a Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPPLC’s interest in the Property pursuant to the Purchase Agreement for a price to BNPPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(B) Debts for Construction, Maintenance, Operation or Development. NAI must cause all debts and liabilities incurred in the construction, maintenance, operation or

development of the Property, including invoices for labor, material and equipment and all debts and charges for utilities servicing the Property, to be promptly paid.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity, applicability or amount of any asserted statutory liens in the nature of contractors', mechanics' or materialmens' liens, and pending such contest NAI will not be deemed in default under this subparagraph because of the contested lien if (1) within thirty days after being asked to do so by BNPPLC, NAI bonds over to BNPPLC's reasonable satisfaction all such contested liens against the Property alleged to secure an amount in excess of \$1,000,000 (individually or in the aggregate), (2) NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPLC, and (3) NAI promptly causes to be paid any amount adjudged by a court of competent jurisdiction to be due, with all costs and interest thereon, promptly after such judgment becomes final; provided, however, that in any event each such contest must be concluded and the lien, interest and costs must be paid by NAI prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPLC or its directors, officers or employees because of the nonpayment thereof, (ii) the date that any writ or order is issued under which the Property or any other property in which BNPPLC has an interest may be seized or sold or any other action is taken or overtly threatened against BNPPLC or any property in which BNPPLC has an interest because of the nonpayment thereof, or (iii) a Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPLC's interest in the Property pursuant to the Purchase Agreement for a price to BNPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(C) Repair, Maintenance, Alterations and Additions. NAI must keep the Property in good order, operating condition and appearance and must cause all necessary repairs, renewals and replacements to be promptly made. NAI will not allow any of the Property to be materially misused, abused or wasted, and NAI will promptly replace any worn-out fixtures and Tangible Personal Property with fixtures and personal property comparable to the replaced items when new. NAI will not, without the prior consent of BNPPLC, (i) remove from the Property any fixture or Personal Property having significant value except such as are replaced by NAI by fixtures or Personal Property of equal suitability and value, free and clear of any lien or security interest (and for purposes of this clause "significant value" will mean any fixture or Personal Property that has a value of more than \$100,000 or that, when considered together with all other fixtures and Personal Property removed and not replaced by NAI by items of equal suitability and value, has an aggregate value of \$500,000 or more) or (ii) make material new Improvements or alter Improvements in any material respect.

However, during the Term, so long as no Event of Default has occurred and is continuing, BNPPLC will not unreasonably withhold a consent requested by NAI pursuant to the preceding sentence for the construction or alteration of Improvements. NAI acknowledges,

however, that BNPPLC's refusal or failure to give such consent will be deemed reasonable if BNPPLC believes in good faith that the construction or alteration for which NAI is requesting consent could have a material adverse impact upon the value of the Property (taken as whole), or if NAI has not provided BNPPLC with adequate information to allow BNPPLC to properly evaluate such impact on value.

Without limiting the foregoing, NAI must notify BNPPLC before making any significant alterations to the Improvements, regardless of the impact on the value of the Property expected to result from such alterations.

(D) Permitted Encumbrances. NAI must comply with and will cause to be performed all of the covenants, agreements and obligations imposed upon the owner of any interest in the Property by the Permitted Encumbrances. Without limiting the foregoing, NAI must cause all amounts to be paid when due, the payment of which is secured by any Lien against the Property created by the Permitted Encumbrances. Without the prior consent of BNPPLC, NAI will not create any new Permitted Encumbrance or enter into, initiate, approve or consent to any modification of any Permitted Encumbrance that would create or expand or purport to create or expand obligations or restrictions which would encumber BNPPLC's interest in the Property or be binding upon BNPPLC itself. (Whether BNPPLC must give any such consent requested by NAI during the Term of this Lease will be governed by subparagraph 4(C) of the Closing Certificate.)

(E) Books and Records Concerning the Property. NAI must keep books and records that are accurate and complete in all material respects for the Property and, subject to Paragraph 22, must permit all such books and records (including all contracts, statements, invoices, bills and claims for labor, materials and services supplied for the construction and operation of any Improvements) to be inspected and copied by BNPPLC during normal business hours. (BNPPLC will not over the objection of NAI inspect or copy such materials more than once in any twelve month period unless BNPPLC believes in good faith that more frequent inspection and copying is required to determine whether a Default or an Event of Default has occurred and is continuing or to assess the effect thereof or to properly exercise remedies with respect thereto.) This subparagraph will not be construed as requiring NAI to regularly maintain separate books and records relating exclusively to the Property, but NAI will as reasonably requested from time to time by BNPPLC construct or abstract from its regularly maintained books and records information required by this subparagraph relating to the Property.

#### **12 Assignment and Subletting by NAI.**

(A) BNPPLC's Consent Required. Without the prior consent of BNPPLC, NAI will not assign, transfer, mortgage, pledge or hypothecate this Lease or any interest of NAI hereunder and will not sublet all or any part of the Property, by operation of law or otherwise, except as follows:

(1) During the Term, so long as no Event of Default has occurred and is continuing, NAI may sublet (a) to Affiliates of NAI, or (b) any or all useable space in then existing and completed building Improvements to Persons who are not NAI's Affiliates, subject to the conditions that (i) any such sublease by NAI must be made expressly subject and subordinate to the terms hereof, (ii) the sublease must have a term equal to or less than the remainder of the then effective Term of this Lease, and (iii) the use permitted by the sublease must be expressly limited to uses consistent with subparagraph 2(A) or other uses approved in advance by BNPPPLC as uses that will not present any extraordinary risk of uninsured environmental or other liability.

(2) During the Term, so long as no Event of Default has occurred and is continuing, NAI may assign all of its rights under this Lease and the other Operative Documents to an Affiliate of NAI, subject to the conditions that (a) the assignment must be in writing and must unconditionally provide that the Affiliate assumes all of NAI's obligations hereunder and thereunder, and (b) NAI must execute an unconditional guaranty of the obligations assumed by the Affiliate in form satisfactory to BNPPPLC, confirming (x) that notwithstanding the assignment NAI will remain primarily liable for all of the obligations undertaken by NAI under the Operative Documents, (y) that such guaranty is a guaranty of payment and performance and not merely of collection, and (z) that NAI waives to the extent permitted by Applicable Law all defenses otherwise available to guarantors or sureties.

(B) Standard for BNPPPLC's Consent to Assignments and Certain Other Matters. Consents and approvals of BNPPPLC which are required by this Paragraph 12 will not be unreasonably withheld, but NAI acknowledges that BNPPPLC's withholding of such consent or approval will be reasonable if BNPPPLC determines in good faith that (1) giving the approval may increase BNPPPLC's risk of liability for any existing or future environmental problem, (2) giving the approval is likely to substantially increase BNPPPLC's administrative burden of complying with or monitoring NAI's compliance with the requirements of this Lease, or (3) any transaction for which NAI has requested the consent or approval would negate NAI's representations in the Operative Documents regarding ERISA or cause any of the Operative Documents (or any exercise of BNPPPLC's rights thereunder) to constitute a violation of any provision of ERISA. Further, NAI acknowledges that BNPPPLC may reasonably require, as a condition to giving its consent to any assignment by NAI, that NAI execute an unconditional guaranty providing that NAI will remain primarily liable for all of the tenant's obligations hereunder and under other Operative Documents. Any such guaranty must be a guaranty of payment and not merely of collection, must provide that NAI waives to the extent permitted by Applicable Law all defenses otherwise available to guarantors or sureties, and must otherwise be in a form satisfactory to BNPPPLC.

(C) Consent Not a Waiver. No consent by BNPPPLC to a sale, assignment, transfer, mortgage, pledge or hypothecation of this Lease or NAI's interest hereunder, and no assignment

or subletting of the Property or any part thereof in accordance with this Lease or otherwise with BNPPPLC's consent, will release NAI from liability hereunder; and any such consent will apply only to the specific transaction thereby authorized and will not relieve NAI from any requirement of obtaining the prior consent of BNPPPLC to any further sale, assignment, transfer, mortgage, pledge or hypothecation of this Lease or any interest of NAI hereunder.

**13 Assignment by BNPPPLC.**

(A) Restrictions on Transfers. Except by a Permitted Transfer, BNPPPLC will not assign, transfer, mortgage, pledge, encumber or hypothecate this Lease or the other Operative Documents or any interest of BNPPPLC in and to the Property during the Term without the prior consent of NAI, which consent NAI may withhold in its sole discretion. Further, notwithstanding anything to the contrary herein contained, if withholding taxes are imposed on the Rents payable to BNPPPLC hereunder because of BNPPPLC's assignment of this Lease to any citizen of, or any corporation or other entity formed under the laws of, a country other than the United States, NAI will not be required to compensate BNPPPLC or any such assignee for the withholding tax.

(B) Effect of Permitted Transfer or other Assignment by BNPPPLC. If by a Permitted Transfer BNPPPLC sells or otherwise transfers the Property and assigns to the transferee all of BNPPPLC's rights under this Lease and under the other Operative Documents, and if the transferee expressly assumes all of BNPPPLC's obligations under this Lease and under the other Operative Documents, then BNPPPLC will thereby be released from any obligations arising after such assumption under this Lease or under the other Operative Documents, and NAI must look solely to each successor in interest of BNPPPLC for performance of such obligations.

**14 BNPPPLC's Right to Enter and to Perform for NAI .**

(A) Right to Enter. BNPPPLC and BNPPPLC's representatives may, subject to subparagraph 14(C), enter the Property for the purpose of making inspections or performing any work BNPPPLC is authorized to undertake by the next subparagraph or for the purpose of confirming whether NAI has complied with the requirements of this Lease or the other Operative Documents. During the Term, so long as no Event of Default has occurred and is continuing and no apparent emergency exists which would justify immediate entry, BNPPPLC will give NAI at least two Business Days notice before making any such entry over the objection of NAI and will limit any such entry to normal business hours.

(B) Performance for NAI. If NAI fails to perform any act or to take any action required of it by this Lease or the Closing Certificate, or to pay any money which NAI is required by this Lease or the Closing Certificate to pay, and if such failure or action constitutes an Event of Default or renders BNPPPLC or any director, officer, employee or Affiliate of BNPPPLC at risk of criminal prosecution or renders BNPPPLC's interest in the Property or any part

thereof at risk of forfeiture by forced sale or otherwise, then in addition to any other remedies specified herein or otherwise available, BNPPLC may, perform or cause to be performed such act or take such action or pay such money. Any expenses so incurred by BNPPLC, and any money so paid by BNPPLC, will be a demand obligation owing by NAI to BNPPLC. Further, upon making such payment, BNPPLC will be subrogated to all of the rights of the person, corporation or body politic receiving such payment. But nothing herein will imply any duty upon the part of BNPPLC to do any work which under any provision of this Lease NAI may be required to perform, and the performance thereof by BNPPLC will not constitute a waiver of NAI's default. BNPPLC may during the progress of any such work by BNPPLC keep and store upon the Property all necessary materials, tools, and equipment. BNPPLC will not in any event be liable for inconvenience, annoyance, disturbance, loss of business, or other damage to NAI or the subtenants or invitees of NAI by reason of the performance of any such work, or on account of bringing materials, supplies and equipment into or through the Property during the course of such work, and the obligations of NAI under this Lease will not thereby be excused in any manner.

(C) Building Security. So long as NAI remains in possession of the Property, BNPPLC or BNPPLC's representative will, before making any inspection or performing any work on the Property authorized by this Lease, do the following

(1) BNPPLC will give NAI at least 24 hours notice, unless BNPPLC believes in good faith that an emergency may exist or a Default has occurred and is continuing, because of which significant damage to the Property or other significant Losses may be sustained if BNPPLC delays entry to the Property; and

(2) if then requested to do so by NAI in order to maintain NAI's security, BNPPLC or its representative will: (i) sign in at NAI's security or information desk if NAI has such a desk on the premises, (ii) wear a visitor's badge or other reasonable identification, (iii) permit an employee of NAI to observe such inspection or work, and (iv) comply with other similar reasonable nondiscriminatory security requirements of NAI that do not, individually or in the aggregate, significantly interfere with inspections or work of BNPPLC authorized by this Lease.

In addition, such inspections shall be subject to the rights of tenants under Existing Space Leases.

#### **15 Remedies.**

(A) Traditional Lease Remedies. At any time after an Event of Default and after BNPPLC has given any notice required by subparagraph 15(C), BNPPLC will be entitled at BNPPLC's option (and without limiting BNPPLC in the exercise of any other right or remedy BNPPLC may have, and without any further demand or notice except as expressly described in

this subparagraph 15(A)), to exercise any one or more of the following remedies:

(1) By notice to NAI, BNPPPLC may terminate NAI's right to possession of the Property. However, only a notice clearly and unequivocally confirming that BNPPPLC has elected to terminate NAI's right of possession will be effective for purposes of this provision.

(2) Upon termination of NAI's right to possession as provided in the immediately preceding subsection (1) and without further demand or notice, BNPPPLC may re-enter the Property in any manner not prohibited by Applicable Laws and take possession of all improvements, additions, alterations, equipment and fixtures thereon and remove any persons in possession thereof. Any personal property on the Land may be removed and stored in a warehouse or elsewhere, and in such event the cost of any such removal and storage will be at the expense and risk of and for the account of NAI.

(3) Upon termination of NAI's right to possession as provided in the immediately preceding subsection (1), this Lease will terminate and BNPPPLC may recover from NAI damages which include the following:

- (a) the worth at the time of award of the unpaid Rent which had been earned at the time of termination;
- (b) costs and expenses actually incurred by BNPPPLC to repair damage to the Property that NAI was obligated to (but failed to) repair prior to the termination;
- (c) the sum of the following ("**Lease Termination Damages**"):
  - 1) the worth at the time of award of the amount by which the unpaid Rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that NAI proves could have been reasonably avoided;
  - 2) the worth at the time of award of the amount by which the unpaid Rent for the balance of the scheduled Term after the time of award exceeds the amount of such rental loss that NAI proves could be reasonably avoided;
  - 3) any other amount necessary to compensate BNPPPLC for all the detriment proximately caused by NAI's failure to perform NAI's obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including the costs and expenses of



preparing and altering the Property for reletting and all other costs and expenses of reletting (including Attorneys' Fees, advertising costs and brokers' commissions), and

(d) such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable California law.

The "**worth at the time of award**" of the amounts referred to in subparagraph 15(A)(3)(a) and subparagraph 15(A)(3)(c)1) will be computed by allowing interest at the Default Rate. The "**worth at the time of award**" of the amount referred to in subparagraph 15(A)(3)(c)2) will be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%).

Notwithstanding the foregoing, the total Lease Termination Damages which BNPPLC may recover from NAI will be limited in amount to the extent required, if any, to prevent the sum of recoverable Lease Termination Damages, plus any Supplemental Payment that BNPPLC has received or remains entitled to recover pursuant to the Purchase Agreement, from being more than the Maximum Remarketing Obligation; *provided, however*, if a Supplemental Payment is owed to BNPPLC according to the Purchase Agreement, but NAI fails to pay it, this limitation upon BNPPLC's right to recover Lease Termination Damages will be of no effect. For purposes of this provision, "Maximum Remarketing Obligation" is intended to have the meaning assigned to it in the Purchase Agreement and is intended to be computed as of the date any award of Lease Termination Damages to BNPPLC as if such date was the Designated Sale Date.

(4) Even after a breach of this Lease or abandonment of the Property by NAI, BNPPLC may continue this Lease in force and recover Rent as it becomes due. Accordingly, despite any breach or abandonment by NAI, this Lease will continue in effect for so long as BNPPLC does not terminate NAI's right to possession, and BNPPLC may enforce all of BNPPLC's rights and remedies under this Lease, including the right to recover the Rent as it becomes due under this Lease. NAI's right to possession will not be deemed to have been terminated by BNPPLC except pursuant to subparagraph 15(A)(1) hereof. The following, in and of themselves, will not constitute a termination of NAI's right to possession:

- (a) Acts of maintenance or preservation or efforts to relet the Property;
- (b) The appointment of a receiver upon the initiative of BNPPLC to protect BNPPLC's interest under this Lease; or
- (c) Reasonable withholding of consent to an assignment or subletting,

or terminating a subletting or assignment by NAI.

(B) Foreclosure Remedies. At any time when an Event of Default has occurred and is continuing, BNPPLC may notify NAI of BNPPLC's intent to pursue remedies described in Exhibit B, and at any time thereafter, regardless of whether the Event of Default is continuing, if NAI has not already purchased the Property or caused an Applicable Purchaser to purchase the Property pursuant to the Purchase Agreement, (i) BNPPLC will have the power and authority, to the extent provided by law, after proper notice and lapse of such time as may be required by law, to sell or arrange for a sale to foreclose its lien and security interest granted in Exhibit B, and (ii) BNPPLC, in lieu of or in addition to exercising any power of sale granted in Exhibit B, may proceed by a suit or suits in equity or at law, whether for a foreclosure or sale of the Property, or against NAI for the Lease Balance, or for the specific performance of any covenant or agreement herein contained or in aid of the execution of any power herein granted, or for the appointment of a receiver pending any foreclosure or sale of the Property, or for the enforcement of any other appropriate legal or equitable remedy.

(C) Notice Required So Long As the Purchase Option Continues Under the Purchase Agreement. During the Term, so long as NAI remains in possession of the Property, BNPPLC's right to exercise remedies provided in subparagraph 15(A) or to complete any foreclosure sale as provided in subparagraph 15(B) will be subject to the condition precedent that BNPPLC has notified NAI, at a time when an Event of Default has occurred and is continuing and no less than thirty days prior to exercising such remedies or completing such a sale, of BNPPLC's intent to do so. The condition precedent is intended to provide NAI with an opportunity to exercise the Purchase Option before losing possession of the Property because of the remedies enumerated in subparagraph 15(A) or because of a sale authorized by subparagraph 15(B). The condition precedent is not, however, intended to extend any period for curing an Event of Default. Accordingly, if an Event of Default has occurred, and regardless of whether any Event of Default is then continuing, BNPPLC may proceed immediately to exercise remedies provided in subparagraph 15(A) or complete a sale authorized by subparagraph 15(B) at any time after the earliest of (i) thirty days after BNPPLC has given such a notice to NAI, (ii) any date upon which NAI relinquishes possession of the Property, or (iii) any termination of the Purchase Option.

(D) Enforceability. This Paragraph 15 will be enforceable to the maximum extent not prohibited by Applicable Laws, and the unenforceability of any provision in this Paragraph will not render any other provision unenforceable.

(E) Remedies Cumulative. No right or remedy herein conferred upon or reserved to BNPPLC is intended to be exclusive of any other right or remedy, and each and every such right and remedy will be cumulative and in addition to any other right or remedy given to BNPPLC under this Lease or other Operative Documents or now or hereafter existing in favor of BNPPLC under Applicable Laws, except as otherwise expressly provided in the last provision of subparagraph 15(A)(3) above. In addition to other remedies provided in this Lease, BNPPLC

will be entitled, to the extent permitted by Applicable Law or in equity, to injunctive relief in case of the violation, or attempted or threatened violation, of any of the covenants, agreements, conditions or provisions of this Lease, or to a decree compelling performance of any of the other covenants, agreements, conditions or provisions of this Lease to be performed by NAI, or to any other remedy allowed to BNPPLC at law or in equity. Nothing contained in this Lease will limit or prejudice the right of BNPPLC to prove for and obtain in proceedings for bankruptcy or insolvency of NAI by reason of the termination of this Lease, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, the damages are to be proved, whether or not the amount be greater, equal to, or less than the amount of the loss or damages referred to above. Without limiting the generality of the foregoing, nothing contained herein will modify, limit or impair any of the rights and remedies of BNPPLC under the Purchase Agreement, and BNPPLC will not be required to give the thirty day notice described in subparagraph 15(C) as a condition precedent to any acceleration of the Designated Sale Date or to taking any action to enforce the Purchase Agreement. However, to prevent a double recovery, BNPPLC acknowledges that BNPPLC's right to recover Lease Termination Damages may be limited by the last provision of subparagraph 15(A)(3) above in the event BNPPLC collects or remains entitled to collect a Supplemental Payment as provided in the Purchase Agreement.

**16 Default by BNPPLC.** If BNPPLC should default in the performance of any of its obligations under this Lease, BNPPLC will have the time reasonably required, but in no event less than thirty days, to cure such default after receipt of notice from NAI specifying such default and specifying what action NAI believes is necessary to cure the default.

**17 Quiet Enjoyment.** Provided NAI pays the Base Rent and all Additional Rent payable hereunder as and when due and payable and keeps and fulfills all of the terms, covenants, agreements and conditions to be performed by NAI hereunder, BNPPLC will not during the Term disturb NAI's peaceable and quiet enjoyment of the Property; however, such enjoyment will be subject to the terms and conditions of this Lease, to the Existing Space Leases and other Permitted Encumbrances and to any other claims not constituting Liens Removable by BNPPLC. If any Lien Removable by BNPPLC is established against the Property, BNPPLC will remove the Lien Removable by BNPPLC promptly. Any breach by BNPPLC of this Paragraph will render BNPPLC liable to NAI for any monetary damages proximately caused thereby, but as more specifically provided in subparagraph 4(B) above, no such breach will entitle NAI to terminate this Lease or excuse NAI from its obligation to pay Rent.

**18 Surrender Upon Termination.** Unless NAI or an Applicable Purchaser is purchasing or has purchased BNPPLC's entire interest in the Property pursuant to the terms of the Purchase Agreement, NAI must, upon the termination of NAI's right to occupancy, surrender to BNPPLC the Property, including Improvements constructed by NAI and fixtures and furnishings included in the Property, free of all Hazardous Substances (including Permitted Hazardous Substances) and tenancies and with all Improvements in substantially the same condition as of the date the

same were initially completed, excepting only (i) ordinary wear and tear that occurs between the maintenance, repairs and replacements required by other provisions of this Lease, and (ii) demolition, alterations and additions which are expressly permitted by the terms of this Lease and which have been completed by NAI in a good and workmanlike manner in accordance with all Applicable Laws. Any movable furniture or movable personal property belonging to NAI or any party claiming under NAI, if not removed at the time of such termination and if BNPPLC so elects, will be deemed abandoned and become the property of BNPPLC without any payment or offset therefor. If BNPPLC does not so elect, BNPPLC may remove such property from the Property and store it at NAI's risk and expense. NAI must bear the expense of repairing any damage to the Property caused by such removal by BNPPLC or NAI.

19 **Holding Over by NAI.** Should NAI not purchase BNPPLC's right, title and interest in the Property as provided in the Purchase Agreement, but nonetheless continue to hold the Property after the termination of this Lease without objection by BNPPLC, whether such termination occurs by lapse of time or otherwise, such holding over will constitute and be construed as a tenancy from day to day only on and subject to all of the terms, provisions, covenants and agreements on the part of NAI hereunder; except that the Base Rent required for each day the holding over continues will be due and payable by NAI to BNPPLC upon demand and will equal the difference computed by subtracting (a) any interest accruing on such day under the Purchase Agreement on any past due Supplemental Payment, from (b) an amount equal to (i) the difference computed by subtracting any Supplemental Payment previously made by NAI to BNPPLC from the Lease Balance, times (ii) the per annum Default Rate computed as of such day, divided by (iii) three hundred sixty. No payments of money by NAI to BNPPLC after the termination of this Lease will reinstate, continue or extend the Term of this Lease and no extension of this Lease after the termination thereof will be valid unless and until the same is reduced to writing and signed by both BNPPLC and NAI.

20 **Recording Memorandum.** Contemporaneously with the execution of this Lease, the parties will execute and record a memorandum of this Lease for purposes of effecting constructive notice to all Persons of NAI's rights hereunder.

21 **Independent Obligations Evidenced by Other Operative Documents.** NAI acknowledges and agrees that nothing contained in this Lease will limit, modify or otherwise affect any of NAI's obligations under the other Operative Documents, which obligations are intended to be separate, independent and in addition to, and not in lieu of, the obligations set forth herein. Further, in the event of any inconsistency between the express terms and provisions of the Purchase Agreement and the express terms and provisions of this Lease, the express terms and provisions of the Purchase Agreement will control.

22 **Proprietary Information and Confidentiality.**

(A) Proprietary Information. NAI will have no obligation to provide proprietary

information (as defined in the next sentence) to BNPPLC, except and to the extent (1) expressly required by other terms and conditions of the Operative Documents, or (2) requested by BNPPLC in connection with any inspection of the Property pursuant to the various provisions hereof and, in BNPPLC's reasonably determination, required to allow BNPPLC to accomplish the purposes of such inspection. (Before NAI delivers any such proprietary information in connection with any inspection of the Property, NAI may require that BNPPLC confirm and ratify the confidentiality agreements covering such proprietary information set forth herein.) For purposes of this Lease and the other Operative Documents, "**proprietary information**" means NAI's intellectual property, trade secrets and other confidential information of value to NAI (including, among other things, information about NAI's manufacturing processes, products, marketing and corporate strategies) that (1) is received by any representative of BNPPLC at the time of any on-site visit to the Property or (2) otherwise delivered to BNPPLC by or on behalf of NAI and labeled "proprietary" or "confidential" or by some other similar designation to identify it as information which NAI considers to be proprietary or confidential.

(B) Confidentiality. BNPPLC will endeavor in good faith to use reasonable precautions to keep confidential any proprietary information that BNPPLC may receive from NAI or otherwise discover with respect to NAI or NAI's business in connection with the administration of this Lease or any investigation by BNPPLC hereunder. This provision will not, however, render BNPPLC liable for any disclosures of proprietary information made by it or its employees or representatives, unless the disclosure is intentional and made for no reason other than to damage NAI's business. Also, this provision will not apply to disclosures: (i) specifically and previously authorized in writing by NAI; (ii) to any assignee of BNPPLC as to any interest in the Property so long as such assignee has agreed in writing to use its reasonable efforts to keep such information confidential in accordance with the terms of this paragraph; (iii) to legal counsel, accountants, auditors, environmental consultants and other professional advisors to BNPPLC so long as BNPPLC informs such persons in writing (if practicable) of the confidential nature of such information and directs them to treat such information confidentially; (iv) to regulatory officials having jurisdiction over BNPPLC or BNPPLC's Parent (although the disclosing party will request confidential treatment of the disclosed information, if practicable); (v) as required by legal process (although the disclosing party will request confidential treatment of the disclosed information, if practicable); (vi) of information which has previously become publicly available through the actions or inactions of a person other than BNPPLC not, to BNPPLC's knowledge, in breach of an obligation of confidentiality to NAI; (vii) to any Participant so long as the Participant is bound by and has not repudiated a confidentiality provision concerning NAI's proprietary information set forth in the Participation Agreement; or (viii) that are reasonably believed by BNPPLC to be necessary or helpful to the determination or enforcement of any contractual or other rights which BNPPLC has or may have against NAI or its Affiliates or which BNPPLC has or may have concerning the Property (provided, that BNPPLC must cooperate with NAI as NAI may reasonably request to mitigate any risk that such disclosures will result in subsequent disclosures of proprietary information which are not necessary or helpful to any such determination or enforcement; such cooperation to include, for

example, BNPPPLC's agreement not to oppose a motion by NAI to seal records containing proprietary information in any court proceeding initiated because of a dispute between the parties over the Property or the Operative Documents).

Further, notwithstanding any other contrary provision contained in this Lease or the other Operative Documents, BNPPPLC and NAI (and each of their respective employees, representatives or other agents) may disclose, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Lease and all materials of any kind (including opinions or other tax analyses) that are provided to such party relating to such tax treatment and tax structure, other than any information for which non-disclosure is reasonably necessary in order to comply with applicable securities laws and other than any information the disclosure of which would waive the attorney-client privilege, the tax advisor privilege under Section 7525 of the Internal Revenue Code, or similar privileges.

**[The signature pages follow.]**

IN WITNESS WHEREOF, this Lease Agreement (1299 Orleans) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

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**Lease Agreement (1299 Orleans) — Signature Page**

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[Continuation of signature pages for Lease Agreement (1299 Orleans) dated as of November 29, 2007]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

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**Lease Agreement (1299 Orleans) — Signature Page**

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**Exhibit A**

**Legal Description**

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:**

All of Parcel 1, as shown upon that certain Map entitled, "Parcel Map being a Resubdivision of Parcel A as shown on Map recorded in Book 431 of Maps, at page 32, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California, on March 8, 1979 in Book 437 of Maps, at Page 9.

APN 110-36-007

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**Exhibit B**

**California Foreclosure Provisions**

Without limiting any of the provisions set forth in the body of this Lease or other attachments to this Lease, the following provisions are included in and made a part of this Lease for all purposes:

GRANT OF LIEN AND SECURITY INTEREST.

NAI, for and in consideration of the sum of Ten Dollars (\$10.00) to NAI in hand paid by Lloyd G. Cox, Trustee, of Dallas County, Texas (in this Exhibit called the “**Trustee**”), in order to secure the recovery of the Lease Balance by BNPPLC and the payment of all of the other obligations, covenants, agreements and undertakings of NAI under this Lease or other Operative Documents (in this Exhibit called the “**Secured Obligations**”), does hereby irrevocably GRANT, BARGAIN, SELL, CONVEY, TRANSFER, ASSIGN and SET OVER to the Trustee, IN TRUST WITH POWER OF SALE, for the benefit of BNPPLC, the Land, together with (i) all the buildings and other improvements now on or hereafter located thereon; (ii) all materials, equipment, fixtures or other property whatsoever now or hereafter attached or affixed to or installed in said buildings and other improvements, including, but not limited to, all heating, plumbing, lighting, water heating, refrigerating, incinerating, ventilating and air conditioning equipment, utility lines and equipment (whether owned individually or jointly with others), sprinkler systems, fire extinguishing apparatus and equipment, water tanks, engines, machines, elevators, motors, cabinets, shades, blinds, partitions, window screens, screen doors, storm windows, awnings, drapes, and floor coverings, and all fixtures, accessions and appurtenances thereto, and all renewals or replacements of or substitutions for any of the foregoing, all of which are hereby declared to be permanent fixtures and accessions to the freehold and part of the realty conveyed herein as security for the obligations mentioned hereinabove; (iii) all easements and rights of way now and at any time hereafter used in connection with any of the foregoing property or as a means of ingress to or egress from the Land or for utilities to said property; (iv) all interests of NAI in and to any streets, ways, alleys and/or strips of land adjoining said land or any part thereof; (v) all rents, issues, profits, royalties, bonuses, income and other benefits derived from or produced by the Land or Improvements; (vi) all leases or subleases of the Land or Improvements or any part thereof now or hereafter in effect, including all security or other deposits, advance or prepaid rents, and deposits or payments of similar nature; (vii) all options to purchase or lease the Land or Improvements or any part thereof or interest therein, and any greater estate in the Land or Improvements now owned or hereafter acquired by NAI; (viii) all right, title, estate and interest of every kind and nature, at law or in equity, which NAI now has or may hereafter acquire in the Land or Improvements; and (ix) all other claims and demands with respect to the Land or Improvements or the Collateral (as hereinafter defined), including all claims or demands to all proceeds of all insurance now or hereafter in effect with respect to the Land, Improvements or Collateral, all awards made for the taking by condemnation or the power of eminent domain, or by any proceeding or purchase in lieu thereof, of the Land, Improvements or Collateral, or any part thereof, or any damage or injury thereto, all awards resulting from a change of grade of streets, and all awards for severance damages; and (vi) all rights, estates, powers and privileges appurtenant or incident to the foregoing.

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TO HAVE AND TO HOLD the foregoing property (in this Exhibit called the “Mortgaged Property”) unto the Trustee, IN TRUST, and his successors or substitutes in this trust and to his or their successors and assigns upon the terms, provisions and conditions herein set forth for the benefit of BNPPLC.

In order to secure the Secured Obligations, NAI also hereby grants to BNPPLC a security interest in: all components of the Property which constitute personalty, whether owned by NAI now or hereafter, and all fixtures, accessions and appurtenances thereto, and all renewals or replacements of or substitutions for any of the foregoing (including all building materials and equipment now or hereafter delivered to said premises and intended to be installed or in or incorporated as part of the Improvements); all rents and other amounts from and under leases of all or any part of the Property; all issues, profits and proceeds from all or any part of the Property; all proceeds (including premium refunds) of each policy of insurance relating to the Property; all proceeds from the taking of the Property or any part thereof or any interest therein or right or estate appurtenant thereto by eminent domain or by purchase in lieu thereof; all permits, licenses, franchises, certificates, and other rights and privileges obtained in connection with the Property; all plans, specifications, maps, surveys, reports, architectural, engineering and construction contracts, books of account, insurance policies and other documents, of whatever kind or character, relating to the use, construction upon, occupancy, leasing, sale or operation of the Property; all proceeds and other amounts paid or owing to NAI under or pursuant to any and all contracts and bonds relating to the construction, erection or renovation of the Property; and all oil, gas and other hydrocarbons and other minerals produced from or allocated to the Property and all products processed or obtained therefrom, the proceeds thereof, and all accounts and general intangibles under which such proceeds may arise, together with any sums of money that may now or at any time hereafter become due and payable to NAI by virtue of any and all royalties, overriding royalties, bonuses, delay rentals and any other amount of any kind or character arising under any and all present and future oil, gas and mining leases covering the Property or any part thereof (all of the property described in this section are collectively called the “**Collateral**” in this Exhibit) and all proceeds of the Collateral. (The Mortgaged Property and the Collateral are in this Exhibit sometimes collectively called the “**Security**”).

#### FORECLOSURE BY POWER OF SALE

Upon the occurrence of any Event of Default, the Trustee, its successor or substitute, and/or BNPPLC is authorized and empowered to execute all written notices then required by law to cause the Security to be sold under power of sale to satisfy the Secured Obligations. Trustee will give and record such notices as the law then requires as a condition precedent to a trustee’s sale. When the minimum period of time required by law after giving all required notices has elapsed, Trustee, without notice to or demand upon NAI except as otherwise required by law, will sell the Security at the time and place of sale fixed by it in the notice of sale, at one or several sales, either as a whole or in separate parcels and in such manner and order, all as BNPPLC or Trustee in its sole discretion may determine, at public auction to the highest bidder

for cash, in lawful money of the United States, payable at the time of sale (the obligations hereby secured being the equivalent of cash for purposes of said sale). NAI will have no right to direct the order in which the Security is sold or to require that the Security be sold in separate lots or parcels or items. The sale by the Trustee of less than the whole of the Mortgaged Property will not exhaust the power of sale herein granted, and the Trustee is specifically empowered to make successive sale or sales under such power until the whole of the Mortgaged Property is sold; and, if the proceeds of such sale of less than the whole of the Mortgaged Property is less than the aggregate of the indebtedness secured hereby and the expense of executing this trust as provided herein, the rights and remedies of BNPPLC hereunder and the lien hereof will remain in full force and effect as to the unsold portion of the Mortgaged Property just as though no sale or sales had been made; provided, however, that NAI will never have any right to require the sale of less than the whole of the Mortgaged Property but BNPPLC will have the right, at its sole election, to request the Trustee to sell less than the whole of the Mortgaged Property. Subject to requirements and limits imposed by law, including California Civil Code § 2924g, Trustee may postpone sale of all or any portion of the Security by public announcement at such time and place of sale and from time to time may postpone the sale by public announcement at the time and place fixed by the preceding postponement. Any person or entity, including Trustee, NAI or BNPPLC, may purchase at the sale, and NAI hereby covenants to warrant and defend the title of such purchaser or purchasers. Trustee will deliver to the purchaser at such sale a deed conveying the Security or portion thereof so sold, but without any covenant or warranty, express or implied. At any such sale (i) NAI hereby agrees, in its behalf and in behalf of its heirs, executors, administrators, successors, personal representatives and assigns, that any and all recitals made in any deed of conveyance given by Trustee of any matters or facts stated therein, including without limitation, the identity of BNPPLC, the occurrence or existence of any default, the acceleration of the maturity of any of the Secured Obligations, the request to sell, the notice of sale, the giving of notice to all debtors legally entitled thereto, the time, place, terms, and manner of sale, and receipt, distribution and application of the money realized therefrom, and the due and proper appointment of a substitute Trustee and any other act or thing duly done by BNPPLC or by Trustee hereunder, will be taken by all courts of law and equity as prima facie evidence that the statement or recitals state facts and are without further question to be so accepted as conclusive proof of the truthfulness thereof, and NAI hereby ratifies and confirms every act that Trustee or any substitute Trustee hereunder may lawfully do in the premises by virtue hereof; and (ii) the purchaser may disaffirm any easement granted, or rental, lease or other contract made, in violation of any provision of any of the Operative Documents, and may take immediate possession of the Security free from, and despite the terms, of, such grant of easement and rental or lease contract.

BNPPLC may elect to cause the Security or any part thereof to be sold under the power of sale herein granted in any manner permitted by applicable law. In connection with any sale or sales hereunder, BNPPLC may elect to treat any portion of the Security which consists of a right in action or which is property that can be severed from the Security without causing structural damage thereto as if the same were personal property, and dispose of the same in accordance with applicable law, separate and apart from the sale of the real property. Any sale of any

personal property hereunder will be conducted in any manner permitted by the California Uniform Commercial Code (in this Exhibit called the “Code”). Where any portion of the Security consists of real property and personal property or fixtures, whether or not such personal property is located on or within the real property, BNPPLC may elect in its discretion to exercise its rights and remedies against any or all of the real property, personal property and fixtures, in such order and manner as is now or hereafter permitted by applicable law. Without limiting the generality of the foregoing, BNPPLC may, in its sole and absolute discretion and without regard to the adequacy of its security, elect to proceed against any or all of the real property, personal property and fixtures in any manner permitted by the Code; and if BNPPLC elects to sell both personal property and real property together as permitted by the Code, the power of sale herein granted will be exercisable with respect to all or any of the real property, personal property and fixtures covered hereby, as designated by BNPPLC, and Trustee is hereby authorized and empowered to conduct any such sale of any real property, personal property and fixtures in accordance with the procedures applicable to real property. Where any portion of the Security consists of real property and personal property, any reinstatement of the Secured Obligations, following default and an election by BNPPLC to accelerate the maturity of said obligations, which is made by NAI or any other person or entity permitted to exercise the right of reinstatement under § 2924c of the California Civil Code or any successor statute, will, in accordance with the terms of Code, not prohibit BNPPLC or Trustee from conducting a sale or other disposition of any personal property or fixtures or from otherwise proceeding against or continuing to proceed against any personal property or fixtures in any manner permitted by the Code, nor will any such reinstatement invalidate, rescind or otherwise affect any sale, disposition or other proceeding held, conducted or instituted with respect to any personal property or fixtures prior to such reinstatement or pending at the time of such reinstatement. Any sums paid to BNPPLC in effecting any reinstatement pursuant to § 2924c of the California Civil Code will be applied to the indebtedness secured hereby, and to BNPPLC’s reasonable costs and expenses in the manner required by § 2924c. Should BNPPLC elect to sell any portion of the Security which is real property, or which is personal property or fixtures that BNPPLC has elected to sell together with the real property in accordance with the laws governing a sale of real property, BNPPLC or Trustee will give such notice of default and election to sell as may then be required by law, and without the necessity of any demand on NAI, Trustee, at the time(s) and place(s) specified in the notice of sale, will sell said real property, and all estate, right, title, interest, claim and demand therein, and equity and right of redemption thereof, at such times and places as required or permitted by law, upon such terms as BNPPLC or Trustee may fix and specify in the notice of sale or as may be required by law. If the Security consists of several lots, parcels or items of property, BNPPLC may: (i) designate the order in which such lots, parcels or items will be offered for sale or sold, or (ii) elect to sell such lots, parcels or items through a single sale, or through two or more successive sales, or in any other manner BNPPLC deems in its best interest. Should BNPPLC desire that more than one sale or other disposition of the Mortgaged Property be conducted, BNPPLC may, at its option, cause the same to be conducted simultaneously, or successively, on the same day, or on such different days or times and in such order as BNPPLC may deem to be in its best interests, and no such sale will exhaust the power of sale herein granted or terminate or otherwise affect the lien granted by NAI herein on, or the security

interests of BNPPPLC in, any part of the Security not sold, until all of the indebtedness secured hereby has been fully paid and satisfied. In the event BNPPPLC elects to dispose of the Security through more than one sale, NAI agrees to pay the costs and expenses of each such sale and of any judicial proceedings wherein the same may be made, including reasonable compensation to BNPPPLC and Trustee, their agents and counsel, and to pay all expenses, liabilities and advances made or incurred by BNPPPLC and Trustee (or either of them) in connection with such sale or sale, together with interest on all such advances made by BNPPPLC and Trustee (or either of them) at the Default Rate..

#### JUDICIAL FORECLOSURE

This instrument will be effective as a mortgage as well as a deed of trust and upon the occurrence of an Event of Default may be foreclosed as to any of the Security in any manner permitted by the laws of the State of California or of any other state in which any part of the Security is situated, and any foreclosure suit may be brought by the Trustee or by BNPPPLC. In the event a foreclosure hereunder is commenced by the Trustee, or his substitute or successor, BNPPPLC may at any time before the sale of the Security direct the said Trustee to abandon the sale, and may then institute suit for the collection of the Secured Obligations and for the judicial foreclosure of this instrument. It is agreed that if BNPPPLC should institute a suit for the collection of the Secured Obligations and for the foreclosure of this instrument, BNPPPLC may at any time before the entry of a final judgment in said suit dismiss the same, and require the Trustee, his substitute or successor to exercise the power of sale granted herein to sell the Security in accordance with the provisions of this instrument.

#### BNPPPLC AS PURCHASER

BNPPPLC will have the right to become the purchaser at any sale held by any Trustee or substitute or successor or by any receiver or public officer, and any BNPPPLC purchasing at any such sale will have the right to credit upon the amount of the bid made therefor, to the extent necessary to satisfy such bid, the outstanding Lease Balance and other Secured Obligations owing to such BNPPPLC.

#### UNIFORM COMMERCIAL CODE REMEDIES

Upon the occurrence of an Event of Default, BNPPPLC may exercise its rights of enforcement with respect to the Collateral under the California Uniform Commercial Code, as amended, and in conjunction with, in addition to or in substitution for those rights and remedies:

- (a) BNPPPLC may enter upon the Land to take possession of, assemble and collect the Collateral or to render it unusable; and
- (b) BNPPPLC may require NAI to assemble the Collateral and make it

available at a place BNPPPLC designates which is mutually convenient to allow BNPPPLC to take possession or dispose of the Collateral; and

(c) written notice mailed to NAI as provided herein ten (10) days prior to the date of public sale of the Collateral or prior to the date after which private sale of the Collateral will be made shall constitute reasonable notice; and

(d) any sale made pursuant to the provisions of this section will be deemed to have been a public sale conducted in a commercially reasonable manner if held contemporaneously with the sale of the Mortgaged Property under power of sale as provided herein upon giving the same notice with respect to the sale of the Collateral hereunder as is required for such sale of the Mortgaged Property under power of sale; and

(e) in the event of a foreclosure sale, whether made by the Trustee exercising the power of sale granted herein, or under judgment of a court, the Collateral and the Mortgaged Property may, at the option of BNPPPLC, be sold as a whole; and

(f) it will not be necessary that BNPPPLC take possession of the Collateral or any part thereof prior to the time that any sale pursuant to the provisions of this section is conducted and it will not be necessary that the Collateral or any part thereof be present at the location of such sale; and

(g) prior to application of proceeds of disposition of the Collateral to the Secured Obligations, such proceeds will be applied to the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and the reasonable attorney's fees and legal expenses incurred by BNPPPLC; and

(h) any and all statements of fact or other recitals made in any bill of sale or assignment or other instrument evidencing any foreclosure sale hereunder as to nonpayment of the Secured Obligations or as to the occurrence of any Event of Default, or as to BNPPPLC having declared any of the Secured Obligations to be due and payable, or as to notice of time, place and terms of sale and of the properties to be sold having been duly given, or as to any other act or thing having been duly done by BNPPPLC, will be taken as prima facie evidence of the truth of the facts so stated and recited; and

(i) BNPPPLC may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale held by BNPPPLC, including the sending of notices and the conduct of the sale, but in the name and on behalf of BNPPPLC.

#### APPOINTMENT OF A RECEIVER

In addition to all other remedies herein provided for, if any Event of Default occurs or continues after the Designated Sale Date, BNPPPLC will as a matter of right be entitled to the

appointment of a receiver or receivers for all or any part of the Security, whether such receivership be incident to a proposed sale of such property or otherwise, and without regard to the adequacy of the security or the value of the Security or the solvency of any person or persons liable for the payment of the Secured Obligations, and NAI does hereby irrevocably consent to the appointment of such receiver or receivers, waives any and all defenses to such appointment and agrees not to oppose any application therefor by BNPPLC, but nothing herein is to be construed to deprive BNPPLC of any other right, remedy or privilege it may now have under the law to have a receiver appointed. Any such receiver or receivers will have all of the usual powers and duties of receivers in like or similar cases and will continue as such and exercise all such powers until the date of confirmation of sale of the Security unless such receivership is sooner terminated. Any money advanced by BNPPLC in connection with any such receivership will be a demand obligation owing by NAI to BNPPLC and will bear interest from the date of making such advancement by BNPPLC until paid at the Default Rate and will be a part of the Secured Obligations and will be secured by this lien and by any other instrument securing the Secured Obligations.

#### PROVISIONS CONCERNING THE TRUSTEE

Trustee accepts this trust when a Short Form Lease or memorandum referencing the provisions of this Exhibit, duly executed and acknowledged, is made a public record as provided by law. The trust hereby created will be irrevocable by NAI.

In the event the Trustee takes any action pursuant to the provisions of this Exhibit, NAI must pay to Trustee reasonable compensation for services rendered in the administration of this trust, which will be in addition to any required reimbursement for Attorney's Fees or other expenses.

BNPPLC may appoint a substitute to replace and act as the Trustee hereunder in any manner now or hereafter provided by law, or in lieu thereof, BNPPLC may from time to time, by an instrument in writing, appoint substitutes as successor or successors to any Trustee named herein or acting hereunder, which instrument, executed and acknowledged by BNPPLC and recorded in the Office of the Recorder of the county in which the Property is located, will be conclusive proof of proper substitution of such successor Trustee or Trustees, who will thereupon and without conveyance from the predecessor Trustee, succeed to all its title, estate, rights, powers and duties. Such instrument must contain the name of the original NAI, Trustee and BNPPLC hereunder, the instrument number of this Deed of Trust, and the name and address of the successor Trustee. In the event the Secured Obligations are at any time owned by more than one person or entity, the holder or holders of not less than a majority in the amount of such Secured Obligations will have the right and authority to make the appointment of a successor or substitute trustee provided for in the preceding sentences. Such appointment and designation by BNPPLC or by the holder or holders of not less than a majority of the Secured Obligations will be full evidence of the right and authority to make the same and of all facts therein recited. If



BNPPLC is a corporation and such appointment is executed in its behalf by an officer of such corporation, such appointment will be conclusively presumed to be executed with authority and will be valid and sufficient without proof of any action by the board of directors or any superior officer of the corporation. Upon the making of any such appointment and designation, all of the estate and title of the Trustee in the Security will vest in the named successor or substitute trustee and he will thereupon succeed to and will hold, possess and execute all the rights, powers, privileges, immunities and duties herein conferred upon the Trustee; but nevertheless, upon the written request of BNPPLC or of the successor or substitute Trustee, the Trustee ceasing to act must execute and deliver an instrument transferring to such successor or substitute Trustee all of the estate and title in the Security of the Trustee so ceasing to act, together with all the rights, powers, privileges, immunities and duties herein conferred upon the Trustee, and must duly assign, transfer and deliver any of the properties and moneys held by said Trustee hereunder to said successor or substitute Trustee. All references herein to the Trustee will be deemed to refer to the Trustee (including any successor or substitute appointed and designated as herein provided) from time to time acting hereunder. NAI hereby ratifies and confirms any and all acts which the herein named Trustee or his successor or successors, substitute or substitutes, in this trust, do lawfully by virtue hereof.

THE TRUSTEE WILL NOT BE LIABLE FOR ANY ERROR OF JUDGMENT OR ACT DONE BY THE TRUSTEE IN GOOD FAITH, OR BE OTHERWISE RESPONSIBLE OR ACCOUNTABLE UNDER ANY CIRCUMSTANCES WHATSOEVER (INCLUDING THE TRUSTEE'S NEGLIGENCE), EXCEPT FOR THE TRUSTEE'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT. The Trustee will have the right to rely on any instrument, document or signature authorizing or supporting any action taken or proposed to be taken by him hereunder, believed by him in good faith to be genuine. All moneys received by the Trustee will, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated in any manner from any other moneys (except to the extent required by law), and the Trustee will be under no liability for interest on any moneys received by him hereunder. NAI WILL REIMBURSE THE TRUSTEE FOR, AND INDEMNIFY AND SAVE HIM HARMLESS AGAINST, ANY AND ALL LIABILITY AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES) WHICH MAY BE INCURRED BY HIM IN THE PERFORMANCE OF HER DUTIES HEREUNDER (INCLUDING ANY LIABILITY AND EXPENSES RESULTING FROM THE TRUSTEE'S OWN NEGLIGENCE). The foregoing indemnity will not terminate upon release, foreclosure or other termination of this instrument.

#### MISCELLANEOUS

BNPPLC may resort to any security given by this instrument or to any other security now existing or hereafter given to secure the payment of the Secured Obligations, in whole or in part, and in such portions and in such order as may seem best to BNPPLC in its sole and uncontrolled discretion, and any such action will not in anywise be considered as a waiver of any of the rights, benefits, liens or security interests evidenced by this instrument.

To the full extent NAI may do so, NAI agrees that NAI will not at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter in force pertaining to the rights and remedies of sureties or redemption, and NAI, for NAI and NAI's successors and assigns, and for any and all persons ever claiming any interest in the Security, to the extent permitted by law, hereby waives and releases all rights of redemption, valuation, appraisal, stay of execution, notice of intention to mature or declare due the whole of the Secured Obligations, notice of election to mature or declare due the whole of the Secured Obligations and all rights to a marshaling of the assets of NAI, including the Security, or to a sale in inverse order of alienation in the event of foreclosure of the liens and security interests hereby created. NAI will not have or assert any right under any statute or rule of law pertaining to the marshaling of assets, sale in inverse order of alienation, the exemption of homestead, the administration of estates of decedents or other matters whatever to defeat, reduce or affect the right of BNPPLC under the terms of this instrument to a sale of the Security for the collection of the Secured Obligations without any prior or different resort for collection, or the right of BNPPLC under the terms of this instrument to the payment of the Secured Obligations out of the proceeds of sale of the Security in preference to every other claimant whatever. If any law referred to in this section and now in force, of which NAI or NAI's successors and assigns and such other persons claiming any interest in the Security might take advantage despite this provision, is hereafter repealed or ceases to be in force, such law shall not thereafter be deemed to preclude the application of this provision.

In the event there is a foreclosure sale hereunder and at the time of such sale NAI or NAI's successors or assigns or any other persons claiming any interest in the Security by, through or under NAI are occupying or using the Security, or any part thereof, each and all will immediately become the tenant of the purchaser at such sale. Such tenancy will be a tenancy from day-to-day, terminable at the will of either landlord or tenant, at a reasonable rental per day based upon the value of the property occupied, such rental to be due daily to the purchaser. In the event the tenant fails to surrender possession of said property upon demand, the purchaser will be entitled to institute and maintain an action to obtain possession in any court of competent jurisdiction in California.

NAI agrees to pay BNPPLC for each statement of BNPPLC (as beneficiary) regarding the obligations secured hereby the maximum fee allowed by law or, if there is no maximum fee, such reasonable fee as is then charged by BNPPLC for rendering such statement.

Notwithstanding any contrary provisions regarding the giving of notices in the Common Definitions or Provisions Agreement or other Operative Documents, any service of a notice required by California Civil Code §2924 will be considered complete when the requirements of that statute are met.

All rights of action under this Exhibit be enforced by BNPPLC or Trustee without the possession of any instruments secured hereby and without the production thereof or of this Lease or other Operative Documents at any trial or other proceeding relative thereto.

**COMMON DEFINITIONS  
AND PROVISIONS AGREEMENT  
(1299 ORLEANS)**

between

BNP PARIBAS LEASING CORPORATION

and

NETWORK APPLIANCE, INC.

Dated as of November 29, 2007

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**Annexes**

Annex 1	ABR Period Election Form
Annex 2	Fixed Rate Lock Notice Form
Annex 3	LIBOR Period Election Form

**COMMON DEFINITIONS  
AND PROVISIONS AGREEMENT  
(1299 ORLEANS)**

This COMMON DEFINITIONS AND PROVISIONS AGREEMENT (1299 ORLEANS) (this “**Agreement**”), dated as of November 29, 2007 (the “**Effective Date**”), is made by and between BNP PARIBAS LEASING CORPORATION (“**BNPPLC**”), a Delaware corporation, and NETWORK APPLIANCE, INC. (“**NAI**”), a Delaware corporation.

**RECITALS**

Contemporaneously with the execution of this Agreement, NAI and BNPPLC are executing the Closing Certificate (as defined below), the Lease (as defined below) and the Purchase Agreement (as defined below), all of which concern NAI or the Property (as defined below). Each of the Closing Certificate, the Lease and the Purchase Agreement (together with this Agreement, the “**Operative Documents**”) are intended to create separate and independent obligations upon the parties thereto. However, NAI and BNPPLC intend that all of the Operative Documents share certain consistent definitions and other miscellaneous provisions. To that end, the parties are executing this Agreement and incorporating it by reference into each of the other Operative Documents.

**AGREEMENTS**

**ARTICLE I — LIST OF DEFINED TERMS**

**Unless a clear contrary intention appears, the following terms will have the respective indicated meanings as used herein and in the other Operative Documents:**

“**ABR**” means, for any day, a fluctuating rate of interest per annum (rounded upwards, if necessary, to the next 1/100th of 1%) equal to the higher of (a) the Prime Rate in effect on such day and (b) the Fed Funds Rate in effect one day prior to such day plus 1/4 of 1% per annum. For any period (including any Base Rent Period), “**ABR**” means the average of the ABR for each day during such period.

“**ABR Period Election**” means an election to have the Effective Rate for any Base Rent Period calculated by reference to the ABR, rather than by reference to LIBOR or a Fixed Rate. NAI may (subject to the limitations and qualifications set forth in this definition) make any Base Rent Period after the first Base Rent Period subject to an ABR Period Election by a notice given to BNPPLC in the form attached as Annex 1 at least five Business Days prior to the commencement of such period. After an ABR Period Election becomes effective, it will remain in effect for all subsequent Base Rent Periods until the Fixed Rate Lock Date for any Fixed Rate Lock or a different election is made in accordance with the provisions of this definition and the

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definition of LIBOR Period Election. In no event will changes in any ABR Period Election or LIBOR Period Election become effective except upon the commencement of a new Base Rent Period. (For purposes of the Operative Documents, an ABR Period Election for any Base Rent Period will also be considered in effect on the Effective Date or Base Rent Date upon which such period begins.)

“**Active Negligence**” of any Person means, and is limited to, the negligent conduct on the Property (and not mere omissions) by such Person or by others acting and authorized to act on such Person’s behalf (other than NAI) in a manner that proximately causes actual bodily injury or property damage for which NAI does not carry (and is not obligated by the Lease to carry) insurance. “**Active Negligence**” will not include (1) any negligent failure of BNPPPLC to act when the duty to act would not have been imposed but for BNPPPLC’s status as owner of any interest in the Land, the Improvements or any other Property or as a party to the transactions described in the Lease or the other Operative Documents, (2) any negligent failure of any other Interested Party to act when the duty to act would not have been imposed but for such party’s contractual or other relationship to BNPPPLC or participation or facilitation in any manner, directly or indirectly, of the transactions described in the Lease or other Operative Documents, or (3) the exercise in a lawful manner by BNPPPLC (or any party lawfully claiming through or under BNPPPLC) of any right or remedy provided in or under the Lease or the other Operative Documents.

“**Additional Rent**” has the meaning indicated in subparagraph 3(F) of the Lease.

“**Administrative Fees**” means the fees identified as such in subparagraph 3(F) of the Lease.

“**Affiliate**” of any Person means any other Person controlling, controlled by or under common control with such Person. For purposes of this definition, the term “control” when used with respect to any Person means the power to direct the management of policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise, and the terms “controlling” and “controlled” have meanings correlative to the foregoing.

“**After Tax Basis**” has the meaning indicated in subparagraph 5(C)(1) of the Lease.

“**Applicable Laws**” means any or all of the following, to the extent applicable to BNPPPLC, NAI, the Property or the Operative Documents, after giving effect to the contractual choice of law provisions in the Operative Documents: restrictive covenants; zoning ordinances and building codes; flood disaster laws; health, safety and environmental laws and regulations; the Americans with Disabilities Act and other laws pertaining to disabled persons; and other laws, statutes, ordinances, rules, permits, regulations, orders, determinations and court decisions.

“**Applicable Purchaser**” means any third party designated to purchase BNPPPLC’s

interest in the Property and in any Escrowed Proceeds as provided in the Purchase Agreement.

“**Arrangement Fee**” has the meaning indicated in subparagraph 3(E) of the Lease.

“**Attorneys’ Fees**” means the expenses and reasonable fees of counsel to the parties incurring the same, including costs or expenses of in-house counsel (whether or not accounted for as general overhead or administrative expenses) and printing, photostating, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals, librarians and others not admitted to the bar but performing services under the supervision of an attorney. Such terms will also include all such expenses and reasonable fees incurred with respect to appeals, arbitrations and bankruptcy proceedings, and whether or not any manner of proceeding is brought with respect to the matter for which such fees and expenses were incurred.

“**Banking Rules Change**” means either: (1) the introduction of or any change after the Effective Date (other than any change by way of imposition or increase of reserve requirements included in the Eurodollar Rate Reserve Percentage) in any law or regulation applicable to BNPPLC, BNPPLC’s Parent or any Participant, or in the generally accepted interpretation by the institutional lending community of any such law or regulation, or in the interpretation of any such law or regulation asserted by any regulator, court or other governmental authority (other than any change by way of imposition or increase of reserve requirements included in the Eurodollar Rate Reserve Percentage) or (2) the compliance by BNPPLC, BNPPLC’s Parent or any Participant with any new guideline or new request issued after the Effective Date from any central bank or other governmental authority (whether or not having the force of law).

“**Base Rent**” means the rent payable by NAI pursuant to subparagraph 3(A) of the Lease.

“**Base Rent Date**” means a date upon which Base Rent must be paid under the Lease, all of which dates will be the first Business Day of a calendar month. The *first* Base Rent Date will be the first Business Day of the *first* calendar month following the Effective Date. Each *successive Base Rent Date after the first Base Rent Date* will be the first Business Day of the first or third calendar month following the calendar month which includes the preceding Base Rent Date, determined as follows:

(1) If an ABR Period Election or a LIBOR Period Election of one month is in effect on a Base Rent Date, or if a Fixed Rate Lock commences or continues on a Base Rent Date, then the first Business Day of the *first* calendar month following such Base Rent Date will be the next following Base Rent Date.

(2) If a LIBOR Period Election of three months or longer is in effect on a Base Rent Date, then the first Business Day of the *third* calendar month following such Base Rent Date will be the next following Base Rent Date.

Thus, for example, if a Base Rent Date falls on the first Business Day of September, 2008 and a

LIBOR Period Election of three months commences on such Base Rent Date, then the first Base Rent Date thereafter will be the first Business Day of December, 2008.

“**Base Rent Period**” means a period for which Base Rent must be paid under the Lease, each of which periods will correspond to the ABR Period Election or LIBOR Period Election for the period (except when a Fixed Rate Lock continues in effect). The first Base Rent Period will begin on and include the Effective Date, and each successive Base Rent Period will begin on and include the Base Rent Date upon which the preceding Base Rent Period ends. Each Base Rent Period, including the first Base Rent Period, will end on but not include the first or second Base Rent Date after the Base Rent Date upon which such period began, determined as follows:

(1) If an ABR Period Election or a LIBOR Period Election of one month or three months is in effect for a Base Rent Period, or if a Fixed Rate Lock commences or continues on the first day of the Base Rent Period, then such Base Rent Period will end on but not include the first Base Rent Date after the Base Rent Date upon which such period began.

(2) If a LIBOR Period Election of six months is in effect for a Base Rent Period, then such Base Rent Period will end on but not include the second Base Rent Date after the Base Rent Date upon which such period began.

The determination of Base Rent Periods can be illustrated by two examples:

1) If NAI makes a LIBOR Period Election of three months for a hypothetical Base Rent Period beginning on the first Business Day in January, 2009, then such Base Rent Period will end on but not include the first Base Rent Date after it begins; that is, such Base Rent Period will end on but not include the first Business Day in April, 2009, the third calendar month after January, 2009.

2) If, however, NAI makes a LIBOR Period Election of six months for the hypothetical Base Rent Period beginning the first Business Day in January, 2009, then such Base Rent Period will end on but not include the second Base Rent Date after it begins; that is, the first Business Day in July, 2009.

“**BNPPLC**” means BNPPLC Leasing Corporation, a Delaware corporation.

“**BNPPLC’s Parent**” means BNP Paribas, a bank organized and existing under the laws of France, and any successors of such bank.

“**Breakage Costs**” means any and all costs, losses or expenses incurred or sustained by BNPPLC’s Parent (as a Participant or otherwise) or any Participant, for which BNPPLC’s Parent or the Participant requests reimbursement from BNPPLC, because of:

(1) the resulting liquidation or redeployment of deposits or other funds that were used to make or maintain Funding Advances upon application of a Qualified Prepayment or upon any sale of the Property pursuant to the Purchase Agreement, if such application or sale occurs on any day other than the last day of a Base Rent Period; or

(2) the resulting liquidation or redeployment of deposits or other funds that were used to make or maintain Funding Advances upon the acceleration of the end of any Base Rent Period because of an acceleration of the Designated Sale Date as described in clauses (2) or (3) of the definition thereof.

Breakage Costs will include, for example, losses on Funding Advances maintained by BNPPLC's Parent or any Participant which are attributable to any decline in LIBOR as of the effective date of any application described in the clause (1) preceding, as compared to the LIBOR used to determine the Effective Rate then in effect. Each determination of Breakage Costs by BNPPLC's Parent or by any Participant, as applicable, will be conclusive and binding upon NAI in the absence of clear and demonstrable error.

“**Break Even Price**” has the meaning indicated in the Purchase Agreement.

“**Business Day**” means any day that is (1) not a Saturday, Sunday or day on which commercial banks are generally closed or required to be closed in New York City, New York, and (2) a day on which dealings in deposits of dollars are transacted in the London interbank market; provided, that if such dealings are suspended indefinitely for any reason, “Business Day” will mean any day described in clause (1).

“**Capital Adequacy Charges**” means any additional amounts BNPPLC's Parent or any Participant requests BNPPLC to pay as compensation for an increase in required capital as provided in subparagraph 5(B)(2) of the Lease.

“**Closing Certificate**” means the Closing Certificate and Agreement (1299 Orleans) dated as of the Effective Date executed by NAI and BNPPLC, as such Closing Certificate and Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Closing Letter**” means the letter agreement dated as of the Effective Date between BNPPLC and NAI confirming the amount of the Initial Advance and the Transactions Expenses paid from the Initial Advance.

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

“**Common Definitions and Provisions Agreement**” means this Agreement, which is incorporated by reference into each of the other Operative Documents, as this Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in

accordance with its terms.

“**Consolidated Debt for Borrowed Money**” has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

“**Consolidated EBITDA**” has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

“**Constituent Documents**” of any entity means the organizational documents pursuant to which such entity was created and is governed, such as the articles of incorporation and bylaws of a corporation, the articles of organization and regulations of a limited liability company or the partnership agreement of a partnership.

“**Default**” means any event or circumstance which constitutes, or which would with the passage of time or the giving of notice or both (if not cured within any applicable cure period) constitute, an Event of Default.

“**Default Rate**” means, a floating per annum rate equal to two percent (2%) above ABR, except that for purposes of computing interest accruing for any period that commences thirty or more days after the Designated Sale Date on any Base Rent or Supplemental Payment that has become due, but remains to be paid to BNPPPLC by NAI, the Default Rate will mean a floating per annum rate equal to five percent (5%) above ABR. Notwithstanding the foregoing, in no event will the “Default Rate” at any time exceed the maximum interest rate permitted by Applicable Laws.

“**Designated Sale Date**” means the earliest of:

(1) the date upon which the Term is scheduled to expire as provided in Paragraph 1(A) of the Lease (*i.e.*, the first Business Day of December, 2012); or

(2) any Business Day designated as the “Designated Sale Date” for purposes of this Agreement and the other Operative Documents in an irrevocable, unconditional notice given by NAI to BNPPPLC; provided, that if the Business Day so designated by NAI as the Designated Sale Date is not at least twenty days after the date of such notice, the notice will be of no effect for purposes of this definition; and provided, further, that to be effective, any such notice must include an irrevocable exercise by NAI of the Purchase Option under subparagraph 2(A)(1) of the Purchase Agreement and thereby obligate NAI to tender payment of the full Break Even Price to BNPPPLC on the Business Day so designated; or

(3) any Business Day designated as the “Designated Sale Date” for purposes of this Agreement and the other Operative Documents in a notice given by BNPPPLC to NAI:

- when an Event of Default has occurred and is continuing; or
- following any change in the zoning or other Applicable Laws affecting the permitted use or development of the Property that, in BNPPLC's judgment, materially reduces the value of the Property; or
- following any discovery of conditions or circumstances on or about the Property, such as the presence of an endangered species, which are likely to substantially impede the use or development of the Property and thereby, in BNPPLC's judgment, materially reduce the value of the Property;

provided, however, that if the Business Day so designated by BNPPLC as the Designated Sale Date is not at least thirty days after the date of such notice, the notice will be of no effect for purposes of this definition; or

(4) the first Business Day after the commencement of any Event of Default described in clauses (G), (H) or (I) of the definition Event of Default herein that occurs because of any bankruptcy proceeding instituted by or against NAI, as debtor, under Title 11 of the United States Code.

“**Effective Date**” means November 29, 2007.

“**Effective Rate**” means, for each Base Rent Period, a per annum rate determined as follows:

(1) In the case of any Base Rent Period subject to a LIBOR Period Election, the Effective Rate will equal the rate per annum determined by dividing (A) LIBOR for such period, by (B) one hundred percent (100%) minus the Eurodollar Rate Reserve Percentage for such period.

(2) In the case of any Base Rent Period that is not subject to a LIBOR Period Election, the Effective Rate will equal the ABR for such period.

(4) Notwithstanding the foregoing, for any Base Rent Period that begins on or after the Fixed Rate Lock Date applicable to a Fixed Rate Lock and that ends before or on the date such Fixed Rate Lock is terminated as provided in subparagraph 3(C) of the Lease, the Effective Rate will equal the Fixed Rate.

So long as any LIBOR Period Election remains in effect, as LIBOR or the Eurodollar Rate Reserve Percentage changes from Base Rent Period to Base Rent Period, the Effective Rate will be automatically increased or decreased, as the case may be, without prior notice to NAI. Also, during any period when no LIBOR Period Election or Fixed Rate Lock is in effect, as the ABR changes from Base Rent Period to Base Rent Period, the Effective Rate will be automatically

increased or decreased, as the case may be, without prior notice to NAI.

If for any reason BNPPLC determines that it is impossible or unreasonably difficult to determine the Effective Rate with respect to a given Base Rent Period in accordance with the foregoing, then the “**Effective Rate**” for that Base Rent Period will equal any published index or per annum interest rate determined in good faith by BNPPLC to be comparable to LIBOR at the beginning of the first day of that Base Rent Period. A comparable interest rate might be, for example, the then existing yield on short term United States Treasury obligations (as compiled by and published in the then most recently published United States Federal Reserve Statistical Release H.15(519) or its successor publication), plus or minus a fixed adjustment based on BNPPLC’s comparison of past eurodollar market rates to past yields on such Treasury obligations.

“**Eligible Financial Institution**” means (a) a commercial bank organized under the laws of the United States, or any State thereof or the District of Columbia, and having total assets in excess of \$5,000,000,000; (b) a commercial bank organized under the laws of any other country which is a member of the Organization for Economic Cooperation and Development (“OECD”) or has concluded special lending arrangements with the International Monetary Fund associated with its General Arrangements to Borrow, or a political subdivision of any such country, and having total assets in excess of \$5,000,000,000; provided, that such bank is acting through a branch or agency located in the United States; (c) the central bank of any country which is a member of the OECD; and (d) a finance company, insurance company or other financial institution (whether a corporation, partnership or other entity, but excluding any savings and loan association) which is engaged in making, purchasing or otherwise investing in commercial loans in the ordinary course of its business, and having total assets in excess of \$5,000,000,000; provided, however, that in no event will any bank or other Person qualify as an Eligible Financial Institution at any time when it has outstanding obligations with a credit rating less than investment grade from Standard & Poor’s, a division of the McGraw-Hill Companies, or Moody’s Investors Service, Inc. or another nationally recognized rating service.

“**Environmental Cutoff Date**” means the later of the dates upon which (i) the Lease terminates or NAI’s interests in the Property are sold at foreclosure as provided in Exhibit B attached to the Lease, or (ii) NAI surrenders possession and control of the Property and ceases to have interest in the Land or Improvements or rights with respect thereto under any of the Operative Documents.

“**Environmental Laws**” means any and all existing and future Applicable Laws pertaining to safety, health or the environment, or to Hazardous Substances or Hazardous Substance Activities, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, and the Resource Conservation and Recovery Act of 1976, as amended by the Used Oil Recycling Act of 1980, the Solid Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984.

“**Environmental Losses**” means Losses suffered or incurred by BNPPLC or any other Interested Party, directly or indirectly, relating to or arising out of, based on or as a result of any of the following: (i) any Hazardous Substance Activity that occurs or is alleged to have occurred on or prior to the Environmental Cutoff Date; (ii) any violation of any applicable Environmental Laws relating to the Land or the Property or to the ownership, use, occupancy or operation thereof that occurs or is alleged to have occurred in whole or in part on or prior to the Environmental Cutoff Date; (iii) any investigation, inquiry, order, hearing, action, or other proceeding by or before any governmental or quasi-governmental agency or authority in connection with any Hazardous Substance Activity that occurs or is alleged to have occurred in whole or in part on or prior to the Environmental Cutoff Date; or (iv) any claim, demand, cause of action or investigation, or any action or other proceeding, whether meritorious or not, brought or asserted against any Interested Party which directly or indirectly relates to, arises from, is based on, or results from any of the matters described in clauses (i), (ii), or (iii) of this definition or any allegation of any such matters. For purposes of determining whether Losses constitute “Environmental Losses,” as the term is used in the Lease, any actual or alleged Hazardous Substance Activity or violation of Environmental Laws relating to the Land or the Property will be presumed to have occurred prior to the Environmental Cutoff Date unless NAI establishes by clear and convincing evidence to the contrary that the relevant Hazardous Substance Activity or violation of Environmental Laws did not occur or commence prior to the Environmental Cutoff Date.

“**Environmental Report**” means, collectively, the following reports, which were provided by NAI to BNPPLC prior to the Effective Date:

- September 2007 Phase I Environmental Site Assessment by WSP Environmental Strategies, 1299 Orleans Drive Sunnyvale, CA;
- AGUIRRE Corp. Phase I Environmental Site Assessment 1299 Orleans Drive, Sunnyvale, CA., September 1997; and
- November 2007 Phase I Environmental Site Assessment by WSP Environmental Strategies, 1299 Orleans Drive Sunnyvale, CA.

“**Existing Space Leases**” means leases or subleases from NAI of space within the Improvements, if any, which are existing as of the Effective Date and are included in the list of Permitted Encumbrances attached as Exhibit B to the Closing Certificate.

“**ERISA**” means the Employee Retirement Income Security Act of 1974, as amended from time to time, together with all rules and regulations promulgated with respect thereto.

“**ERISA Affiliate**” means any Person who for purposes of Title IV of ERISA is a member of NAI’s controlled group, or under common control with NAI, within the meaning of Section 414 of the Internal Revenue Code, and the regulations promulgated and rulings issued



thereunder.

“**ERISA Termination Event**” means (a) the occurrence with respect to any Plan of (1) a reportable event described in Sections 4043(b)(5) or (6) of ERISA or (2) any other reportable event described in Section 4043(b) of ERISA other than a reportable event not subject to the provision for thirty-day notice to the Pension Benefit Guaranty Corporation pursuant to a waiver by such corporation under Section 4043(a) of ERISA, or (b) the withdrawal of NAI or any ERISA Affiliate from a Plan during a plan year in which it was a “substantial employer” as defined in Section 4001(a)(2) of ERISA, or (c) the filing of a notice of intent to terminate any Plan or the treatment of any Plan amendment as a termination under Section 4041 of ERISA, or (d) the institution of proceedings to terminate any Plan by the Pension Benefit Guaranty Corporation under Section 4042 of ERISA, or (e) any other event or condition which might constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Plan.

“**Escrowed Proceeds**” means, subject to the exclusions specified in the next sentence, any money that is received by BNPPLC from time to time during the Term (and any interest earned thereon) from any party (1) under any property insurance policy as a result of damage to the Property, (2) as compensation for any restriction imposed by any Governmental Authority upon the use or development of the Property or for the condemnation of the Property or any portion thereof, (3) because of any judgment, decree or award for physical damage to the Property or (4) as compensation under any title insurance policy or otherwise as a result of any title defect or claimed title defect with respect to the Property; provided, however, in determining the amount of “Escrowed Proceeds” there will be deducted all expenses and costs of every type, kind and nature (including Attorneys’ Fees) incurred by BNPPLC to collect such proceeds. Notwithstanding the foregoing, “Escrowed Proceeds” will not include (A) any payment to BNPPLC by a Participant or an Affiliate of BNPPLC that is made to compensate BNPPLC for the Participant’s or Affiliate’s share of any Losses BNPPLC may incur as a result of any of the events described in the preceding clauses (1) through (4), (B) any money or proceeds that have been applied as a Qualified Prepayment or to pay any Breakage Costs, Fixed Rate Settlement Amount or other costs incurred in connection with a Qualified Prepayment, (C) any money or proceeds that, after no less than ten days notice to NAI, BNPPLC returns or pays to a third party because of BNPPLC’s good faith belief that such return or payment is required by law, (D) any money or proceeds paid by BNPPLC to NAI or offset against any amount owed by NAI, or (E) any money or proceeds used by BNPPLC in accordance with the Lease for repairs or the restoration of the Property or to obtain development rights or the release of restrictions that will inure to the benefit of future owners or occupants of the Property. Until Escrowed Proceeds are paid to NAI pursuant to Paragraph 10 of the Lease, transferred to a purchaser under the Purchase Agreement as therein provided or applied as a Qualified Prepayment or as otherwise described in the preceding sentence, BNPPLC will keep the same deposited in one or more interest bearing accounts, and all interest earned on such account will be added to and made a part of Escrowed Proceeds.

“**Established Misconduct**” of a Person means, and is limited to:

(1) if the Person is bound by the Operative Documents or the Participation Agreement, conduct of such Person that constitutes a breach by it of the express provisions of the Operative Documents or the Participation Agreement, as applicable, and that continues beyond any period for cure provided therein, as determined in or as a necessary element of a final judgment rendered against such Person by a court with jurisdiction to make such determination, and

(2) conduct of such Person or its Affiliates that has been determined to constitute willful misconduct or Active Negligence in or as a necessary element of a final judgment rendered against such Person by a court with jurisdiction to make such determination.

In no event, however, will Established Misconduct include actions of any Person undertaken in good faith to mitigate Losses that such Person may suffer because of a breach or repudiation by NAI of any of the Operative Documents. Further, negligence other than Active Negligence will not in any event constitute Established Misconduct. For purposes of this definition, “conduct of a Person” will consist of (1) the conduct of any employee of that Person to the extent (and only to the extent) that the employee is acting within the scope of his employment by that Person, and (2) the conduct of an agent of that Person (such as an independent environmental consultant engaged by that Person), but only to the extent that the agent is (a) acting within the scope of the authority granted to him by such Person, and (b) neither NAI nor acting with the consent or approval of or at the request of or under the direction of NAI or NAI’s Affiliates, employees or agents. Established Misconduct of one Interested Party will not be attributed to a second Interested Party unless the second Interested Party is an Affiliate of the first, and it is understood that BNPPLC has not been authorized, and nothing in the Participation Agreement will be construed as authorizing BNPPLC, to act as an “agent” for any Participant as the term is used in this definition.

“**Eurocurrency Liabilities**” has the meaning indicated in Regulation D of the Board of Governors of the Federal Reserve System, as in effect from time to time.

“**Eurodollar Rate Reserve Percentage**” means, for purposes of determining the Effective Rate for any Base Rent Period, the reserve percentage applicable two Business Days before the first day of such Base Rent Period under regulations issued from time to time by the Board of Governors of the Federal Reserve System (or any successor) for determining the maximum reserve requirement (including any emergency, supplemental or other marginal reserve requirement) for BNPPLC’s Parent with respect to liabilities or deposits consisting of or including Eurocurrency Liabilities (or with respect to any other category or liabilities by reference to which LIBOR is determined) having a term comparable to such Base Rent Period.

“**Event of Default**” means any of the following:

(A) NAI fails to pay when due any installment of Base Rent or Administrative Fees required by the Lease, and such failure continues for three Business Days after NAI is notified in writing thereof.

(B) NAI fails to pay the full amount of any Supplemental Payment as provided in the Purchase Agreement on the Designated Sale Date.

(C) NAI fails to pay when first due any amount required by the Operative Documents (other than Base Rent or Administrative Fees required as provided in the Lease or any Supplemental Payment required as provided in the Purchase Agreement) and such failure continues for ten Business Days after NAI is notified thereof.

(D) NAI fails to cause any representation or warranty of NAI contained in any of the Operative Documents that was false or misleading in any material respect when made to be made true and not misleading (other than as described in the other clauses of this definition), or NAI fails to comply with any provision of the Operative Documents (other than as described in the other clauses of this definition), and in either case does not cure such failure prior to the earlier of (A) thirty days after notice thereof is given to NAI or (B) the date any writ or order is issued for the levy or sale of any property owned by BNPPLC (including the Property) or any criminal prosecution is instituted or overtly threatened against BNPPLC or any of its directors, officers or employees because of such failure; provided, however, that so long as no such writ or order is issued and no such criminal prosecution is instituted or overtly threatened, the period within which such failure may be cured by NAI will be extended for a further period (not to exceed an additional one hundred twenty days) as is necessary for the curing thereof with diligence, if (but only if) (x) such failure is susceptible of cure but cannot with reasonable diligence be cured within such thirty day period, (y) NAI promptly commences to cure such failure and thereafter continuously prosecutes the curing thereof with reasonable diligence and (z) the extension of the period for cure will not, in any event, cause the period for cure to extend to or beyond the Designated Sale Date.

(E) NAI abandons any material part of the Property.

(F) NAI or any Subsidiary of NAI fails to pay any principal of or premium or interest on any of its Indebtedness which is outstanding in a principal amount of at least \$25,000,000 when the same becomes due and payable (whether by scheduled maturity, required prepayment, acceleration, demand or otherwise), and such failure continues after the applicable grace period, if any, specified in the agreement or instrument relating to such Indebtedness; or any other event occurs or condition exists under any agreement or instrument relating to any such Indebtedness and continues after the applicable grace period, if any, specified in such agreement or instrument, if the effect of such event or condition is to accelerate the maturity of such Indebtedness; or any such Indebtedness is declared by the creditor to be due and payable, or

required to be prepaid (other than by a regularly scheduled required prepayment), redeemed, purchased or defeased, or an offer to prepay, redeem, purchase or defease such Indebtedness is required to be made, in each case prior to the stated maturity thereof.

(G) NAI or any Subsidiary of NAI is generally not paying its debts as such debts become due, or admits in writing its inability to pay its debts generally, or makes a general assignment for the benefit of creditors; or any proceeding is instituted by or against NAI or any Subsidiary of NAI seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee, custodian or other similar official for it or for any substantial part of its property and, in the case of any such proceeding instituted against it (but not instituted by it), either such proceeding remains undismissed or unstayed for a period of sixty consecutive days, or any of the actions sought in such proceeding (including the entry of an order for relief against, or the appointment of a receiver, trustee, custodian or other similar official for, it or for any substantial part of its property) occurs; or NAI or any Subsidiary of NAI takes any corporate action to authorize any of the actions set forth above in this clause.

(H) Any order, judgment or decree is entered in any proceedings against NAI or any of NAI's Subsidiaries decreeing its dissolution and such order, judgment or decree remains unstayed and in effect for more than sixty days.

(I) Any order, judgment or decree is entered in any proceedings against NAI or any of NAI's Subsidiaries decreeing a divestiture of any of assets that represent a substantial part, or the divestiture of the stock of any of NAI's Subsidiaries whose assets represent a substantial part, of the total assets of NAI and its Subsidiaries (determined on a consolidated basis in accordance with GAAP) or which requires the divestiture of assets, or stock of any of NAI's Subsidiaries, which have contributed a substantial part of the net income of NAI and its Subsidiaries (determined on a consolidated basis in accordance with GAAP) for any of the three fiscal years then most recently ended, and such order, judgment or decree remains unstayed and in effect for more than sixty days.

(J) A judgment or order for the payment of money in an amount (not covered by insurance) which exceeds \$25,000,000 is rendered against NAI or any of NAI's Subsidiaries and either (i) enforcement proceedings is commenced by any creditor upon such judgment, or (ii) within thirty days after the entry thereof, such judgment or order is not discharged or execution thereof stayed pending appeal, or within thirty days after the expiration of any such stay, such judgment is not discharged.

(K) Any ERISA Termination Event occurs that BNPPPLC determines in good faith would constitute grounds for a termination of any Plan or for the appointment by the appropriate United States district court of a trustee to administer any Plan and such ERISA Termination

Event is continuing thirty days after notice to such effect is given to NAI by BNPPLC, or any Plan is terminated, or a trustee is appointed by a United States district court to administer any Plan, or the Pension Benefit Guaranty Corporation institutes proceedings to terminate any Plan or to appoint a trustee to administer any Plan.

(L) NAI enters into any transaction which would cause any of the Operative Documents or any other document executed in connection herewith (or any exercise of BNPPLC's rights hereunder or thereunder) to constitute a non-exempt prohibited transaction under ERISA.

(M) NAI fails to comply with the financial covenants set forth in subparagraph 3(C) of the Closing Certificate.

(N) Any Change in Control (as defined in subparagraph 3(A) of the Closing Certificate) shall occur.

**"Excluded Taxes"** means:

(A) taxes upon or measured by *net* income to the extent such taxes are payable in respect of Base Rent or other Qualified Income Payments;

(B) transfer or change of ownership taxes assessed because of BNPPLC's transfer or conveyance to any third party of any rights or interest in the Improvements Lease, the Purchase Agreement or the Property (other than any such taxes assessed because of any Permitted Transfer under clauses (1), (4) or (5) of the definition of Permitted Transfer in this Agreement);

(C) federal, state and local income taxes upon any amounts paid as reimbursement for or to satisfy Losses incurred by BNPPLC or any Participant to the extent, but only to the extent, such taxes are offset by a corresponding reduction of BNPPLC's or the applicable Participant's income taxes which are not otherwise subject to reimbursement or indemnification by NAI because of BNPPLC's or such Participant's deduction of the reimbursed Losses from its taxable income or because of any tax credits attributable thereto;

(D) income taxes that are (i) payable by BNPPLC in respect of any Qualified Prepayment or any net sales proceeds paid to BNPPLC upon a sale of the Property because of Forced Recharacterization as described in subparagraph 4(C)(3) of the Lease, and (ii) offset in the same taxable period by a reduction in the taxes of BNPPLC which are not otherwise subject to reimbursement or indemnification by NAI resulting from depreciation deductions or other tax benefits available to BNPPLC only because of the refusal of the tax authorities to treat the Lease and other Operative Documents as a financing arrangement;

(E) any withholding taxes that subparagraph 13(A) of the Lease excuses NAI from paying or requires BNPPLC to pay; and

(F) any franchise taxes payable by BNPPLC, but only to the extent that such franchise taxes would be payable by BNPPLC even if the transactions contemplated by the Lease and the other Operative Documents were characterized for tax purposes as a mere financing arrangement and not as a lease or sale.

It is understood that if tax rates used to calculate income taxes which constitute Excluded Taxes under clause (1) of this definition are increased, the resulting increase will not be subject to reimbursement or indemnification by NAI. If, however, a change in Applicable Laws after the Effective Date, as applied to the transactions contemplated by the Operative Documents on a stand-alone basis, results in an increase in such income taxes for any reason other than an increase in the applicable tax rates (e.g., a disallowance of deductions that would otherwise be available against payments described in clause (1) of this definition), then for purposes of the Operative Documents, the term “Excluded Taxes” will not include the actual increase in such taxes attributable to the change. Accordingly, BNPPLC or any Participant may recover any such net increase from NAI pursuant to subparagraph 5(B) of the Lease.

It is also understood that nothing in this definition of “Excluded Taxes” will prevent any Original Indemnity Payment (as defined in subparagraph 5(C)(1) of the Lease) from being paid on an After Tax Basis.

“**Fed Funds Rate**” means, for any period, a fluctuating interest rate (expressed as a per annum rate and rounded upwards, if necessary, to the next 1/16 of 1%) equal on each day during such period to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published for such day (or, if such day is not a Business Day, for the next preceding Business Day) by the Federal Reserve Bank of New York, or, if such rates are not so published for any day which is a Business Day, the average of the quotations for each day during such period on such transactions received by BNPPLC’s Parent from three Federal funds brokers of recognized standing selected by BNPPLC’s Parent.

“**Fixed Rate**” means the fixed rate of interest established by BNPPLC’s execution of an Interest Rate Swap as described in subparagraph 3(B)(4) of the Lease.

“**Fixed Rate Lock**” has the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

“**Fixed Rate Lock Date**” has the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

“**Fixed Rate Lock Termination**” means any termination in whole or in part of the Fixed Rate Swap as described in the first and second sentences of subparagraph 3(C) of the Lease.

“**Fixed Rate Lock Termination Date**” means the date upon which a Fixed Rate Lock Termination is effective. In the case of a Fixed Rate Lock Termination that results from

BNPPLC's receipt of a Qualified Prepayment, the date such Qualified Prepayment is applied to reduce the Lease Balance will constitute the Fixed Rate Lock Termination Date. In the case of any Fixed Rate Lock Termination resulting from an acceleration of the Designated Sale Date as provided in clauses (2) or (3) the definition thereof in this Agreement, the Fixed Rate Lock Termination Date will constitute the Designated Sale Date.

“**Fixed Rate Lock Notice**” has the meaning assigned to it in subparagraph 3(B)(4) of the Lease, which includes a reference to the form attached as Annex 2.

“**Fixed Rate Loss**” means an amount reasonably determined in good faith by the Floating Rate Payor to be its total losses and costs in connection with any Fixed Rate Lock Termination. Fixed Rate Loss will include any loss of bargain, cost of funding or, at the election of the Floating Rate Payor but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position. The Floating Rate Payor will be expected to determine the Fixed Rate Loss as of the date of the relevant Fixed Rate Lock Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. The Floating Rate Payor may (but need not) determine its Fixed Rate Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.

“**Fixed Rate Settlement Amount**” means, with respect to any Fixed Rate Lock Termination:

- (a) the Market Quotation for such Fixed Rate Lock Termination, if a Market Quotation can be determined and if (in the reasonable belief of the Floating Rate Payor as the party making the determination) determining a Market Quotation would produce a commercially reasonable result; or
- (b) the Fixed Rate Loss, if any, for such Fixed Rate Lock Termination if a Market Quotation cannot be determined or would not (in the reasonable belief of the Floating Rate Payor as the party making the determination) produce a commercially reasonable result.

“**Fixed Rate Swap**” has the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

“**Floating Rate Payor**” means BNP Paribas or any successor or assign of BNP Paribas under an Interest Rate Swap.

“**Fully Subordinated or Removable**” means, with respect to any Lien encumbering the Land or any appurtenant easement, that such Lien is, either by operation of Applicable Laws or by the express terms of documents which grant or create such Lien:

- (1) fully subject and subordinate to all rights and property interests of BNPPLC

under the Operative Documents; or

(2) subject to release and removal by BNPPLC or any subsequent owner of the Property at any time after a Designated Sale Date without any requirement that BNPPLC or the subsequent owner compensate the holder of such Lien or make any other significant payment in connection with such release and removal;

provided, however, a Lien will not qualify as Fully Subordinated or Removable under clause (2) preceding if it provides or includes a power of sale or other right or remedy in favor of the holder of such Lien which could result in a foreclosure sale or other forfeiture of BNPPLC's rights or interests in the Property.

**"Funding Advances"** means all advances made by BNPPLC's Parent or any Participant to or on behalf of BNPPLC to allow BNPPLC to make the Initial Advance or maintain its investment in the Property.

**"GAAP"** means generally accepted accounting principles in the United States of America as in effect from time to time, applied on a basis consistent with those used in the preparation of the financial statements referred to in subparagraph 2(A)(4) of the Closing Certificate (except for changes with which NAI's independent public accountants concur).

**"Governmental Authority"** means (1) the United States, the state, the county, the municipality, and any other political subdivision in which the Land is located, and (2) any other nation, state or other political subdivision or agency or instrumentality thereof having or asserting jurisdiction over NAI or the Property.

**"Hazardous Substance"** means (i) any chemical, compound, material, mixture or substance that is now or hereafter defined or listed in, regulated under, or otherwise classified pursuant to, any Environmental Laws as a "hazardous substance," "hazardous material," "hazardous waste," "extremely hazardous waste or substance," "infectious waste," "toxic substance," "toxic pollutant," or any other formulation intended to define, list or classify substances by reason of deleterious properties, including ignitability, corrosiveness, reactivity, carcinogenicity, toxicity or reproductive toxicity; (ii) petroleum, any fraction of petroleum, natural gas, natural gas liquids, liquified natural gas, synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas), and ash produced by a resource recovery facility utilizing a municipal solid waste stream, and drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources; (iii) asbestos and any asbestos containing material; and (iv) any other material that, because of its quantity, concentration or physical or chemical characteristics, is the subject of regulation under Applicable Law or poses a significant present or potential hazard to human health or safety or to the environment if released into the workplace or the environment.

**"Hazardous Substance Activity"** means any actual, proposed or threatened use, storage,



holding, release (including any spilling, leaking, leaching, pumping, pouring, emitting, emptying, dumping, disposing into the environment, and the continuing migration into or through soil, surface water, groundwater or any body of water), discharge, deposit, placement, generation, processing, construction, treatment, abatement, removal, disposal, disposition, handling or transportation of any Hazardous Substance from, under, in, into or on Land or the Property, including the movement or migration of any Hazardous Substance from surrounding property, surface water, groundwater or any body of water under, in, into or onto the Property and any resulting residual Hazardous Substance contamination in, on or under the Property. **“Hazardous Substance Activity”** also means any existence of Hazardous Substances on the Property that would cause the Property or the owner or operator thereof to be in violation of, or that would subject the Land or the Property to any remedial obligations under, any Environmental Laws, assuming disclosure to the applicable Governmental Authorities of all relevant facts, conditions and circumstances pertaining to the Property.

**“Improvements”** means any and all (1) buildings and other real property improvements previously or hereafter erected on the Land, and (2) equipment (*e.g.*, HVAC systems, elevators and plumbing fixtures) attached to the buildings or other real property improvements, the removal of which would cause structural or other material damage to the buildings or other real property improvements or would materially and adversely affect the value or use of the buildings or other real property improvements.

**“Indebtedness”** of any Person means (without duplication of any item) Liabilities of such Person in any of the following categories:

- (A) Liabilities for borrowed money;
- (B) Liabilities constituting an obligation to pay the deferred purchase price of property or services;
- (C) Liabilities evidenced by a bond, debenture, note or similar instrument;
- (D) Liabilities which (1) would under GAAP be shown on such Person’s balance sheet as a liability, and (2) are payable more than one year from the date of creation thereof (other than reserves for taxes and reserves for contingent obligations);
- (E) Liabilities constituting principal under leases capitalized in accordance with GAAP;
- (F) Liabilities arising under conditional sales or other title retention agreements;
- (G) Liabilities owing under direct or indirect guaranties of Liabilities of any other Person or otherwise constituting obligations to purchase or acquire or to otherwise

protect or insure a creditor against loss in respect of Liabilities of any other Person (such as obligations under working capital maintenance agreements, agreements to keep-well, or agreements to purchase Liabilities, assets, goods, securities or services), but excluding endorsements in the ordinary course of business of negotiable instruments in the course of collection;

(H) Liabilities (for example, repurchase agreements, mandatorily redeemable preferred stock and sale/leaseback agreements) consisting of an obligation to purchase or redeem securities or other property, if such Liabilities arises out of or in connection with the sale or issuance of the same or similar securities or property;

(I) Liabilities with respect to letters of credit or applications or reimbursement agreements therefor;

(J) Liabilities with respect to payments received in consideration of oil, gas, or other commodities yet to be acquired or produced at the time of payment (including obligations under “take-or-pay” contracts to deliver gas in return for payments already received and the undischarged balance of any production payment created by such Person or for the creation of which such Person directly or indirectly received payment);

(K) Liabilities with respect to other obligations to deliver goods or services in consideration of advance payments therefor; or

(L) Liabilities under any “synthetic” or other lease of property or related documents (including a separate purchase agreement) which obligate such Person or any of its Affiliates (whether by purchasing or causing another Person to purchase any interest in the leased property or otherwise) to guarantee a minimum residual value of the leased property to the lessor.

For purposes of this definition, the amount of Liabilities described in the last clause of the preceding sentence with respect to any lease classified according to GAAP as an “operating lease,” will equal the sum of (1) the present value of rentals and other minimum lease payments required in connection with such lease [calculated in accordance with SFAS 13 and other GAAP relevant to the determination of the whether such lease must be accounted for as an operating lease or capital lease], plus (2) the fair value of the property covered by the lease; except that such amount will not exceed the price, as of the date a determination of Indebtedness is required hereunder, for which the lessee can purchase the leased property pursuant to any valid ongoing purchase option if, upon such a purchase, the lessee will be excused from paying rentals or other minimum lease payments that would otherwise accrue after the purchase.

Notwithstanding the foregoing, the “Indebtedness” of any Person will not include Liabilities that were incurred by such Person on ordinary trade terms to vendors, suppliers, or other Persons providing goods and services for use by such Person in the ordinary course of its business, unless

and until such Liabilities are outstanding more than 90 days past the original invoice or billing date therefor.

“**Initial Advance**” means, collectively, all advances made by BNPPPLC’s Parent (directly or through one or more of its Affiliates) and by Participants to or on behalf of BNPPPLC on or prior to the Effective Date to cover the purchase price payable by BNPPPLC to the for its interest in the Land and Improvements and other Property, if any, and to cover the cost to BNPPPLC of certain Transaction Expenses and other amounts confirmed in the Closing Letter.

“**Interested Party**” means each of following Persons and their Affiliates: (1) BNPPPLC and its successors and permitted assigns as to the Property or any part thereof or any interest therein, (2) BNPPPLC’s Parent, and (3) the Participants and their successors and permitted assigns under the Participation Agreement; provided, however, none of the following Persons will constitute an Interested Party: (a) any Person to whom BNPPPLC may transfer an interest in the Property by a conveyance that is not a Permitted Transfer and others that cannot lawfully claim an interest in the Property except through or under a transfer by such a Person, (b) NAI and its Affiliates, (c) any Person claiming through or under a conveyance made by NAI after any purchase by NAI of BNPPPLC’s interest in the Property pursuant to the Purchase Agreement, or (d) any Applicable Purchaser designated by NAI under the Purchase Agreement who purchases the Property pursuant to a sale arranged by NAI and any Person that cannot lawfully claim an interest in the Property except through or under a conveyance from such an Applicable Purchaser.

“**Interest Rate Swap**” means an interest rate exchange transaction, entered into between BNPPPLC, as the fixed rate payor, and BNP Paribas, as the swap counterparty and floating rate payor, under the then most recent form of Master Agreement published by the International Swaps and Derivatives Association, Inc., as supplemented by the definitions and such schedules, annexes, exhibits and supplements as are agreed upon by the parties thereto, pursuant to which BNP Paribas agrees to pay monthly to BNPPPLC a floating rate of interest equal to LIBOR and BNPPPLC agrees to pay monthly to BNP Paribas a fixed rate of interest for a term that commences on the Fixed Rate Lock Date and ends on the last day of the scheduled Term of the Lease. The notional principal amount used for any such interest rate exchange transaction will equal the Lease Balance calculated as of the date such transaction is entered into.

“**Land**” means the land described in Exhibit A attached to the Closing Certificate, the Lease and the Purchase Agreement.

“**Lease**” means the Lease Agreement (1299 Orleans) dated as of the Effective Date between BNPPPLC, as landlord, and NAI, as tenant, pursuant to which NAI has agreed to lease BNPPPLC’s interest in the Property, as such Lease Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Lease Balance**” as of any date means the amount equal to the sum of the Initial

Advance, minus all funds actually received by BNPPLC and applied as Qualified Prepayments on or prior to such date. Under no circumstances will any payment of Base Rent or other Qualified Income Payments reduce the Lease Balance.

“**Lease Termination Damages**” has the meaning indicated in subparagraph 15(A)(3)(c) of the Lease.

“**Liabilities**” means, as to any Person, all indebtedness, liabilities and obligations of such Person, whether matured or unmatured, liquidated or unliquidated, primary or secondary, direct or indirect, absolute, fixed or contingent, and whether or not required to be considered pursuant to GAAP.

“**LIBOR**” means, for purposes of determining the Effective Rate for any Base Rent Period, the per annum rate equal to:

(a) the offered rate for deposits in U.S. dollars as of approximately 11:00 a.m., London time, on the day that is two London Banking Days (hereinafter defined) prior to the day upon which such Base Rent Period begins (the “Reset Date”), as reported:

(1) on Reuters Screen LIBOR01 page (or any replacement page or pages on which London interbank rates of major banks for U.S. dollars are displayed) by the Reuters service; or

(2) on Moneyline Telerate Page 3750, British Bankers Association Interest Settlement Rates, or another news page selected by BNPPLC’s Parent if the Reuters Screen LIBOR01 page is removed from the Reuters system or changed such that, in the opinion of BNPPLC’s Parent, the interest rates shown on it no longer represent the same kind of interest rates as when the Operative Documents were executed; or

(b) if such offered rate is for any reason unavailable, the rate per annum determined by BNPPLC’s Parent on the basis of rates offered for deposits in U.S. dollars by four major banks in the London interbank market selected by BNPPLC’s Parent (“Reference Banks”) at approximately 11:00 a.m., London time, on the day that is two London Banking Days preceding the Reset Date to prime banks in the London interbank market for a period corresponding as nearly as possible to the applicable Base Rent Period. ( If this clause (b) applies, BNPPLC’s Parent will request the principal London office of each of the Reference Banks to provide a quotation of its rate. If at least two quotations are provided, “LIBOR” will be the arithmetic mean of the quotations. If, however, fewer than two quotations are provided, “LIBOR” will be the arithmetic mean of the rates quoted by major banks in New York selected by BNPPLC’s Parent, at approximately 11:00 a.m., New York time, on the Reset Date for loans in U.S. dollars to leading U.S. banks for a period corresponding as nearly as possible to the applicable Base

Rent Period.)

As used in this definition, "London Banking Day" means any day on which commercial banks are open for general business (including dealings in foreign exchange and foreign currency deposits) in London, England.

"**LIBOR Period Election**" means an election to have the Effective Rate for any Base Rent Period calculated by reference to LIBOR, rather than by reference to the ABR or the Fixed Rate, and to have such period extend for approximately one month, three months or six months. The first Base Rent Period will be subject to a LIBOR Period Election of one month; and, subject to the limitations and qualifications set forth in this definition, NAI may make any subsequent Base Rent Period subject to a LIBOR Period Election by a notice given to BNPPLC in the form attached as Annex 3 at least five Business Days prior to the commencement of such period. After a LIBOR Period Election becomes effective, it will remain in effect for all subsequent Base Rent Periods until a different election is made in accordance with the provisions of this definition and the definition of ABR Period Election above. (For purposes of the Lease a LIBOR Period Election for any Base Rent Period will also be considered the LIBOR Period Election in effect on the Effective Date or Base Rent Date upon which such Base Rent Period begins.) Notwithstanding the foregoing:

- No LIBOR Period Election will be effective that would cause a Base Rent Period to extend beyond the end of the scheduled Term or beyond a Fixed Rate Lock Date.
- No LIBOR Period Election will commence or continue during any period that begins on or after the Fixed Rate Lock Date applicable to a Fixed Rate Lock and that ends before or on the date such Fixed Rate Lock is terminated as provided in subparagraph 3(C) of the Lease.
- Changes in any ABR Period Election or LIBOR Period Election will become effective only upon the commencement of a new Base Rent Period.
- In the event BNPPLC determines that it would be unlawful (or any central bank or governmental authority asserts that it would be unlawful) for BNPPLC, BNPPLC's Parent or any Participant to provide or maintain Funding Advances during a Base Rent Period if the Base Rent accrued during such period at a rate based upon LIBOR, NAI will be deemed to have made such Base Rent Period subject to an ABR Period Election, not a LIBOR Period Election.
- If for any reason (including BNPPLC's receipt of a notice from NAI purporting to make a LIBOR Period Election that is contrary to the foregoing provisions), BNPPLC is unable to determine with certainty whether a particular Base Rent Period is subject to a specific LIBOR Period Election of one month, three months

or six months, or if any Event of Default has occurred and is continuing on the third Business Day preceding the commencement of a particular Base Rent Period, NAI will be deemed to have made an ABR Period Election for that particular Base Rent Period.

“**Lien**” means any mortgage, pledge, security interest, encumbrance, lien or charge of any kind (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature thereof, any agreement to sell receivables with recourse, and the filing of or agreement to give any financing statement under the Uniform Commercial Code of any jurisdiction).

“**Liens Removable by BNPPLC**” means, and is limited to, Liens encumbering the Property that are asserted (1) other than as contemplated in the Operative Documents, by BNPPLC itself or by BNPPLC’s Parent, (2) by third parties lawfully claiming through or under BNPPLC (which for purposes of the Operative Documents will include any judgment liens established against the Property because of a judgment rendered against BNPPLC and will also include any liens established against the Property to secure past due Excluded Taxes), or (3) by third parties claiming under a deed or other instrument duly executed by BNPPLC; provided, however, Liens Removable by BNPPLC will not include (A) any Permitted Encumbrances (regardless of whether claimed through or under BNPPLC), (B) the Operative Documents or any other document executed by BNPPLC with the knowledge of (and without objection by) NAI or NAI’s counsel contemporaneously with the execution and delivery of the Operative Documents, (C) Liens which are neither lawfully claimed through or under BNPPLC (as described above) nor claimed under a deed or other instrument duly executed by BNPPLC, (D) Liens claimed by NAI or claimed through or under a conveyance made by NAI, (E) Liens arising because of BNPPLC’s compliance with Applicable Law, the Operative Documents, Permitted Encumbrances or any written request made by NAI, (F) Liens securing the payment of property taxes or other amounts assessed against the Property by any Governmental Authority, other than to secure the payment of past due Excluded Taxes or to secure damages caused by (and attributed by any applicable principles of comparative fault to) BNPPLC’s own Established Misconduct, (G) Liens resulting from or arising in connection with any breach by NAI of the Operative Documents; or (H) Liens resulting from or arising in connection with any Permitted Transfer that occurs more than thirty days after any Designated Sale Date upon which, for any reason, NAI or any Applicable Purchaser does not purchase BNPPLC’s interest in the Property pursuant to the Purchase Agreement for a price (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

“**Local Impositions**” means all sales, excise, ad valorem, gross receipts, business, transfer, stamp, occupancy, rental and other taxes (other than taxes on net income and corporate franchise taxes), levies, fees, charges, surcharges, assessments, interest, additions to tax, or penalties imposed by the State of California or any agency or political subdivision thereof upon BNPPLC or any owner of the Property or any part of or interest in the Property because of (i) the

Lease or other Operative Documents, (ii) the status of record title to the Property, (iii) the ownership, leasing, occupancy, sale or operation of the Property or any part thereof or interest therein, or (iv) the Permitted Encumbrances; excluding, however, Excluded Taxes. “**Local Impositions**” will include any real estate taxes imposed because of a change of use or ownership of the Property resulting from, or occurring on or prior to the date of, any sale by BNPPLC pursuant to the Purchase Agreement.

“**Losses**” means the following: any and all losses, liabilities, damages (whether actual, consequential, punitive or otherwise denominated), demands, claims, administrative or legal proceedings, actions, judgments, causes of action, assessments, fines, penalties, costs of settlement and other costs and expenses (including Attorneys’ Fees and the fees of outside accountants and environmental consultants), of any and every kind or character, foreseeable and unforeseeable, liquidated and contingent, proximate and remote, known and unknown.

“**Market Quotation**” means, with respect to any Fixed Rate Lock Termination, an amount determined by the Floating Rate Payor on the basis of quotations from Reference Market-makers. Each quotation will be for an amount, if any, that would be paid by the Floating Rate Payor in consideration of an agreement between it and the quoting Reference Market-maker to enter into a transaction (the “Replacement Transaction”) that would have the effect of preserving for the Floating Rate Payor the economic equivalent of any payment or delivery (whether the underlying obligation was absolute or contingent and assuming the satisfaction of each applicable condition precedent) that would, but for the occurrence of the relevant Fixed Rate Lock Termination, have been required under the Fixed Rate Swap. The Replacement Transaction would be subject to such documentation as such party and the Reference Market-maker may, in good faith, agree. The Floating Rate Payor (or its agent) will request each Reference Market-maker to provide its quotation to the extent reasonably practicable as of the same day and time (without regard to different time zones) on the effective date of or as soon as reasonably practicable after the relevant Fixed Rate Lock Termination. The date and time as of which those quotations are to be obtained will be selected in good faith by the Floating Rate Payor. If more than three quotations are provided, the Market Quotation will be the arithmetic mean of the quotations, without regard to the quotations having the highest and lowest values. If exactly three such quotations are provided, the Market Quotation will be the quotation remaining after disregarding the highest and lowest quotations. For this purpose, if more than one quotation has the same highest value or lowest value, then one of such quotations will be disregarded. If fewer than three quotations are provided, it will be deemed that the Market Quotation in respect of such Fixed Rate Lock Termination cannot be determined.

“**Material Adverse Effect**” means a material adverse effect on (a) the assets, operations, financial condition or businesses of NAI, (b) the ability of NAI to perform any of its obligations under the Operative Documents, (c) the rights of or benefits available to BNPPLC under the Operative Documents, (d) the value, utility or useful life of the Property or (e) the priority, perfection or status of any of BNPPLC’s interests in the Property or in any of the Operative Documents.

“**Maximum Remarketing Obligation**” has the meaning indicated in the Purchase Agreement.

“**Multiemployer Plan**” means a multiemployer plan as defined in Section 3(37) of ERISA to which contributions have been made by NAI or any ERISA Affiliate during the preceding six years and which is covered by Title IV of ERISA.

“**NAI**” means Network Appliance, Inc., a Delaware corporation.

“**Operative Documents**” means the Closing Letter, the Closing Certificate, the Lease, the Purchase Agreement and this Common Definitions and Provisions Agreement.

“**Participant**” means any Person other than BNPPCL that from time to time, by executing the Participation Agreement or supplements as contemplated therein, becomes a party to the Participation Agreement and thereby agrees to participate in all or some of the risks and rewards to BNPPCL of the Operative Documents; provided, however, no such Person will qualify as a Participant for purposes of the Operative Documents unless (i) such Person is approved to be a Participant by NAI or (ii) such Person becomes a Participant when an Event of Default has occurred and is continuing. As of the Effective Date, NAI has approved only BANK OF AMERICA, N.A.; GOLDMAN SACHS CREDIT PARTNERS L.P.; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION; KEYBANK NATIONAL ASSOCIATION; MORGAN STANLEY BANK; SUMITOMO MITSUI BANKING CORPORATION; and WELLS FARGO BANK, N.A. (all of which are original parties to the Participation Agreement). BNPPCL may, however, from time to time request NAI’s approval for other prospective Participants. NAI will not unreasonably withhold or delay any approval required for any prospective Participant which is an Eligible Financial Institution. However, as to any prospective Participant that is not already a party to the Participation Agreement or an Eligible Financial Institution, NAI may withhold such approval in its sole discretion. Further, it is understood that if giving such approval will increase NAI’s liability for withholding taxes or other taxes not constituting Excluded Taxes under tax laws or regulations then in effect, NAI may reasonably refuse to give such approval.

“**Participation Agreement**” means the Participation Agreement (1299 Orleans) dated as of the Effective Date, pursuant to which BANK OF AMERICA, N.A.; GOLDMAN SACHS CREDIT PARTNERS L.P.; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION; KEYBANK NATIONAL ASSOCIATION; MORGAN STANLEY BANK; SUMITOMO MITSUI BANKING CORPORATION; and WELLS FARGO BANK, N.A. are agreeing with BNPPCL to participate in the risks and rewards to BNPPCL of the Operative Documents, as such Participation Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms. It is understood, however, that because the Participation Agreement will expressly make NAI a third party beneficiary of each Participant’s obligations thereunder to make advances to BNPPCL in connection with Construction Advances under the Construction Agreement, NAI’s consent will be required to any amendment of the Participation Agreement that limits or excuses such obligations.



**“Permitted Encumbrances”** means (i) the encumbrances and other matters affecting the Property that are set forth in Exhibit B attached to the Closing Certificate, (ii) any easement agreement or other document affecting title to the Property executed by BNPPLC at the request of or with the consent of NAI, (iii) any Liens securing the payment of Local Impositions which are not delinquent or claimed to be delinquent or which are being contested in accordance with subparagraph 5(A) of the Lease, and (iv) statutory liens, if any, in the nature of contractors’, mechanics’ or materialmen’s liens for amounts not past due or claimed to be past due for more than thirty days or which are being contested in accordance with subparagraph 11(B) of the Lease, (v) Liens which are Fully Subordinated or Removable.

**“Permitted Hazardous Substance Use”** means the use, generation, storage and offsite disposal of Permitted Hazardous Substances in strict accordance with applicable Environmental Laws and with due care given the nature of the Hazardous Substances involved; provided, the scope and nature of such use, generation, storage and disposal will not:

(1) exceed that reasonably required for the use and operation of the Property for the purposes expressly permitted under subparagraph 2(A) of the Lease; or

(2) include any disposal, discharge or other release of Hazardous Substances from the Property in any manner that might allow such substances to reach surface water or groundwater, except (i) through a lawful and properly authorized discharge (A) to a publicly owned treatment works or (B) with rainwater or storm water runoff in accordance with Applicable Laws and any permits obtained by NAI that govern such runoff; or (ii) any such disposal, discharge or other release of Hazardous Substances for which no permits are required and which are not otherwise regulated under applicable Environmental Laws.

Further, notwithstanding anything to the contrary herein contained, Permitted Hazardous Substance Use will not include any use of the Property (including as a landfill, incinerator or other waste disposal facility) in a manner that requires a treatment, storage or disposal permit under the Resource Conservation and Recovery Act of 1976, as amended by the Used Oil Recycling Act of 1980, the Solid Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984..

**“Permitted Hazardous Substances”** means Hazardous Substances used and reasonably required for the use and operation of the Property by NAI and its permitted subtenants and assigns for the purposes expressly permitted by subparagraph 2(A) of the Lease, in either case in strict compliance with all Environmental Laws and with due care given the nature of the Hazardous Substances involved. Without limiting the generality of the foregoing, Permitted Hazardous Substances will include usual and customary office and janitorial products.

**“Permitted Transfer”** means any one or more of the following:

(1) the creation or conveyance by BNPPLC of rights and interests in favor of Participants pursuant to the Participation Agreement;

(2) any lien, security interest or assignment covering the Property or the Rents which is granted by BNPPLC in favor of Participants or an agent appointed for them to secure their rights under the Participation Agreement, and any subsequent assignment or conveyance made to accomplish a foreclosure of such lien or security interest, provided that such lien, security interest or assignment and any such subsequent assignment or conveyance are all made expressly subject to the rights of NAI under the Operative Documents;

(3) other than as described in the preceding clauses, any conveyance to BNPPLC's Parent or to any Qualified Affiliate of BNPPLC of all or any interest in or rights with respect to the Property or any portion thereof, provided that NAI and Participants must be notified before any such conveyance to BNPPLC's Parent or a Qualified Affiliate which will be recorded in the real property records of the county in which the Land is situated;

(4) any assignment or conveyance by BNPPLC requested by NAI or required by any Permitted Encumbrance, by the Purchase Agreement or by Applicable Laws; or

(5) any assignment or conveyance after a Designated Sale Date on which NAI does not purchase or cause an Applicable Purchaser to purchase BNPPLC's interest in the Property and, if applicable, after the expiration of the thirty day cure period specified in Paragraph 3(A) of the Purchase Agreement.

**"Person"** means an individual, a corporation, a partnership, an unincorporated organization, an association, a joint stock company, a joint venture, a trust, an estate, a government or agency or political subdivision thereof or other entity, whether acting in an individual, fiduciary or other capacity.

**"Personal Property"** has the meaning indicated on page 2 of the Lease.

**"Plan"** means any employee benefit or other plan established or maintained, or to which contributions have been made, by NAI or any ERISA Affiliate during the preceding six years and which is covered by Title IV of ERISA, including any Multiemployer Plan.

**"Prime Rate"** means the prime interest rate or equivalent charged by BNPPLC's Parent in the United States of America as announced or published by BNPPLC's Parent from time to time, which need not be the lowest interest rate charged by BNPPLC's Parent. If for any reason BNPPLC's Parent does not announce or publish a prime rate or equivalent, the prime rate or equivalent announced or published by either CitiBank, N.A. or any New York branch or office of Credit Commercial de France as selected by BNPPLC will be used to compute the rate

describe in the preceding sentence. The prime rate or equivalent announced or published by such bank need not be the lowest rate charged by it. The Prime Rate may change from time to time after the Effective Date without notice to NAI as of the effective time of each change in rates described in this definition.

“**Prior Owner**” means AMB Property, L.P., a Delaware limited partnership, which is at the request and direction of NAI conveying the Property to BNPPLC contemporaneously with the execution of the Operative Documents.

“**Property**” means the Personal Property and the Real Property, collectively.

“**Purchase Agreement**” means the Purchase Agreement (1299 Orleans) dated as of the Effective Date between BNPPLC and NAI, as such Purchase Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Purchase Option**” has the meaning indicated in the Purchase Agreement.

“**Qualified Affiliate**” means any Person that, like BNPPLC, (i) is one hundred percent (100%) owned, directly or indirectly, by BNPPLC’s Parent or any successor of such bank, (ii) can make (and has in writing made) the same representations to NAI that BNPPLC has made in subparagraphs 4(A) and 4(B) of the Closing Certificate (except that it need not be incorporated in or qualified to do business in Delaware), and (iii) is an entity organized under the laws of the State of Delaware or another state within the United States of America.

“**Qualified Income Payments**” means: (A) Base Rent; (B) payments of the following made to BNPPLC to satisfy the Lease: the Upfront Fees, the Arrangement Fee, Administrative Fees, Increased Cost Charges and Capital Adequacy Charges; (C) any interest paid to BNPPLC or any Participant pursuant to subparagraph 3(H) of the Lease; and (D) payments by BNPPLC to Participants required under the Participation Agreements because of BNPPLC’s receipt of payments described in the preceding clauses (A) through (C).

“**Qualified Prepayments**” means any payments received by BNPPLC from time to time during the Term (1) under any property insurance policy as a result of damage to the Property, (2) as compensation for any restriction placed upon the use or development of the Property or for the condemnation of the Property or any portion thereof, (3) because of any judgment, decree or award for injury or damage to the Property, or (4) under any title insurance policy or otherwise as a result of any title defect or claimed title defect with respect to the Property. For the purposes of determining the amount of any Qualified Prepayment and other amounts dependent upon Qualified Prepayments (*e.g.*, the Lease Balance and the Break Even Price):

(i) there will be deducted all expenses and costs of every kind, type and nature (including taxes and Attorneys’ Fees) incurred by BNPPLC with respect to the

collection or application of such payments;

(ii) Qualified Prepayments will not include any payment to BNPPPLC by a Participant or an Affiliate of BNPPPLC that is made to compensate BNPPPLC for the Participant's or Affiliate's share of any Losses BNPPPLC may incur as a result of any of the events described in the preceding clauses (1) through (4);

(iii) Qualified Prepayments will not include any payments received by BNPPPLC that BNPPPLC has paid or is obligated to pay to NAI for the repair, restoration or replacement of the Property or that BNPPPLC is holding as Escrowed Proceeds in accordance with the Paragraph 10 of the Lease or other provisions of the Operative Documents;

(iv) payments described in the preceding clauses (i) through (iii) will be considered as Escrowed Proceeds, not Qualified Prepayments, until they are actually applied as Qualified Prepayments by BNPPPLC as provided in Paragraph 10 of the Lease; and

(v) in no event will interest that accrues under the Purchase Agreement on a past due Supplemental Payment constitute a Qualified Prepayment.

For purposes of computing the total Qualified Prepayments (and other amounts dependent upon Qualified Prepayments, such as the Lease Balance and the Break Even Price) paid to or received by BNPPPLC as of any date, payments described in the preceding clauses (1) through (4) will be considered as Escrowed Proceeds, not Qualified Prepayments, until they are actually applied as Qualified Prepayments by BNPPPLC as provided in the Paragraph 10 of the Lease.

**"Real Property"** has the meaning indicated on page 2 of the Lease.

**"Remedial Work"** means any investigation, monitoring, clean-up, containment, remediation, removal, payment of response costs, or restoration work and the preparation and implementation of any closure or other required remedial plans that any governmental agency or political subdivision requires or approves (or could reasonably be expected to require if it was aware of all relevant circumstances concerning the Property), whether by judicial order or otherwise, because of the presence of or suspected presence of Hazardous Substances in, on, under or about the Property or because of any prior Hazardous Substance Activity.

**"Rent"** means the Base Rent and all Additional Rent.

**"Responsible Financial Officer"** means the chief financial officer, the controller, the treasurer or the assistant treasurer of NAI.

**"Rolling Four Quarters Period"** has the meaning indicated in subparagraph 3(A) of the

Closing Certificate.

“**Spread**” means, for any period beginning on and including the Effective Date or a Base Rent Date and ending on but not including the next Base Rent Date, the amount established as of the date (in this definition, the “**Spread Test Date**”) that is two Business Days prior to such period by reference to the pricing grid below, based upon the ratio calculated by dividing (1) Consolidated EBITDA for the then latest Rolling Four Quarters Period that ended prior to (and for which NAI has reported earnings as necessary to compute Consolidated EBITDA) into (2) the Consolidated Debt for Borrowed Money as of the end of such Rolling Four Quarters Period. In each case, the Spread will be established at the Level in the pricing grid below which corresponds to such ratio; provided, that:

(a) promptly after earnings are reported by NAI for the latest quarter in any Rolling Four Quarters Period, NAI must notify BNPPLC of any resulting change in the Spread under this definition, and no reduction in the Spread from one period to the next will be effective for purposes of the Operative Documents unless, prior to the Spread Test Date for the next period, NAI shall have provided BNPPLC with a written notice setting forth and certifying the calculation under this definition that justifies the reduction;

(b) if Carrying Costs are understated or Base Rent is underpaid for any Period because of any misstatement, subsequently discovered, of Consolidated EBITDA or Consolidated Debt for Borrowed Money used for purposes of the pricing grid below, BNPPLC will be entitled to collect from NAI all additional payments that would have been expected under the Operative Documents but for the misstatement, together with interest on each such additional payment computed at the Default Rate from the date it would have been expected to the date it is actually paid; and

(c) notwithstanding anything to the contrary in this definition, on any date when an Event of Default has occurred and is continuing, the Spread will equal the Default Rate less the Effective Rate.

Levels	Ratio of Consolidated Debt for Borrowed Money to Consolidated EBITDA	Spread
Level I	less than 0.5	35.0 basis points
Level II	greater than or equal to 0.5, but less than 1.0	45.0 basis points
Level III	greater than or equal to 1.0, but less than 1.5	55.0 basis points
Level IV	greater than or equal to 1.5, but less than 2.0	70.0 basis points
Level IV	greater than or equal to 2.0	85.0 basis points

All determinations of the Spread by BNPPPLC will, in the absence of clear and demonstrable error, be binding and conclusive for purposes of the Operative Documents. Further BNPPPLC may, but will not be required, to rely on the determination of the Spread set forth in any notice delivered by NAI as described above in clause (a) of this definition.

“**Subsidiary**” means, with respect to any Person, any Affiliate of which at least a majority of the securities or other ownership interests having ordinary voting power then exercisable for the election of directors or other persons performing similar functions are at the time owned directly or indirectly by such Person.

“**Supplemental Payment**” has the meaning indicated in the Purchase Agreement.

“**Supplemental Payment Obligation**” has the meaning indicated in the Purchase Agreement.

“**Tangible Personal Property**” has the meaning indicated on page 2 of the Lease.

“**Term**” has the meaning indicated in subparagraph 1(A) of the Lease.

“**Transaction Expenses**” means costs incurred in connection with the preparation and negotiation of the Operative Documents and related documents and the consummation of the transactions contemplated therein.

“**Unfunded Benefit Liabilities**” means, with respect to any Plan, the amount (if any) by which the present value of all benefit liabilities (within the meaning of Section 4001(a)(16) of ERISA) under the Plan exceeds the market value of all Plan assets allocable to such benefit liabilities, as determined on the most recent valuation date of the Plan and in accordance with the provisions of ERISA for calculating the potential liability of NAI or any ERISA Affiliate under Title IV of ERISA.

“**Upfront Fees**” has the meaning indicated in subparagraph 3(E) of the Lease.

## ARTICLE II — SHARED PROVISIONS

**The following provisions will apply to and govern the construction of this Agreement and the other Operative Documents (including attachments), except to the extent (if any) a clear, contrary intent is expressed herein or therein:**

1. **Notices.** Any provision of (1) any of the Operative Documents, (2) any other document which references this provision for purposes of establishing notice requirements (in this provision, a “**Related Document**”), or (3) any Applicable Law, that makes reference to any required payment from NAI to BNPPPLC or that makes reference to the sending, mailing or delivery of any notice or demand will be subject to the following provisions (except that any notice given by BNPPPLC to satisfy any statutory requirement, including any notice of eviction or foreclosure, will be considered sufficient if it satisfies the statutory requirements applicable to the notice, regardless of whether the notice or payment satisfies the following provisions):

(i) All Rent and other amounts required to be paid by NAI to BNPPPLC must be paid to BNPPPLC in immediately available funds by wire transfer to:

Federal Reserve Bank of New York  
BNP Paribas — New York Branch  
Favor: BNP Paribas Leasing Corporation  
ABA 026 007 689  
/AC/ 0200-517000-070-78  
Reference: Network Appliance, Inc./Building 9 Lease

or at such other place and in such other manner as BNPPPLC may designate in a notice to NAI.

(ii) All notices, demands, approvals, consents and other communications to be made under any Operative Document or Related Document to or by the parties thereto must, to be effective for purposes thereof, be in writing. Notices, demands and other communications required or permitted under any Operative Document or Related

Document must be given by any of the following means: (A) personal service (including local and overnight courier), with proof of delivery or attempted delivery retained; (B) electronic communication, whether by electronic mail or telecopying (if confirmed in writing sent by United States first class mail, return receipt requested); or (C) registered or certified first class mail, return receipt requested. Such addresses may be changed by notice to the other parties given in the same manner as provided above. Any notice or other communication sent pursuant to clause (A) or (B) hereof will be deemed received upon such personal service or upon dispatch by electronic means, and, if sent pursuant to clause (C) will be deemed received five days following deposit in the mail. Notices, demands and other communications required or permitted by any Related Document are to be sent to the addresses set forth therein; and notices, demands and other communications required or permitted by under any Operative Document are to be sent to the following addresses (or in the case of communications to Participants, at the addresses set forth in Schedule 1 to the Participation Agreement):

Address of BNPPLC:

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Address of NAI:

Network Appliance, Inc.  
7301 Kit Creek Road  
Research Triangle Park, NC 27709  
Attention: Ingemar Lanevi  
Telecopy: (919) 476-5750

With a copy to:

Network Appliance, Inc.  
495 East Java Drive  
Sunnyvale, California 94089  
Attention: Mr. Thom Bryant  
Telecopy: (408)-822-4463

However, any party to any Operative Document or Related Document may change its address above or in the Related Document, as applicable, by written notice to the other parties to such Operative Document or Related Document given in accordance with this



provision.

2. **Severability.** If any term or provision of any Operative Document or the application thereof is to any extent held by a court of competent jurisdiction to be invalid and unenforceable, the remainder of such document, or the application of such term or provision other than to the extent to which it is invalid or unenforceable, will not be affected thereby.

3. **No Merger.** There will be no merger of the Lease or of the leasehold estate created by the Lease or of the mortgage and security interest granted in subparagraph 4(C)(1) of the Lease with any other interest in the Property by reason of the fact that the same person may acquire or hold, directly or indirectly, the Lease or the leasehold estate created thereby or such mortgage and security interest and any other interest in the Property, unless all Persons with an interest in the Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred. There will be no merger of the Purchase Agreement or of the purchase options or obligations created by the Purchase Agreement with any other interest in the Property by reason of the fact that the same person may acquire or hold, directly or indirectly, the rights and options granted by the Purchase Agreement and any other interest in the Property, unless all Persons with an interest in the Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred.

4. **No Implied Waiver.** The failure of any party to any Operative Document to insist at any time upon the strict performance of any covenant or agreement therein or to exercise any option, right, power or remedy contained therein will not be construed as a waiver or a relinquishment thereof for the future. The waiver of or redress for any breach of any Operative Document by any party thereto will not prevent a similar subsequent act from constituting a violation. Any express waiver of any provision of any Operative Document will affect only the term or condition specified in such waiver and only for the time and in the manner specifically stated therein. No waiver by any party to any Operative Document of any provision therein will be deemed to have been made unless expressed in writing and signed by the party to be bound by the waiver. A receipt by any party to any Operative Document of any payment thereunder (including the receipt by BNPPLC of any Rent paid under the Lease) with knowledge of the breach by another party of any covenant or agreement contained in that or any other Operative Document will not be deemed a waiver of such breach.

5. **Entire and Only Agreements.** The Operative Documents supersede any prior negotiations and agreements between BNPPLC and NAI concerning the Property, and no amendment or modification of any Operative Document will be binding or valid unless expressed in a writing executed by all parties to such Operative Document.

6. **Binding Effect.** Except to the extent, if any, expressly provided to the contrary in any Operative Document with respect to assignments thereof, all of the covenants, agreements, terms and conditions to be observed and performed by the parties to the Operative Documents will be applicable to and binding upon their respective successors and, to the extent

assignment is permitted thereunder, their respective assigns.

7. **Time is of the Essence.** Time is of the essence as to all obligations created by the Operative Documents and as to all notices expressly required by the Operative Documents.

8. **Governing Law.** Each Operative Document will be governed by and construed in accordance with the laws of the State of California without regard to conflict or choice of laws principles that might require the application of the laws of another jurisdiction.

9. **Paragraph Headings.** The paragraph and section headings contained in the Operative Documents are for convenience only and will in no way enlarge or limit the scope or meaning of the various and several provisions thereof.

10. **Negotiated Documents.** All parties to each Operative Document and their counsel have reviewed and revised or requested revisions to such Operative Document, and the usual rule of construction that any ambiguities are to be resolved against the drafting party will not apply to the construction or interpretation of any Operative Documents or any amendments thereof.

11. **Terms Not Expressly Defined in an Operative Document.** As used in any Operative Document, a capitalized term that is not defined therein or in this Agreement, but is defined in another Operative Document, will have the meaning ascribed to it in the other Operative Document.

12. **Other Terms and References.** Words of any gender used in each Operative Document will be held and construed to include any other gender, and words in the singular number will be held to include the plural and vice versa, unless the context otherwise requires. References in any Operative Document to Paragraphs, subparagraphs, Sections, subsections or other subdivisions refer to the corresponding Paragraphs, subparagraphs, Sections, subsections or subdivisions of that Operative Document, unless specific reference is made to another document or instrument. References in any Operative Document to any Schedule or Exhibit refer to the corresponding Schedule or Exhibit attached to that Operative Document, which are made a part thereof by such reference. All capitalized terms used in each Operative Document which refer to other documents will be deemed to refer to such other documents as they may be renewed, extended, supplemented, amended or otherwise modified from time to time, provided such documents are not renewed, extended or modified in breach of any provision contained in the Operative Documents or, in the case of any other document to which BNPPLC or NAI is a party or intended beneficiary, without its consent. All accounting terms used but not specifically defined in any Operative Document will be construed in accordance with GAAP. The words "this [Agreement]", "herein", "hereof", "hereby", "hereunder" and words of similar import when used in each Operative Document refer to that Operative Document as a whole and not to any particular subdivision unless expressly so limited. The phrases "this Paragraph", "this subparagraph", "this Section", "this subsection" and similar phrases used in any Operative

Document refer only to the Paragraph, subparagraph, Section, subsection or other subdivision described in which the phrase occurs. As used in the Operative Documents the word “or” is not exclusive, and the words “include”, “including” and similar terms will be construed as if followed by “without limitation to”. The rule of *ejusdem generis* will not be applied to limit the generality of a term in any of the Operative Documents when followed by specific examples. When used to qualify any representation or warranty made by a Person, the phrases “to the knowledge of [such Person]” or “to the best knowledge of [such Person]” are intended to mean only that such Person does not have knowledge of facts or circumstances which make the representation or warranty false or misleading in some material respect; such phrases are not intended to suggest that the Person does indeed know the representation or warranty is true.

13. **Execution in Counterparts.** To facilitate execution, each of the Operative Documents may be executed in multiple identical counterparts. It will not be necessary that the signature of, or on behalf of, each party, or that the signature of all persons required to bind any party, appear on each counterpart. All counterparts, taken together, will collectively constitute a single instrument. But it will not be necessary in making proof of any of the Operative Documents to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the parties to such document. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page. Signing and sending a counterpart (or a signature page detached from the counterpart) by facsimile or other electronic means to another party will have the same legal effect as signing and delivering an original counterpart to the other party. A copy (including a copy produced by facsimile or other electronic means) of any signature page that has been signed by or on behalf of a party to any of the Operative Documents will be as effective as the original signature page for the purpose of proving such party’s agreement to be bound.

14. **Not a Partnership, Etc.** Nothing in any Operative Document is intended to create any partnership, joint venture, or other joint enterprise between NAI and BNPPPLC or any other Interested Party.

15. **No Fiduciary Relationship Intended.** Neither the execution of the Operative Documents or other documents referenced in this Agreement nor the administration thereof by BNPPPLC will create any fiduciary obligations of BNPPPLC (or any other Interested Party) to NAI. Moreover, BNPPPLC and NAI disclaim any intent to create any fiduciary or special relationship between themselves (or on the part of any other Interested Party) under or by reason of the Operative Documents or the transactions described therein or any other documents or agreements referenced therein.

[The signature pages follow.]

IN WITNESS WHEREOF, this Common Definitions and Provisions Agreement (1299 Orleans) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

[Continuation of signature pages for Common Definitions and Provisions Agreement (1299 Orleans) dated as of November 29, 2007]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

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**Common Definitions and Provisions Agreement (1299 Orleans) — Signature Page**

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Annex 1

**Notice of ABR Period Election**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (1299 Orleans) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc. This letter constitutes notice of our election to make the first Base Rent Period beginning on or after \_\_\_\_\_, 20\_\_ subject to an ***ABR Period Election***.

We understand that until a different election becomes effective as provided in definitions of "ABR Period Election" and "LIBOR Period Election" in the Common Definitions and Provisions Agreement (1299 Orleans), all subsequent Base Rent Periods will also be subject to an ABR Period Election.

**NOTE: YOU ARE ENTITLED TO DISREGARD THIS NOTICE IF THE DATE SPECIFIED ABOVE CONCERNING THE COMMENCEMENT OF THE ABR PERIOD ELECTION IS LESS THAN FIVE BUSINESS DAYS AFTER YOUR RECEIPT OF THIS NOTICE. HOWEVER, WE ASK THAT YOU NOTIFY US IMMEDIATELY IF FOR ANY REASON YOU BELIEVE THIS NOTICE IS DEFECTIVE.**

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]

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Annex 2

**Fixed Rate Lock Notice**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (1299 Orleans) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. By this letter, which is given pursuant to subparagraph 3(B)(4) of the Lease, NAI requests that BNPPLC promptly establish a Fixed Rate for a notional amount equal to the Lease Balance as of the date of this letter for use in the calculation of the Effective Rate for all Base Rent Periods commencing on or after the following Fixed Rate Lock Date: \_\_\_\_\_, 20\_\_.

As contemplated in the conditions set forth in subparagraph 3(B)(4) of the Lease, such Fixed Rate Lock Date does not fall prior to the end of any Base Rent Period which has commenced or will commence before BNPPLC receives this notice; and NAI expects BNPPLC to receive this notice more than ten days prior to such Fixed Rate Lock Date.

In an earlier phone conversation today between a representative of NAI and \_\_\_\_\_ at the New York Branch of BNP Paribas, NAI requested an estimate from BNP Paribas of the Fixed Rate that would be established by BNPPLC and BNP Paribas entering into an Interest Rate Swap. The estimate provided by telephone was: \_\_\_\_\_ percent (\_\_\_%) per annum.

By this letter, NAI confirms that it will accept such a rate or any lower rate as the Fixed Rate for purposes of the Lease.

**NOTE: BNPPLC will be entitled to disregard this notice if the conditions to a Fixed Rate Lock, as specified in subparagraph 3(B)(4) of the Lease, have not been satisfied. However, NAI requests that BNPPLC notify NAI immediately if for any reason BNPPLC believes this notice will not be effective.**

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**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]



**Annex 3**

**Notice of LIBOR Period Election**

[Date]

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (1299 Orleans) dated as of November 29, 2007, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. This letter constitutes notice of our election to make the first Base Rent Period beginning on or after \_\_\_\_\_, 20\_\_ subject to a ***LIBOR Period Election*** of \_\_\_\_\_ month(s).

We understand that until a different election becomes effective as provided in definitions of "ABR Period Election" and "LIBOR Period Election" in the Common Definitions and Provisions Agreement (1299 Orleans), all subsequent Base Rent Periods will also be subject to the same LIBOR Period Election.

**NOTE: YOU ARE ENTITLED TO DISREGARD THIS NOTICE IF THE NUMBER OF MONTHS SPECIFIED ABOVE IS NOT A PERMITTED NUMBER UNDER THE DEFINITION OF "LIBOR PERIOD ELECTION" IN THE COMMON DEFINITIONS AND PROVISIONS AGREEMENT (1299 ORLEANS), OR IF THE DATE SPECIFIED ABOVE CONCERNING THE COMMENCEMENT OF THE LIBOR PERIOD ELECTION IS LESS THAN FIVE BUSINESS DAYS AFTER YOUR RECEIPT OF THIS NOTICE. HOWEVER, WE ASK THAT YOU NOTIFY US IMMEDIATELY IF FOR ANY REASON YOU BELIEVE THIS NOTICE IS DEFECTIVE.**

NETWORK APPLIANCE, INC., a Delaware corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[cc all Participants]

**PURCHASE AGREEMENT  
(1299 ORLEANS)  
BETWEEN  
NETWORK APPLIANCE, INC.  
("NAI")  
AND  
BNP PARIBAS LEASING CORPORATION  
("BNPPLC")  
November 29, 2007**

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**PURCHASE AGREEMENT  
(1299 ORLEANS)**

This PURCHASE AGREEMENT (1299 ORLEANS) (this "**Agreement**"), dated as of November 29, 2007 (the "**Effective Date**"), is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and NETWORK APPLIANCE, INC. ("**NAI**"), a Delaware corporation.

**RECITALS**

Contemporaneously with the execution of this Agreement, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement (1299 Orleans) dated as of the Effective Date (the "**Common Definitions and Provisions Agreement**"), which by this reference is incorporated into and made a part of this Agreement for all purposes. *As used in this Agreement, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Agreement are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

Contemporaneously with this Agreement, at the request of NAI BNPPLC is acquiring the Land described in Exhibit A and existing Improvements on the Land pursuant to the Existing Contract.

Also contemporaneously with this Agreement, BNPPLC and NAI are executing a Lease Agreement (1299 Orleans) dated as of the Effective Date (the "**Lease**"), pursuant to which NAI is leasing from BNPPLC the Land described in Exhibit A and all Improvements on such Land. (As used herein, "**Property**" means (i) all of BNPPLC's interests, including those conveyed to it by the Prior Owner, in the Land and in the Improvements and in all other real and personal property from time to time covered or to be covered by the Lease and included within the "Property" as defined therein, and (ii) BNPPLC's interest in any Escrowed Proceeds yet to be applied as a Qualified Prepayment or to the cost of repairs to or restoration of the Improvements or other property covered by the Lease.)

NAI and BNPPLC have agreed on the terms and conditions upon which NAI may purchase or arrange for the purchase of the Property, and by this Agreement they desire to confirm all such terms and conditions.

**AGREEMENTS**

**1 Additional Definitions.** As used in this Agreement, capitalized terms defined above have the respective meanings assigned to them above; as indicated above, capitalized terms that are defined in the Common Definitions and Provisions Agreement and that are used but not otherwise defined have the respective meanings assigned to them in the Common Definitions and Provisions Agreement; and, the following terms have the following respective meanings:

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“97-1/Default (100%)” means a Default that is or results from any of the following:

(A) a failure of NAI to make any payment required by any Operative Document, including any payment of Rent required by the Lease or any Supplemental Payment required by this Agreement;

(B) any Hazardous Substance Activities on or about the Land;

(C) any failure of NAI to insure, maintain, operate or repair the Property in accordance with all terms and conditions of the Lease;

(D) any failure of NAI to apply insurance or condemnation proceeds received by NAI as required by the Lease;

(E) any breach by NAI of the provisions in Paragraph 1 of the Closing Certificate;

(F) any bankruptcy or insolvency proceeding involving NAI or any of its Subsidiaries, as the debtor, or any of the events or circumstances described in clauses (G), (H) or (I) of the definition of Event of Default in the Common Definitions and Provisions Agreement;

(G) any breach by NAI of the financial covenants in subparagraph 3(C) of the Closing Certificate;

(H) a failure of NAI or any of its Subsidiaries to pay when due a regularly scheduled payment of the principal of or premium or interest on any of its Indebtedness which is outstanding in a principal amount of at least \$25,000,000, as described in clause (F) of the definition of Event of Default in the Common Definitions and Provisions Agreement;

(I) a failure of NAI or any of its Subsidiaries to pay any judgment or order for the payment of money rendered against it in an amount (not covered by insurance) which exceeds \$25,000,000, as described in clause (J) of the definition of Event of Default in the Common Definitions and Provisions Agreement; or

(J) subject to the proviso at the end of Exhibit B, any breach by NAI of the provisions set forth in Exhibit B.

Except as provided in subparagraph 3(B), the characterization of any Default as a 97-1/Default (100%) will not affect the rights or remedies available to BNPPPLC because of the Default.

“**Applicable Purchaser**” means (1) the third party designated by NAI to purchase the Property at any sale arranged by NAI as provided in this Agreement, or (2) the third party designated by BNPPLC as the purchaser at any Qualified Sale not arranged by NAI.

“**BNPPLC’s Actual Out of Pocket Costs**” means the out-of-pocket costs and expenses, if any, incurred by BNPPLC in connection with a sale of the Property under this Agreement or in connection with the collection of payments due to it under this Agreement (including any Breakage Costs; Attorneys’ Fees; appraisal costs; and income, transfer, withholding or other taxes which do not constitute Excluded Taxes; but not including Excluded Taxes or costs of removing any Lien Removable by BNPPLC).

“**Break Even Price**” means an amount equal to:

- the Lease Balance, *plus*
- BNPPLC’s Actual Out of Pocket Costs.

“**Committed Price**” has the meaning indicated in subparagraph 3(C)(3).

“**Conditions to NAI’s Initial Remarketing Rights**” has the meaning indicated in subparagraph 2(A)(2)(a).

“**Decision Not to Sell at a Loss**” means a decision by BNPPLC not to sell the Property on the Designated Sale Date to an Applicable Purchaser as provided in subparagraph 2(A)(2), despite NAI’s satisfaction of the Conditions to NAI’s Initial Remarketing Rights.

“**Deemed Sale**” has the meaning indicated in subparagraph 3(D).

“**Extended Remarketing Period**” means a period beginning on the Designated Sale Date and ending on the Final Sale Date.

“**Fair Market Value**” has the meaning indicated in Exhibit B.

“**Final Sale Date**” means the earliest of:

- any date after the Designated Sale Date upon which BNPPLC conveys the Property to consummate a sale of the Property to NAI because of BNPPLC’s exercise of the Put Option as provided in subparagraph 3(B); or
- any date after the Designated Sale Date upon which BNPPLC conveys the Property to consummate a sale of the Property to NAI or to any Affiliate of NAI,



including any such sale resulting from NAI's exercise of its rights under subparagraph 3(A); or

- any date after the Designated Sale Date upon which BNPPLC conveys the Property to consummate a Qualified Sale, or would have done so but for a material breach of this Agreement by NAI (including any breach of its obligation to make any Supplemental Payment required in connection with such Qualified Sale); or
- the second anniversary of the Designated Sale Date, which will be the date of a Deemed Sale as provided in subparagraph 3(D) if no earlier date qualifies as the Final Sale Date and the entire Property is not sold by BNPPLC to NAI or an Applicable Purchaser prior to the second anniversary of the Designated Sale Date.

**"Initial Remarketing Notice"** means a notice delivered to BNPPLC by NAI prior to the Designated Sale Date in which NAI confirms NAI's decision to exercise NAI's Initial Remarketing Rights and the amount of the Initial Remarketing Price. (Once given, any such notice may not be rescinded or modified without BNPPLC's consent.)

**"Initial Remarketing Price"** means the cash price set forth in an Initial Remarketing Notice delivered by NAI to BNPPLC as the price for which NAI has arranged a sale of the Property on the Designated Sale Date to an Applicable Purchaser which is not an Affiliate of NAI. Such price may be any price negotiated by the Applicable Purchaser in good faith and on an arms length basis with NAI.

**"Lease Balance"** means the Lease Balance (as defined in the Common Definitions and Provisions Agreement) on the Designated Sale Date, but computed without deduction for any Supplemental Payment or other amount paid to BNPPLC pursuant to this Agreement on the Designated Sale Date.

**"Make Whole Amount"** means the sum of the following:

(1) the amount (if any) by which the Lease Balance exceeds any Supplemental Payment which was actually paid to BNPPLC on the Designated Sale Date, together with interest on such excess computed at the Default Rate for the period commencing on the Designated Sale Date and ending on the Final Sale Date; *plus*

(2) any unpaid Base Rent or other amounts due to BNPPLC pursuant to the other Operative Documents; *plus*

(3) BNPPLC's Actual Out of Pocket Costs; *plus*

(4) the amount, but not less than zero, by which (i) all Local Impositions, insurance premiums and other Losses of every kind suffered or incurred by BNPPLC (whether or not reimbursed in whole or in part by another Interested Party) with respect to the ownership, operation or maintenance of the Property during the Extended Remarketing Period, exceeds (ii) any rents or other sums collected by BNPPLC during such period from third parties as consideration for any lease or other contracts made by BNPPLC that authorize the use and enjoyment of the Property by such parties; together with interest on such excess computed at the Default Rate for each day prior to the Final Sale Date.

“**Maximum Remarketing Obligation**” means a dollar amount equal to the following (but not less than zero):

- 85% of the Lease Balance; *less*
- any Fixed Rate Settlement Amount that NAI is required to pay pursuant to the Lease because of any acceleration of the Designated Sale Date which causes it to occur prior to the date upon which the Term of the Lease is scheduled to expire (as such date is confirmed in clause (1) of the definition of Designated Sale Date in the Common Definitions and Provisions Agreement).

“**Must Sell Price**” means, with respect to any Proposed Sale arranged by NAI pursuant to subparagraph 3(C), a cash price to BNPPLC equal to the Make Whole Amount, computed as of the Proposed Sale Date applicable to such Proposed Sale.

“**NAI’s Extended Remarketing Right**” has the meaning indicated in subparagraph 3(C).

“**NAI’s Initial Remarketing Rights**” has the meaning indicated in subparagraph 2(A)(2).

“**NAI’s Target Price**” means the cash purchase price that, according to NAI, should reasonably be expected for the Property during the Extended Remarketing Period if the parties make a reasonable marketing effort to sell the Property, as such price is set forth in a notice given by NAI to BNPPLC after the Designated Sale Date. Once established by any such notice, the amount of NAI’s Target Price will not be increased, although nothing in this definition will be construed to prevent NAI from arranging a sale of the Property pursuant to this Agreement at a price higher than NAI’s Target Price. After providing a notice of NAI’s Target Price to BNPPLC, NAI may later decrease NAI’s Target Price by another notice to BNPPLC, but only if the decrease is justified by a material adverse change in the physical condition of the Property (*e.g.*, significant damage to the Property by fire or other casualty).

“**Notice of Sale**” has the meaning indicated in subparagraph 3(C)(3).

“**Proposed Sale**” has the meaning indicated in subparagraph 3(C).

“**Proposed Sale Date**” has the meaning indicated in subparagraph 3(C)(3).

“**Purchase Option**” has the meaning indicated in subparagraph 2(A)(1).

“**Put Option**” has the meaning indicated in subparagraph 3(B).

“**Qualified Sale**” means any (1) Deemed Sale as described in subparagraph 3(D), or (2) actual sale (prior to any such Deemed Sale) of all or substantially all of the Property to an Applicable Purchaser that occurs after the thirty day period specified in subparagraph 3(A) and that:

- results from NAI’s exercise of NAI’s Extended Remarketing Right as described in subparagraph 3(C); or
- is approved in advance as a Qualified Sale by NAI; or
- is to a third party which is not an Affiliate of BNPPLC and, if it is completed by a conveyance from BNPPLC prior to eighteen months after the Designated Sale Date, is for a price not less than the least of the following amounts:
  - (a) the lowest price at which BNPPLC will be obligated, pursuant to clause (3) of subparagraph 3(E), to reimburse to NAI the entire amount of any Supplemental Payment theretofore made by NAI to BNPPLC; or
  - (b) (i) if NAI notified BNPPLC of NAI’s Target Price prior to the date BNPPLC and the third party agreed to a price for the sale, NAI’s Target Price, or (ii) if NAI did not notify BNPPLC of NAI’s Target Price prior to the date BNPPLC and the third party agreed to a price for the sale, any price satisfactory to BNPPLC in its sole good faith business judgment; or
  - (c) 90% of the Fair Market Value of the Property.

NAI acknowledges that BNPPLC’s own marketing efforts after the Designated Sale Date will depend upon the minimum price required for a Qualified Sale, and such efforts could be hampered if NAI’s Target Price is too high. Thus, after receipt of any notice of NAI’s Target Price from NAI, BNPPLC may (but will not be obligated to) invoke the Valuation Procedures in order to determine the minimum price permitted under clause (c) preceding.

“**Sale Closing Documents**” means the following documents, which BNPPLC must

tender pursuant to Paragraph 5(A) to consummate any sale of the Property pursuant to this Agreement: (1) a Deed With Limited Title Warranties in the form attached as Exhibit C, (2) a Bill of Sale and Assignment in the form attached as Exhibit D, (3) an Acknowledgment of Disclaimer of Representations and Warranties in the form attached as Exhibit E, (4) a Secretary's Certificate in the form attached as Exhibit F, and (5) a certificate concerning tax withholding in the form attached as Exhibit G.

“**Supplemental Payment**” has the meaning indicated in subparagraph 2(A)(3).

“**Supplemental Payment Obligation**” has the meaning indicated in subparagraph 2(A)(3).

“**Valuation Procedures**” means procedures set forth in Exhibit B, which are to be followed in the event a determination of the Fair Market Value of the Property or any portion thereof is required by this Agreement.

## 2 NAI's Options and Obligations on the Designated Sale Date.

(A) Purchase Option; Initial Remarketing Rights; Supplemental Payment Obligation. Whether or not an Event of Default has occurred and is continuing, but subject to Paragraph 6 below:

(1) NAI will have the right (the “**Purchase Option**”) to purchase or cause an Affiliate of NAI, as the Applicable Purchaser, to purchase the Property on the Designated Sale Date for a cash price equal to the Break Even Price.

(2) If NAI does not exercise the Purchase Option, NAI will have the following rights (collectively, “**NAI's Initial Remarketing Rights**”):

(a) First, NAI will have the right to designate a third party, other than an Affiliate of NAI, as the Applicable Purchaser and to cause such Applicable Purchaser to purchase the Property on the Designated Sale Date for a cash price equal to the Initial Remarketing Price. Such right, however, will be subject to the conditions (the “**Conditions to NAI's Initial Remarketing Rights**”) that (i) NAI deliver an Initial Remarketing Notice to BNPPLC within the thirty days prior to the Designated Sale Date, (ii) on the Designated Sale Date the Applicable Purchaser tenders to BNPPLC a payment equal to the Initial Remarketing Price, and (iii) NAI itself tenders to BNPPLC the Supplemental Payment, if any, which will be required by subparagraph 2(A)(3) in the event BNPPLC completes the sale to the Applicable Purchaser. Further, notwithstanding the satisfaction of the Conditions to NAI's Initial Remarketing Rights on the Designated Sale Date, if the sum of the price to be paid by the Applicable Purchaser for the Property (*i.e.*,

the Initial Remarketing Price) and any Supplemental Payment required by subparagraph 2(A)(3) is less than the Break Even Price, then BNPPLC may affirmatively elect not to complete the sale of the Property to the Applicable Purchaser on the Designated Sale Date (and thereby defer the sale of the Property pursuant to this Agreement) by making a Decision Not to Sell at a Loss.

(b) Second, if BNPPLC completes a sale of the Property to an Applicable Purchaser on the Designated Sale Date pursuant to subparagraph 2(A)(2)(a) and the price paid by the Applicable Purchaser for the Property (*i.e.*, the Initial Remarketing Price) is greater than the Break Even Price, then BNPPLC will pay the excess to NAI or as otherwise required by Applicable Law.

(3) If for any reason whatsoever BNPPLC does not receive a cash price for the Property on the Designated Sale Date equal to or in excess of the Break Even Price in connection with a sale made pursuant to subparagraph 2(A)(1) or subparagraph 2(A)(2)(a), then NAI will have the obligation (the “**Supplemental Payment Obligation**”) to pay to BNPPLC on the Designated Sale Date a supplemental payment (the “**Supplemental Payment**”) equal to the lesser of:

- (a) the amount by which the Break Even Price exceeds any such cash price actually received by BNPPLC on the Designated Sale Date; or
- (b) the Maximum Remarketing Obligation.

Without limiting the generality of the foregoing, NAI must make the Supplemental Payment even if BNPPLC does not sell the Property to NAI or an Applicable Purchaser on the Designated Sale Date because of (A) a Decision Not to Sell at a Loss, or (B) a failure of NAI to exercise, or a decision by NAI not to exercise, the Purchase Option or NAI’s Initial Remarketing Rights, or (C) a failure of NAI or any Applicable Purchaser to tender the price required by the forgoing provisions on the Designated Sale Date following any exercise of or attempt by NAI to exercise the Purchase Option or NAI’s Initial Remarketing Rights.

NAI acknowledges that it is undertaking the Supplemental Payment Obligation in consideration of the rights afforded to it by this Agreement, but that such obligation is not contingent upon any exercise by NAI of such rights or upon any purchase of the Property by NAI or an Applicable Purchaser. If any Supplemental Payment due according to this subparagraph 2(A)(3) is not actually paid to BNPPLC on the Designated Sale Date, then NAI must pay interest on the past due amount computed at the Default Rate. However, NAI will be entitled to a credit against the interest required by the preceding sentence equal to the Base Rent, if any, actually paid by NAI pursuant to the Lease for any period

after the Designated Sale Date.

(4) For the avoidance of doubt, BNPPLC acknowledges that NAI may elect not to exercise the Purchase Option or NAI's Initial Remarketing Rights and instead pay to BNPPLC a Supplemental Payment equal to the Maximum Remarketing Obligation on the Designated Sale Date in full satisfaction of its obligations under this subparagraph 2(A).

(B) Designation of the Purchaser. To give BNPPLC the opportunity before the Designated Sale Date to prepare the Sale Closing Documents, NAI must, by a notice to BNPPLC given at least ten days prior to the Designated Sale Date, specify irrevocably, unequivocally and with particularity any party who will purchase the Property because of NAI's exercise of its Purchase Option or of NAI's Initial Remarketing Rights. If NAI fails to do so, BNPPLC may postpone the delivery of the Sale Closing Documents until a date after the Designated Sale Date and not more than ten days after NAI finally does so specify a party, but such postponement will not relieve or postpone the obligation of NAI to make a Supplemental Payment on the Designated Sale Date as provided in subparagraph 2(A)(3).

(C) Delivery of Property Related Documents If BNPPLC Retains the Property. Unless NAI or its Affiliate or another Applicable Purchaser purchases the Property pursuant to subparagraph 2(A), promptly after the Designated Sale Date NAI must deliver and assign to BNPPLC all plans and specifications for the Property previously prepared for NAI or otherwise available to NAI, together with all other files, documents and permits of NAI (including all Existing Leases and any subleases then in force) which may be necessary or useful to any future owner's or occupant's use of the Property. Without limiting the foregoing, NAI will transfer or arrange the transfer to BNPPLC of all utility, building, health and other operating permits required by any municipality or other governmental authority having jurisdiction over the Property for uses of the Property permitted by the Lease if neither NAI nor any Affiliate or other Applicable Purchaser purchases the Property pursuant to subparagraph 2(A).

(D) Effect of the Purchase Option and NAI's Initial Remarketing Rights on Subsequent Title Encumbrances. Any conveyance made to consummate a sale of the Property to NAI or any Applicable Purchaser pursuant to subparagraph 2(A) will cut off and terminate all interests in the Property claimed by, through or under BNPPLC, including Liens Removable by BNPPLC (including any leasehold estate or other interests conveyed by BNPPLC to third parties, even if conveyed in the ordinary course of BNPPLC's business, and including any judgment liens established against the Property because of a judgment rendered against BNPPLC), but not personal obligations of NAI to BNPPLC under the Lease or other Operative Documents (including obligations of NAI arising under the indemnities in the Lease, which indemnities will survive any such sale). Anyone accepting or taking any interest in the Property through or under BNPPLC on or after the Effective Date will acquire such interest subject to the Purchase Option.

(E) Security for NAI's Purchase Option. If (contrary to the intent of the parties as expressed in subparagraph 4(C) of the Lease) it is determined that NAI is not, under applicable state law as applied to the Operative Documents, the equitable owner of the Property and the borrower from BNPPPLC in a financing arrangement, but rather is a tenant under the Lease with an option to purchase from BNPPPLC as provided in subparagraph 2(A)(1), then the parties intend that the Purchase Option be secured by a lien and security interest against the Property. **Accordingly, BNPPPLC does hereby grant to NAI a lien and security interest against the Property, including all rights, title and interests of BNPPPLC from time to time in and to the Land and Improvements, in order to secure (1) BNPPPLC's obligation to convey the Property to NAI or an Affiliate designated by it if NAI exercises the Purchase Option and tenders payment of the Break Even Price to BNPPPLC on the Designated Sale Date as provided herein, and (2) NAI's right to recover any damages from BNPPPLC caused by a breach of such obligation, including any such breach caused by a rejection or termination of this Agreement in any bankruptcy or insolvency proceeding instituted by or against BNPPPLC, as debtor.** NAI may enforce such lien and security interest judicially after any such breach by BNPPPLC, but not otherwise.

### 3 NAI's Rights, Options and Obligations *AFTER* the Designated Sale Date.

(A) NAI's Right to Buy During the Thirty Days After the Designated Sale Date. Even after a failure to pay any required Supplemental Payment on the Designated Sale Date, NAI may tender (or cause an Applicable Purchaser to tender) to BNPPPLC the full Make Whole Amount (including all amounts then due under the other Operative Documents) on any Business Day within thirty days after the Designated Sale Date. If presented with such a tender within thirty days after the Designated Sale Date, BNPPPLC must accept it and promptly thereafter deliver to NAI (or the Applicable Purchaser) the Sale Closing Documents and any Escrowed Proceeds then constituting Property held by BNPPPLC. Otherwise, BNPPPLC will have no further obligation to sell the Property to NAI or to any Affiliate of NAI pursuant to this Agreement, although BNPPPLC will continue to have the option to require NAI to buy the Property if the conditions listed in the next subparagraph are satisfied.

(B) NAI's Obligation to Buy if Certain Conditions are Satisfied. Regardless of any prior Decision Not to Sell at a Loss, BNPPPLC will have the option (the "**Put Option**") to require NAI to purchase the Property upon demand at any time after the Designated Sale Date for a cash price equal to the Make Whole Amount if:

- (1) BNPPPLC has not already conveyed the Property to consummate a sale of the Property to NAI or an Applicable Purchaser pursuant to other provisions of this Agreement; and
- (2) a 97-1/Default (100%) occurs or is continuing on or after the Designated Sale Date; and

(3) BNPPLC notifies NAI of BNPPLC's exercise of the Put Option within two years following the Designated Sale Date.

Further, and without limiting the foregoing, if any Event of Default occurs as described in clauses (G), (H) or (I) of the definition Event of Default in the Common Definitions and Provisions Agreement because of any bankruptcy proceeding instituted by or against NAI, as debtor, under Title 11 of the United States Code, then NAI will be obligated (without any further act or notice or demand by BNPPLC) to pay to BNPPLC the Make Whole Amount and purchase the Property, as if (i) BNPPLC had exercised the Put Option, and (ii) the second Business Day after the commencement of such Event of Default was the Final Sale Date.

(C) NAI's Extended Right to Remarket. If the Property is not sold to NAI or an Applicable Purchaser on the Designated Sale Date pursuant to this Agreement, NAI will have the right ("**NAI's Extended Remarketing Right**") during the Extended Remarketing Period to arrange a sale of the Property to an Applicable Purchaser, other than an Affiliate of NAI, for a price equal to or in excess of the Must Sell Price (a "**Proposed Sale**"). NAI's Extended Remarketing Right will, however, be subject to all of the following conditions:

(1) BNPPLC has not exercised the Put Option as provided in subparagraph 3(B) or already contracted with another Applicable Purchaser to convey the Property in connection with a Qualified Sale.

(2) NAI's Extended Remarketing Right is not terminated pursuant to subparagraph 6(B) because of NAI's failure to pay any required Supplemental Payment.

(3) NAI must have provided a notice to BNPPLC (a "**Notice of Sale**") setting forth (i) the date proposed by NAI as the Final Sale Date (the "**Proposed Sale Date**"), which must be no sooner than thirty days after BNPPLC's receipt of the Notice of Sale and no later than the last Business Day of the Extended Remarketing Period, (ii) the full legal name of the Applicable Purchaser and such other information as is needed to prepare the Sale Closing Documents, and (iii) the cash price that will be tendered to BNPPLC for the Property (the "**Committed Price**").

(4) The Committed Price must be no less than the Must Sell Price, computed as of the Proposed Sale Date. Also, if NAI has notified BNPPLC of NAI's Target Price, the Committed Price must be no less than NAI's Target Price.

(D) Deemed Sale On the Second Anniversary of the Designated Sale Date. If no date prior to the second anniversary of the Designated Sale Date qualifies as the Final Sale Date, then on second anniversary of the Designated Sale Date BNPPLC will, for purposes of the next subparagraph, be *deemed* to have sold the Property (a "**Deemed Sale**") to an Applicable Purchaser at a Qualified Sale for a net cash price equal to its Fair Market Value.



(E) NAI's Right to Share in Sales Proceeds Received By BNPPPLC From any Qualified Sale. BNPPPLC must apply the cash proceeds received by BNPPPLC from any Qualified Sale (regardless of whether the sale is arranged by NAI as provided in subparagraph 3(C) or by BNPPPLC itself), or deemed to be received in connection with any Deemed Sale, in the following order of priority:

- (1) first, to pay to BNPPPLC the Make Whole Amount;
- (2) second, to pay to BNPPPLC any other amounts then due from NAI to BNPPPLC under any of the Operative Documents;
- (3) third, to reimburse LRC for any Supplemental Payment previously made by LRC to BNPPPLC; and
- (4) last, if any such cash proceeds exceed all the payments and reimbursements that are required or may be required as described in the preceding clauses of this subparagraph, BNPPPLC may retain the excess.

If, however, BNPPPLC completes any sale and conveyance of the Property *after* the Extended Remarketing Period expires or is terminated, BNPPPLC will not be required by this subparagraph to share any proceeds of the sale or conveyance with NAI or any other party claiming through or under NAI.

#### **4 Transfers By BNPPPLC After the Designated Sale Date.**

(A) BNPPPLC's Right to Sell. At any time more than thirty days after the Designated Sale Date, if the Property has not already been sold and conveyed by BNPPPLC pursuant to Paragraph 2 or Paragraph 3, BNPPPLC will have the right to sell the Property or offer the Property for sale to any third party on any terms believed to be appropriate by BNPPPLC in its sole good faith business judgment.

(B) Survival of NAI's Rights and the Supplemental Payment Obligation. If the Property is not sold on the Designated Sale Date, and if BNPPPLC completes a sale or other transfer of the Property after the Designated Sale Date, other than a Qualified Sale, the Supplemental Payment Obligation will survive in favor of BNPPPLC's successors and assigns with respect to the Property, and BNPPPLC's successors and assigns will take the Property subject to NAI's rights under Paragraph 3, all on the same terms and conditions as would have applied to BNPPPLC itself if BNPPPLC had not transferred or sold the Property. Without limiting the foregoing, any purchaser that acquires the Property from BNPPPLC during the Extended Remarketing Period, other than at a Qualified Sale, will be obligated to distribute proceeds of a subsequent Qualified Sale of the Property as described in the subparagraph 3(E) in the same manner and to the same extent that BNPPPLC itself would have been obligated if not for the sale

by BNPPPLC to the purchaser.

(C) Easements and Other Transfers in the Ordinary Course of Business. No "Permitted Transfer" described in clause (5) (the last clause) of the definition thereof in the Common Definitions and Provisions Agreement will constitute a Qualified Sale if it covers less than all or substantially all of BNPPPLC's then existing interests in the Property. Any such Permitted Transfer of less than all or substantially all of BNPPPLC's then existing interests in the Property will not be prohibited by this Agreement during the Extended Remarketing Period or otherwise; *provided, however*, any such Permitted Transfer made before the end of one hundred eighty days after the Designated Sale Date, or made to an Affiliate of BNPPPLC before the end of the Extended Remarketing Period, or otherwise not made in the ordinary course of business, will be made subject to NAI's rights under Paragraph 3. Thus, for example, if the Property is not sold by BNPPPLC to an Applicable Purchaser on the Designated Sale Date, then at any time more than one hundred eighty days after the Designated Sale Date BNPPPLC may in the ordinary course of business convey a utility easement or a lease of space in the Improvements to a Person not an Affiliate of BNPPPLC free from NAI's rights under Paragraph 3, although following such conveyance of the lesser estate, NAI's rights under Paragraph 3 will continue during the Extended Remarketing Period as to BNPPPLC's remaining interest in the Land and the Improvements.

#### **5 Terms of Conveyance Upon Purchase.**

(A) Tender of Sale Closing Documents. As necessary to consummate any sale of the Property to NAI or an Applicable Purchaser pursuant to this Agreement, BNPPPLC must, subject to any postponement permitted by subparagraph 2(B), promptly after the tender of the purchase price and any other payments to BNPPPLC required pursuant to Paragraph 2 or Paragraph 3, as applicable, convey the Property to NAI or the Applicable Purchaser, as the case may be, by BNPPPLC's execution, acknowledgment (where appropriate) and delivery of the Sale Closing Documents. Such conveyance by BNPPPLC will be subject to the Permitted Encumbrances and any other encumbrances that do not constitute Liens Removable by BNPPPLC, and such conveyance will not include the rights of BNPPPLC or other Interested Parties under the indemnities provided in the Operative Documents, including rights to any payments then due from NAI under the indemnities or that may become due thereafter because of any Loss incurred by BNPPPLC or another Interested Party resulting in whole or in part from events or circumstances occurring or alleged to have occurred before such conveyance. The costs, both foreseen and unforeseen, of any purchase by NAI or an Applicable Purchaser will be the responsibility of the purchaser to the extent (if any) not included in any Break Even Price or Make Whole Amount actually paid to BNPPPLC. If for any reason BNPPPLC fails to tender the Sale Closing Documents as required by this Paragraph 5(A), BNPPPLC will have the right and obligation to cure such failure at any time before thirty days after receipt of a demand for such cure from NAI. Prior to the end of such cure period, NAI may initiate appropriate legal action to specifically enforce BNPPPLC's obligation to deliver the Sale Closing Documents or to foreclose

NAI's liens or security interests against the Property which secure such obligation, but if BNPPPLC does cure within such thirty day period, BNPPPLC will not be liable for monetary damages because of its prior failure to deliver the Sale Closing Documents.

(B) Delivery of Escrowed Proceeds. BNPPPLC may deliver any Escrowed Proceeds constituting Property directly to NAI or to any Applicable Purchaser purchasing the Property pursuant to this Agreement notwithstanding any prior actual or attempted conveyance or assignment by NAI, voluntary or otherwise, of any right to receive the same; BNPPPLC will not be responsible for the proper distribution or application by NAI or any Applicable Purchaser of any such Escrowed Proceeds; and any such payment of Escrowed Proceeds to NAI or an Applicable Purchaser will discharge any obligation of BNPPPLC to deliver the same to all Persons claiming an interest therein.

#### **6 Survival and Termination of the Rights and Obligations of NAI and BNPPPLC.**

(A) Status of this Agreement Generally. Except as expressly provided in other provisions of this Agreement, this Agreement will not terminate; nor will NAI have any right to terminate this Agreement; nor will NAI be entitled to any reduction (by setoff or otherwise) of the Break Even Price, the Make Whole Amount or any payment required under this Agreement; nor will any of the obligations of NAI to BNPPPLC under Paragraph 2 or Paragraph 3 be excused by reason of (i) any damage to or the destruction of all or any part of the Property from whatever cause, (ii) the taking of the Property or any portion thereof by eminent domain or otherwise for any reason, (iii) the prohibition, limitation or restriction of NAI's use or development of all or any portion of the Property or any interference with such use by governmental action or otherwise, (iv) any eviction of NAI or of anyone claiming through or under NAI, (v) any default on the part of BNPPPLC under this Agreement or any other Operative Document or any other agreement to which BNPPPLC and NAI are parties, (vi) the inadequacy in any way whatsoever of the design, construction, assembly or installation of any improvements, fixtures or tangible personal property included in the Property (it being understood that BNPPPLC has not made, does not make and will not make any representation express or implied as to the adequacy thereof), (vii) any latent or other defect in the Property or any change in the condition thereof or the existence with respect to the Property of any violations of Applicable Laws, or (viii) NAI's prior acquisition or ownership of any interest in the Property, or (ix) any other cause, whether similar or dissimilar to the foregoing, any existing or future law to the contrary notwithstanding. It is the intention of the parties hereto that the obligations of NAI under this Agreement (including the obligation to make any Supplemental Payment as provided in Paragraph 2) be separate from and independent of BNPPPLC's obligations under this Agreement or any other agreement between BNPPPLC and NAI; however, nothing in this subparagraph will be construed as a waiver by NAI of any right NAI may have at law or in equity to the following remedies, whether because of BNPPPLC's failure to remove a Lien Removable by BNPPPLC or because of any other default by BNPPPLC under this Agreement: (A) the recovery of monetary damages, (B) injunctive relief in

case of the violation, or attempted or threatened violation, by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Agreement which are binding upon BNPPLC, or (C) a decree compelling performance by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Agreement which are binding upon BNPPLC.

(B) Automatic Termination of NAI's Rights. If NAI fails to pay the full amount of any Supplemental Payment required by subparagraph 2(A)(3) on the Designated Sale Date, then the Purchase Option, NAI's Initial Remarketing Rights, NAI's Extended Remarketing Right and all other rights of NAI under this Agreement, other than its rights under subparagraph 3(A), will terminate automatically. No termination of NAI's rights as described in this subparagraph will limit BNPPLC's other remedies, including its right to sue NAI for any amounts due from NAI pursuant to any of the Operative Documents and its right to exercise the Put Option.

(C) Payment Only to BNPPLC. All amounts payable under this Agreement by NAI and, if applicable, by an Applicable Purchaser must be paid directly to BNPPLC. If paid to other parties, such payments will not be effective for purposes of this Agreement.

(D) Preferences and Voidable Transfers. If any payment to BNPPLC by an Applicable Purchaser is held to constitute a preference or a voidable transfer under Applicable Laws, or must for any other reason be refunded by BNPPLC to the Applicable Purchaser or to another Person, and if such payment to BNPPLC reduced or had the effect of reducing a payment required of NAI by this Agreement (*e.g.*, the Supplemental Payment) or increased or had the effect of increasing any sale proceeds paid over to NAI pursuant to subparagraph 2(A)(2)(b) or pursuant to subparagraph 3(E), then NAI must pay to BNPPLC upon demand an amount equal to the reduction of the payment required of NAI or to the increase of the excess sale proceeds paid to NAI, as applicable, and this Agreement will continue to be effective or will be reinstated as necessary to permit BNPPLC to enforce its right to collect such amount from NAI.

(E) Remedies Under the Other Operative Documents. No repossession of or re-entering upon the Property or exercise of any other remedies available to BNPPLC under the other Operative Documents will terminate NAI's rights or obligations under this Agreement, all of which will survive BNPPLC's exercise of remedies under the other Operative Documents. NAI acknowledges that the consideration for this Agreement is separate from and independent of the consideration for the Construction Agreement, the Lease, the Closing Certificate and other agreements executed by the parties, and NAI's obligations under this Agreement will not be affected or impaired by any event or circumstance that would excuse NAI from performance of its obligations under such other Operative Documents.

**7 Certain Remedies Cumulative.** No right or remedy herein conferred upon or reserved to BNPPLC is intended to be exclusive of any other right or remedy BNPPLC has with respect to the Property, and each and every right and remedy of BNPPLC will be cumulative and in addition to any other right or remedy given to it under this Agreement or now or hereafter existing in its favor at law or in equity. In addition to other remedies available under this Agreement, either party may obtain a decree compelling specific performance of any of the other party's agreements hereunder.

**8 Attorneys' Fees and Legal Expenses.** If BNPPLC commences any legal action or other proceeding because of any breach of this Agreement by NAI, BNPPLC may recover all Attorneys' Fees incurred by it in connection therewith from NAI, whether or not such controversy, claim or dispute is prosecuted to a final judgment. Any Attorneys' Fees incurred by BNPPLC in enforcing a judgment in its favor under this Agreement will be recoverable separately from such judgment, and the obligation for such Attorneys' Fees is intended to be severable from other provisions of this Agreement and not to be merged into any such judgment.

**9 Successors and Assigns.** The terms, provisions, covenants and conditions hereof will be binding upon NAI and BNPPLC and their respective permitted successors and assigns and will inure to the benefit of NAI and BNPPLC and all permitted transferees, mortgagees, successors and assignees of NAI and BNPPLC with respect to the Property; except that (A) the rights of BNPPLC hereunder will not pass to NAI or any Applicable Purchaser or any subsequent owner claiming through NAI or an Applicable Purchaser, (B) BNPPLC will not assign this Agreement or any rights hereunder except pursuant to a Permitted Transfer, and (C) NAI will not assign this Agreement or any rights hereunder without the prior written consent of BNPPLC.

[The signature pages follow.]

IN WITNESS WHEREOF, this Purchase Agreement (1299 Orleans) is executed to be effective as of November 29, 2007.

**BNP PARIBAS LEASING CORPORATION**, a Delaware corporation

By: \_\_\_\_\_  
Lloyd G. Cox, Managing Director

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**Purchase Agreement (1299 Orleans) — Signature Page**

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[Continuation of signature pages for Purchase Agreement (1299 Orleans) dated as of November 29, 2007.]

**NETWORK APPLIANCE, INC.**, a Delaware corporation

By: \_\_\_\_\_  
Ingemar Lanevi, Vice President and Corporate  
Treasurer

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**Purchase Agreement (1299 Orleans) — Signature Page**

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**Exhibit A**

**Legal Description**

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:**

All of Parcel 1, as shown upon that certain Map entitled, "Parcel Map being a Resubdivision of Parcel A as shown on Map recorded in Book 431 of Maps, at page 32, Santa Clara County Records", which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California, on March 8, 1979 in Book 437 of Maps, at Page 9.

APN 110-36-007

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## Exhibit B

### Valuation Procedures

This Exhibit explains the procedures to be used to determine Fair Market Value of the Property if such a determination is required by this Agreement. In such event, either party may invoke the procedures set out herein prior to the date the determination will be needed so as to minimize any postponement of any payment, the amount of which depends upon Fair Market Value. In the event such a payment becomes due before the required determination of Fair Market Value is complete, such payment will be postponed until the determination is complete. But in that event, when the required determination is complete, the payment will be made together with interest thereon, computed at a rate equal to ABR, accruing over the period the payment was postponed.

If any determination of Fair Market Value is required, NAI and BNPPLC will attempt in good faith to reach a written agreement upon the Fair Market Value without unnecessary delay, and either party may propose such an agreement to the other. If, however, for any reason whatsoever, they do not execute such an agreement within seven days after the first such proposed agreement is offered by one party to the other, then the determination will be made by independent appraisers in accordance with the following procedures:

1. Definitions and Assumptions. For purposes of the determination, Fair Market Value will be defined as follows, and all appraisers or others involved in the determination will be instructed to use the following definition:

"Fair Market Value" means the most probable net cash price, as of a specified date, for which the Property should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

In addition, the appraisers or others making the determination will be instructed to assume that ordinary and customary brokerage fees, title insurance costs and other sales expenses will be incurred and deducted in the calculation of such net cash price. Such appraisers or others making the determination will also be instructed to assume that the value of the Property (or applicable portion thereof) is neither enhanced nor reduced by any lease to another tenant that BNPPLC may have executed subsequent to the termination or expiration of the Lease (a "**Replacement Lease**"). In other words, rather than determine value in light of actual rents generated or to be generated by any such Replacement Lease, the Property (or applicable portion thereof) will be valued in light of the most probable rent that it should bring in a competitive and open market (in this section, a "**Fair Market Rental**"), taking into account:

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(i) the actual physical condition of the Property <sup>1</sup>; and

(iii) that a reasonable period of time may be required to market the Property (or applicable portion thereof) for lease and make it ready for use or occupancy before it is leased at a Fair Market Rental.

2. Initial Selection of Appraisers; Appraiser's Agreement as to Value. After having failed to reach a written agreement upon Fair Market Value as described in the second paragraph of this Exhibit, either party may deliver a notice to the other demanding the appointment of appraisers (the "**First Appraisal Notice**") pursuant to this Exhibit. In such event:

(a) Within fifteen days after the First Appraisal Notice is delivered, NAI and BNPPLC must each appoint an independent property appraiser who has experience appraising commercial properties in California and notify the other party of such appointment, including the name of the appointed appraiser (a "**Notice of Appointment**").

(b) If the appraiser appointed by NAI and the appraiser appointed by BNPPLC agree in writing upon the Fair Market Value (an "**Appraiser's Agreement As To Value**"), such agreement will be binding upon NAI and BNPPLC. Both NAI and BNPPLC will instruct their respective appraisers to attempt in good faith to quickly reach an Appraiser's Agreement As To Value. Neither appraiser will be required to produce a formal appraisal prior to reaching an Appraiser's Agreement As To Value.

3. Selection of a Third Appraiser. If the two appraisers fail to deliver an Appraiser's Agreement As to Value within thirty days following the later of the dates upon which NAI or BNPPLC delivers its Notice of Appointment, then either party (NAI or BNPPLC) may deliver another notice to the other (a "**Third Appraisal Notice**"), demanding that the two appraisers appoint a third independent property appraiser to help with the determination of Fair Market Value. Immediately after the Third Appraisal Notice is delivered, each of the first two appraisers must act promptly, reasonably and in good faith to try to reach agreement upon the third appraiser. If, however, the two appraisers fail to reach agreement upon a third appraiser within ten days after the Third Appraisal Notice is delivered:

(a) NAI and BNPPLC will each cause its respective appraiser to deliver, no later than fifteen days after the delivery of the Third Appraisal Notice, an unqualified written promise addressed to *both* of NAI and BNPPLC: (i) to act promptly, reasonably and in good faith in trying to reach agree upon the third appraiser, and (ii) to propose and consider proposals of persons as the third appraiser on the basis of objectivity and competence, not on the basis of such

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<sup>1</sup> If, however, the use of the Property by BNPPLC or any tenant under any Replacement Lease after NAI vacated the Property has resulted in excess wear and tear, such excess wear and tear will be assumed not to have occurred for purposes of determining Fair Market Value.

persons' relationships with the other appraisers or with NAI or BNPPPLC, and not on the basis of preferences expressed by NAI or BNPPPLC.

(b) If, despite the delivery of the promises described in the preceding subsection, the two appraisers fail to reach agreement upon a third appraiser within thirty days after the Third Appraisal Notice is delivered, then each of the first two appraisers must immediately submit its top choice for the third appraiser to the then highest ranking officer of the California Bar Association who will agree to help and who has no attorney/client or other significant relationship to either NAI or BNPPPLC. Such officer will have complete discretion to select the most objective and competent third appraiser from between the choice of each of the first two appraisers, and will do so within ten days after such choices are submitted to him.

4. Resolution of Issues by the Third Appraiser. If a third appraiser is selected under the procedure set out above:

(a) No later than thirty days after a third appraiser is selected, each of the first two appraisers must submit (and NAI and BNPPPLC will each cause its appointed appraiser to submit) his best estimate of Fair Market Value, together with a written report supporting such estimate. (Such report need not be in the form of a formal appraisal, and may contain any qualifications the submitting appraiser deems necessary under the circumstances. Any such qualifications, however, may be considered by the third appraiser for purposes of the selection required by the next subsection.)

(b) After receipt of the two estimates required by the preceding subsection, and no later than forty-five days after the third appraiser is selected, he must (i) choose one or the other of the two estimates of Fair Market Value submitted by the first two appraisers as being the more accurate in his opinion, and (ii) notify NAI and BNPPPLC of which estimate he chose. The third appraiser will *not* be asked or allowed to specify an amount as Fair Market Value that is different than an estimate provided by one of the other two appraisers (either by averaging the two estimates or otherwise). The estimate of Fair Market Value thus chosen by the third appraiser as being the more accurate will be binding upon NAI and BNPPPLC.

5. Criteria For Selecting Appraisers; Cost of Appraisals. All appraisers selected for the appraisal process set out in this Exhibit will be disinterested, reputable, qualified appraisers with the designation of MAI or equivalent and with at least five years experience in appraising commercial properties comparable to the Property. NAI and BNPPPLC will each bear the expense of the appraiser appointed by it, and the expense of the third appraiser and of any officer of the California Bar Association who participates in the appraisal process described above will be shared equally by NAI and BNPPPLC.

6. Time is of the Essence; Defaults.

(a) All time periods and deadlines specified in this Exhibit are of the essence.

(b) Each party must cause the appraiser appointed by it (as set forth in Section 2(a)) to comply in a timely manner with the requirements of this Exhibit applicable to such appraiser. Accordingly, if an appraiser appointed by one of the parties as provided in Section 2(a) fails to comply in a timely manner with any provision of this Exhibit, such failure will be considered a default by the party who appointed such appraiser.

(c) Any breach of or default under this Exhibit by either party will be construed as a breach of the Purchase Agreement to which this Exhibit is attached.

(d) Any such breach or default by NAI will constitute a 97-1/Default (100%); *provided, however:*

(1) Before characterizing any such breach or default as a 97-1/Default (100%), BNPPPLC must first notify NAI of the breach or default and give NAI the opportunity, during the five days after delivery of such notice, to fully rectify the breach or default.

(2) Any breach or default by NAI under this Exhibit will be deemed rectified if, within such five day period, NAI offers BNPPPLC an unqualified written agreement that all determinations of Fair Market Value required by this Agreement will, if made by the appraiser appointed by BNPPPLC as hereinabove provided, be binding upon BNPPPLC and NAI. (It is understood that following the delivery of any such agreement by NAI, no further input from NAI's appraiser or from any official of the California bar association or from a third appraiser will be required for any required determination of Fair Market Value.)

**Exhibit C**  
**Form of Deed**

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:

NAME: [NAI or the Applicable Purchaser]  
ADDRESS: \_\_\_\_\_  
ATTN: \_\_\_\_\_  
CITY: \_\_\_\_\_  
STATE: \_\_\_\_\_  
Zip: \_\_\_\_\_

**DEED WITH LIMITED TITLE WARRANTIES**

BNP Paribas Leasing Corporation (“**Grantor**”), a Delaware corporation, for and in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration paid to Grantor by **[NAI or the Applicable Purchaser]** (hereinafter called “**Grantee**”), the receipt and sufficiency of which are hereby acknowledged, does hereby GRANT, SELL, CONVEY, ASSIGN and DELIVER to Grantee (1) the land described in Annex A attached hereto and hereby made a part hereof, and (2) all other rights, titles and interests of Grantor in and to (a) such land, (b) the buildings and other improvements situated on such land, (c) any fixtures and other property affixed thereto and (d) the adjacent streets, alleys and rights-of-way (all of the property interests conveyed hereby being hereinafter collectively referred to as the “**Property**”); however, this conveyance is made by Grantor and accepted by Grantee subject to all general or special assessments due and payable after the date hereof, all encroachments, variations in area or in measurements, boundary line disputes, roadways and other matters not of record which would be disclosed by a current survey and inspection of the Property, and the encumbrances listed in Annex B attached hereto and made a part hereof (collectively, the “**Permitted Encumbrances**”).

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto belonging unto Grantee, its successors and assigns, forever, and Grantor does hereby bind Grantor and Grantor’s successors and assigns to warrant and forever defend all and singular the said premises unto Grantee, its successors and assigns against every person whomsoever lawfully claiming, or to claim the same, or any part thereof by, through or under Grantor, but not otherwise; subject, however, to the Permitted Encumbrances. Except as expressly set forth in the preceding sentence, Grantor makes no warranty of title, express or implied.

Grantee hereby assumes the obligations (including any personal obligations) of Grantor, if any, created by or under, and agrees to be bound by the terms and conditions of, the Permitted Encumbrances to the extent that the same concern or apply to the land or improvements

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conveyed by this Deed.

[Signature pages follow.]







Annex A

LEGAL DESCRIPTION

**[DRAFTING NOTE: TO THE EXTENT THAT THE “LAND” COVERED BY THE LEASE BECAUSE OF ADJUSTMENTS FOR WHICH NAI REQUESTS BNPPLC’S CONSENT OR APPROVAL AS PROVIDED IN THE CLOSING CERTIFICATE, SO TOO WILL THE DESCRIPTION OF THE LAND BELOW CHANGE. ANY SUCH CHANGES WILL BE INCORPORATED INTO THE DESCRIPTION BELOW AND THIS “DRAFTING NOTE” WILL BE DELETED BEFORE THE ASSIGNMENT TO WHICH THIS DESCRIPTION IS ATTACHED IS ACTUALLY EXECUTED AND DELIVERED.]**

**THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SUNNYVALE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:**

All of Parcel 1, as shown upon that certain Map entitled, “Parcel Map being a Resubdivision of Parcel A as shown on Map recorded in Book 431 of Maps, at page 32, Santa Clara County Records”, which Map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California, on March 8, 1979 in Book 437 of Maps, at Page 9.

APN 110-36-007

## Annex B

### Permitted Encumbrances

**[DRAFTING NOTE: BEFORE THIS ASSIGNMENT IS ACTUALLY EXECUTED AND DELIVERED BY BNPPLC: ALL PERMITTED ENCUMBRANCES LISTED IN EXHIBIT B TO THE CLOSING CERTIFICATE WILL BE SET OUT BELOW, IN ADDITION TO THE ITEMS ALREADY LISTED. ALSO, IF ANY ENCUMBRANCES (OTHER THAN “LIENS REMOVABLE BY BNPPLC”) ARE IDENTIFIED IN ADDITION TO THOSE DESCRIBED BELOW OR IN EXHIBIT B TO THE CLOSING CERTIFICATE, SUCH ADDITIONAL ENCUMBRANCES WILL BE ADDED TO THE LIST BELOW. AFTER SUCH ADJUSTMENTS ARE MADE, THIS “DRAFTING NOTE” WILL BE DELETED. THE ADDITIONAL ENCUMBRANCES TO BE LISTED BELOW WOULD INCLUDE ANY NEW ENCUMBRANCES APPROVED BY BNPPLC AS “PERMITTED ENCUMBRANCES” FROM TIME TO TIME OR BECAUSE OF XYZ’S REQUEST FOR BNPPLC’S CONSENT OR APPROVAL TO AN ADJUSTMENT.]**

This conveyance is subject to all encumbrances not constituting a “Lien Removable by BNPPLC” (as defined in the Common Definitions and Provisions Agreement (1299 Orleans) incorporated by reference into the Lease Agreement (1299 Orleans) referenced in the last item of the list below), including the following matters to the extent the same are still valid and in force:

**1. The lien of supplemental taxes**, if any, assessed pursuant to the provisions of Chapter 3.5 (Commencing with Section 75) of the Revenue and Taxation code of the State of California. (none currently assessed)

**2. Covenants, conditions and restrictions** in the declaration of restrictions:

Recorded: March 8, 1978, Book D511, Page 396, of Official Records  
and re-recorded: December 12, 1978, Book E157, Page 147, of Official Records

Said covenants, conditions and restrictions provide that a violation thereof shall not defeat the lien of any mortgage or deed of trust made in good faith and for value.

**3. Easement** for the purposes stated herein, and incidental purposes, shown or dedicated by the Map recorded in Book 431 of Maps, at Page 32

For: Public Utility Easement  
Affects: The Easterly 10 feet of Said Land

Said easement is as depicted on the ALTA/ACSM Survey by Kier & Wright, Civil Engineers & Surveyors, Inc., dated October 1, 2007, Job No. A03080-1

**Exhibit D**

**BILL OF SALE AND ASSIGNMENT**

Reference is made to: (1) that certain Purchase Agreement (1299 Orleans) dated as of November 29, 2007, (the "**Purchase Agreement**") between BNP Paribas Leasing Corporation ("**Assignor**"), a Delaware corporation, and Network Appliance, Inc., a Delaware corporation, and (2) that certain Lease Agreement (1299 Orleans) dated as of November 29, 2007 (the "**Lease**") between Assignor, as landlord, and Network Appliance, Inc., a Delaware corporation, as tenant. (*Capitalized terms used and not otherwise defined in this document are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement (1299 Orleans) incorporated by reference into both the Purchase Agreement and Lease.*)

As contemplated by the Purchase Agreement, Assignor hereby sells, transfers and assigns unto [**NAI or the Applicable Purchaser**], a \_\_\_\_\_ ("**Assignee**"), all of Assignor's right, title and interest in and to the following property, if any, to the extent such property is assignable:

- (a) the Lease;
- (b) any pending or future award made because of any condemnation affecting the Property or because of any conveyance to be made in lieu thereof, and any unpaid award for damage to the Property and any unpaid proceeds of insurance or claim or cause of action for damage, loss or injury to the Property; and
- (c) all other personal or intangible property included within the definition of "Property" as set forth in the Purchase Agreement, including but not limited to any of the following transferred to Assignor by the tenant pursuant to Paragraph 6 of the Lease or otherwise acquired by Assignor, at the time of the execution and delivery of the Lease and Purchase Agreement or thereafter, by reason of Assignor's status as the owner of any interest in the Property: (1) any goods, equipment, furnishings, furniture, chattels and tangible personal property of whatever nature that are located on the Property and all renewals or replacements of or substitutions for any of the foregoing; (ii) the rights of Assignor, existing at the time of the execution of the Lease and Purchase Agreement or thereafter arising, under Permitted Encumbrances; and (iii) any general intangibles, other permits, licenses, franchises, certificates, and other rights and privileges related to the Property that Assignee would have acquired if Assignee had itself acquired the interest of Assignor in and to the Property instead of Assignor.

Provided, however, excluded from this conveyance and reserved to Assignor are any rights or privileges of Assignor under the following: (1) the indemnities set forth in the Lease, whether such rights are presently known or unknown, including rights of the Assignor to be indemnified against environmental claims of third parties as provided in the Lease which may not presently be known, all of which indemnities will survive the deliver of this Bill of Sale and Assignment and other documents required by the Purchase Agreement, (2) provisions in the Lease that

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establish the right of Assignor to recover any accrued unpaid rent under the Lease which may be outstanding as of the date hereof, (3) agreements between Assignor and Assignor's Parent or any Participant, or (4) any other instrument being delivered to Assignor contemporaneously herewith pursuant to the Purchase Agreement. **[Drafting Note: The following sentence will be included unless the Property is being sold to NAI or an Affiliate pursuant to subparagraph 2(A)(1), 3(A) or 3(B) of the Purchase Agreement:** Also excluded from this conveyance and reserved to Assignor are (i) the right to retain Escrowed Proceeds, if any, that consist of condemnation or insurance proceeds resulting from a Pre-completion Force Majeure Event, and (ii) any right to receive future payments of any such condemnation or insurance proceeds. ]

Assignor does for itself and its successors covenant and agree to warrant and defend the title to the property assigned herein against the just and lawful claims and demands of any person claiming under or through a Lien Removable by Assignor, but not otherwise.

Assignee hereby assumes and agrees to keep, perform and fulfill Assignor's obligations, if any, relating to any permits or contracts (including the Lease), under which Assignor has rights being assigned herein.

**[Signature pages follow.]**





**Exhibit E**

**ACKNOWLEDGMENT OF DISCLAIMER  
OF REPRESENTATIONS AND WARRANTIES**

THIS ACKNOWLEDGMENT OF DISCLAIMER OF REPRESENTATIONS AND WARRANTIES (this “**Certificate**”) is made as of \_\_\_\_\_, \_\_\_\_, by [NAI or the Applicable Purchaser], a \_\_\_\_\_ (“**Assignee**”).

Contemporaneously with the execution of this Certificate, BNP Paribas Leasing Corporation (“**Assignor**”), a Delaware corporation, is executing and delivering to Assignee (1) a Deed With Limited Title Warranties, and (2) a Bill of Sale and Assignment (the foregoing documents and any other documents to be executed in connection therewith are herein called the “**Conveyancing Documents**” and any of the properties, rights or other matters assigned, transferred or conveyed pursuant thereto are herein collectively called the “**Subject Property**”).

**Notwithstanding any provision contained in the Conveyancing Documents to the contrary, Assignee acknowledges that Assignor makes no representations or warranties of any nature or kind, whether statutory, express or implied, with respect to environmental matters or the physical condition of the Subject Property, and Assignee, by acceptance of the Conveyancing Documents, accepts the Subject Property “AS IS,” “WHERE IS,” “WITH ALL FAULTS” and without any such representation or warranty by Grantor as to environmental matters, the physical condition of the Subject Property, compliance with subdivision or platting requirements or construction of any improvements.** Without limiting the generality of the foregoing, Assignee hereby further acknowledges and agrees that warranties of merchantability and fitness for a particular purpose are excluded from the transaction contemplated by the Conveyancing Documents, as are any warranties arising from a course of dealing or usage of trade. Assignee hereby assumes all risk and liability (and agrees that Assignor will not be liable for any special, direct, indirect, consequential, or other damages) resulting or arising from or relating to the ownership, use, condition, location, maintenance, repair, or operation of the Subject Property, except for damages proximately caused by (and attributed by any applicable principles of comparative fault to) the Established Misconduct of Assignor. As used in the preceding sentence, “**Established Misconduct**” is intended to have, and be limited to, the meaning given to it in the Common Definitions and Provisions Agreement (1299 Orleans) incorporated by reference into the Purchase Agreement (1299 Orleans) dated as of November 29, 2007 between Assignor and Network Appliance, Inc., pursuant to which Purchase Agreement Assignor is delivering the Conveyancing Documents.

The provisions of this Certificate will be binding on Assignee, its successors and assigns and any other party claiming through Assignee. Assignee hereby acknowledges that Assignor is entitled to rely and is relying on this Certificate.

[Signature page follows.]

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**Exhibit F**

**SECRETARY'S CERTIFICATE**

The undersigned, [Secretary or Assistant Secretary] of BNP Paribas Leasing Corporation (“**BNPPLC**”), a Delaware corporation, hereby certifies as follows:

1. That he is the duly, elected, qualified and acting Secretary [or Assistant Secretary] of the Corporation and has custody of the corporate records, minutes and corporate seal.

2. That the following named persons have been properly designated, elected and assigned to the office in BNPPLC as indicated below; that such persons hold such office at this time and that the specimen signature appearing beside the name of such officer is his or her true and correct signature.

**[The following blanks must be completed with the names and signatures of the officers who will be signing the Sale Closing Documents on behalf of BNPPLC.]**

Name _____	Title _____	Signature _____
_____	_____	_____
_____	_____	_____

3. That the resolutions attached hereto and made a part hereof were duly adopted by the Board of Directors of BNPPLC in accordance with BNPPLC's Articles of Incorporation and Bylaws. Such resolutions have not been amended, modified or rescinded and remain in full force and effect.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the seal of the Corporation on this \_\_\_\_\_, day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
[signature and title]

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**CORPORATE RESOLUTIONS OF  
BNP PARIBAS LEASING CORPORATION**

**[DRAFTING NOTE: INSERT HERE COPIES OF RESOLUTIONS ADOPTED BY THE BOARD OF DIRECTORS OF BNPPLC SUFFICIENT TO AUTHORIZE THE DELIVERY OF SALE CLOSING DOCUMENTS. SUCH RESOLUTIONS MAY BE AS FOLLOWS:**

WHEREAS, pursuant to that certain Purchase Agreement (1299 Orleans) (herein called the "Purchase Agreement") dated as of November 29, 2007, by and between BNP Paribas Leasing Corporation ("BNPPLC") and Network Appliance, Inc. ("NAI"), BNPPLC agreed to sell and Purchaser agreed to purchase or cause the Applicable Purchaser (as defined in the Purchase Agreement) to purchase the Corporation's interest in the property (the "Property") located in Santa Clara County, California, more particularly described therein.

NOW THEREFORE, BE IT RESOLVED, that the Board of Directors of BNPPLC, in its best business judgment, deems it in the best interest of BNPPLC and its shareholders that BNPPLC convey the Property to NAI or the Applicable Purchaser pursuant to and in accordance with the terms of the Purchase Agreement.

RESOLVED FURTHER, that the proper officers of BNPPLC, and each of them, are hereby authorized and directed in the name and on behalf of BNPPLC to cause BNPPLC to fulfill its obligations under the Purchase Agreement.

RESOLVED FURTHER, that the proper officers of BNPPLC, and each of them, are hereby authorized and directed to take or cause to be taken any and all actions and to prepare or cause to be prepared and to execute and deliver any and all deeds, assignments and other documents, instruments and agreements that are necessary, advisable or appropriate, in such officer's sole and absolute discretion, to carry out the intent and to accomplish the purposes of the foregoing resolutions. ]

**Exhibit G**

**CERTIFICATION OF NON-FOREIGN STATUS**

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. Sections 18805, 18815 and 26131 of the California Revenue and Taxation Code, as amended, provide that a transferee of a California real property interest must withhold income tax if the transferor is a nonresident seller.

To inform **[NAI or the Applicable Purchaser]** ("**Transferee**") that withholding of tax is not required upon the disposition of a U.S. real property interest by BNP PARIBAS LEASING CORPORATION ("**Transferor**"), a Delaware corporation, the undersigned hereby certifies the following on behalf of Transferor:

1. Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. Transferor is not a disregarded entity (as defined in Section 1.1445-2(b)(2)(iii) of the Income Tax Regulations);
3. Transferor's U.S. employer identification number is 75-2252918; and
4. Transferor's office address is:

BNP Paribas Leasing Corporation  
12201 Merit Drive, Suite 860  
Dallas, Texas 75251  
Attention: Lloyd G. Cox, Managing Director  
Telecopy: (972) 788-9140

Transferor understands that this Certification of Non-Foreign Status may be disclosed to the Internal Revenue Service by Transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this Certification of Non-Foreign Status and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of the Transferor.

Dated: \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**CERTIFICATION PURSUANT TO SECTION 302(a)  
OF THE SARBANES-OXLEY ACT OF 2002**

I, Daniel J. Warmenhoven, certify that:

- 1) I have reviewed this Quarterly Report on Form 10-Q of Network Appliance, Inc.;
- 2) Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
- 3) Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
- 4) The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
- 5) The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/ DANIEL J. WARMENHOVEN  
\_\_\_\_\_  
Daniel J. Warmenhoven  
*Chief Executive Officer*

Date: March 4, 2008

**CERTIFICATION PURSUANT TO SECTION 302(a)  
OF THE SARBANES-OXLEY ACT OF 2002**

I, Steven J. Gomo, certify that:

- 1) I have reviewed this Quarterly Report on Form 10-Q of Network Appliance, Inc.;
- 2) Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
- 3) Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
- 4) The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
- 5) The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/ STEVEN J. GOMO

\_\_\_\_\_  
Steven J. Gomo  
*Executive Vice President of Finance and Chief Financial  
Officer*

Date: March 4, 2008

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

I, Daniel J. Warmenhoven, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Quarterly Report of Network Appliance, Inc., on Form 10-Q for the quarterly period ended January 25, 2008 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, and that information contained in such Quarterly Report on Form 10-Q fairly presents, in all material respects, the financial condition and results of operations of Network Appliance, Inc.

/s/ DANIEL J. WARMENHOVEN

Daniel J. Warmenhoven  
*Chief Executive Officer*

Date: March 4, 2008

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

I, Steven J. Gomo, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Quarterly Report of Network Appliance, Inc., on Form 10-Q for the quarterly period ended January 25, 2008 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, and that information contained in such Quarterly Report on Form 10-Q fairly presents, in all material respects, the financial condition and results of operations of Network Appliance, Inc.

/s/ STEVEN J. GOMO

Steven J. Gomo  
*Executive Vice President of Finance and Chief Financial  
Officer*

Date: March 4, 2008